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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES.

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A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

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MEMORIAL

Unanimously Adopted at a Recent Meeting of the Bar of the Western District of Tennessee, and Reported by a Committee Consisting of Messrs. Jno. E. McCall, Thos. M. Scruggs, and Albert W. Biggs, to the West Publishing Company, with Request to Publish the Same in a Bound Volume of the Federal Reporter.

Hon. ELI SHELBY HAMMOND

Late U. S. District Judge for the Western District of Tennessee.

Judge E. S. Hammond was the son of Dr. John Chessed Pernell Hammond and Priscilla Attalla Shelby Hammond, and was born at Brandon, Miss., April 27, 1838; moved to Collierville, Tenn., at the age of four years; graduated from Union College, Murfreesboro, in 1856; also graduated from the Lebanon Law School in 1857. He was admitted to the bar at Ripley, Miss., when not yet 20 years of age. He practiced in Mississippi with W. P. Curlee, of the firm of Hammond & Curlee, until 1859, when he moved to Memphis and formed a partnership with Sidney Y. Watson, under the firm name of Watson & Hammond. In April, 1861, he enlisted in the Shelby Grays, Confederate States Army. He was lieutenant and adjutant in the 14th Tennessee Cavalry, was taken prisoner at one time, and spent seven months in Irving Block Prison, Memphis. After his release he rejoined the army and served to the end of the war, being paroled at Greenville, Ala. He was married in 1864 in Ripley, Miss., to Miss Fannie F. Davis, daughter of Hon. Orlando Davis. In 1865 he came to Memphis again and entered upon the practice of law there with Col. Luke W. Finlay, under the firm name of Finlay & Hammond, but shortly thereafter his father-in-law, Judge Davis, persuaded him to accept a partnership in a lucrative practice in North Mississippi, under the firm name of Davis & Hammond, where he practiced until the fall of 1869. He again returned to Memphis, and formed a partnership with Hon. Wm. M. Randolph, under the firm name of Randolph & Hammond, and subsequently, Mr. R. D. Jordan being admitted to the firm, the firm was Randolph, Hammond & Jordan. He was appointed District Judge of the United States District Court for the Western District of Tennessee by President Hayes in 1878, and held this

ion till his death, which occurred in New York on the 17th of December, 1904. His first wife, Fannie Davis Hammond, in July, 1892, by whom he had two children, both still living—Orlando D. Hammond, now a member of the Memphis bar, a daughter, Patty Shelby Hammond, who married Dr. Geo. W. ian, an eminent physician of New York. In 1896 he married Margaret Wiltshire, who now survives him. At the time s death he was the fourth oldest federal judge in point of com-ion.

ese were the simple biographical events and circumstances s early life, and yet these have in them the seeds from which ld naturally spring the noblest virtues, the loftiest characters, the grandest achievements. Here we have good birth, com-ncy, healthful physical and moral surroundings, country life, and ld country school, social, and political atmosphere and economies e South of that day. It is said that all great events have their s deep in the past; and so of race characteristics. I doubt if e whole history of civilization such a conjunction of historic race characteristics has occurred so favorable to the develop-t of a high order of men as preceded and produced the young hron of 1861. Born of a pioneer ancestry, that had subdued vilds of forest and savage and developed it into the fairest of s; that had fought the Revolution and achieved independence; had established a new form of government, based upon the in-ual rights of man, and demonstrated through years of toil its ency; that had fought the war for Texas and of 1812, and the n wars of later date—it was but natural that the youth who red the Southern army should be of virile and heroic mold. ght up under the social system of the South, with a dominant subservient race, it was but natural that the dominant should asterful and commanding; given the advantages, as they were, bstantial and polite education, that they became masters of rts and sciences; trained in the school of dominant state and nal politics, that they should have been statesmen and leaders. ounded, as they were, by social atmosphere of courage among and grace and beauty among women, they became leaders in n and courteous in bearing. Tracked down the years, their acteristics could be early traced to their source.

e subject of this sketch was of the highest type evolved from ancestry and social surroundings. "Man entered thus, he d like the sea," and in all the positions of his after life, each g for different traits and different virtues, the inherited qual-of sense of duty, courage, nobility, and courtesy bloomed fructified into splendid fruition. There were three theaters s action—soldier, lawyer, judge. Of him as a soldier we could fully write a book as full of moving incident and stirring ts as any Ivanhoe or Last of the Barons, a life of as knightly ngs and full of deeds of "derring do." And yet the incidents s martial life and of personal deeds were but those of thousands rode and fought with Forrest. The fact is that no book has

yet been written, no biography of Forrest and his men yet penned, which brings out in their true intensity the stirring events of those days. Nor will there be until the highest imaginings of men are uttered in romance and poetry and song, with those bold riders the heroes of the theme. It is a volume in a word, a romance in a sentence, an Iliad in verse, an heroic epic in a line, to say that "he rode with Forrest." One incident, however, of this period, as evidence of his loyalty and courage. He was sick and in prison for months. His exchange for another officer—a prisoner with Forrest—was offered. But while in prison another prisoner condemned to be hanged had been kind to him. Lieut. Hammond declined to be exchanged, unless this condemned associate was included in the cartel; and they were both finally paroled together. His practice as a lawyer began after his graduation from Lebanon, in 1858, and continued until 1878, a period of twenty years, less the four years spent by him in the Confederate Army. He was a member of the Memphis bar the last four years of this period.

It is, we know, the tendency of increasing years to look backward and give probably greater virtues to the men of the past than belong to those of the present. In the eyes of elders, the present always suffers in comparison with the past. But no one can or will deny that the bar of Memphis from 1865 to 1890 was the most splendid aggregation of professional zeal and energy, profound learning and brilliant talent, of any city of its size in the United States. This was not the result of accidental happenings, but of many causes, geographical, social, and political. After the war Memphis was the most prominent and central city of a large territory composing a number of states. There were eminent men in the smaller towns and cities of these states, who were too large for the impoverished condition of their residence. First men of provinces, they aspired to be first men of Rome, and they came to Memphis. Duncan K. McRhea, the brilliant orator, and speaker of the most accurate and splendid diction ever at this bar, came from North Carolina, and also from the same state came the profound lawyer, Judge Heath; Judge Wesley Harris and H. T. Ellett from the Supreme Bench of Mississippi; and Adams from Arkansas, and others from other states. Then, from other parts of Tennessee, Landon C. Haynes, the Heiskells, and Jarnagan from East Tennessee, Stephens from Jackson, Thos. R. Smith and Judges Thos. G. Smith and Hill of Trenton. These came as new recruits to the noble old guard already here—Archibald Wright, L. D. McKisick, Howell Jackson, Henry Craft, R. J. Morgan, B. M. Estes, George Gantt, Ed Yerger, and many others of the older members; and of the younger set came S. P. Walker, W. C. Fowlkes, Dave Poston, and many others, for we do not mention the living of either the older or younger lawyers. There was much litigation, the pent-up volume of war's four years, and the forensic conflicts of each day were great. Exhaustive briefs, clearly reasoned arguments, scholarly and finished diction, were daily tributes. It was a day of the highest code of professional ethics. "Noblesse oblige" was

motto of the lawyer, to be as profoundly respected as by the alry of France. A lawyer of those days could not afford to do a or a mean thing. There was no running after clients, under- ing of proffered services, or underbidding competition. The radation of commercialism was comparatively unknown, and ne advertising unpracticed. The lawyer was the high priest, inistering at the altar of justice, and his robes must be spotless. above all and beyond all there was with the bar of that day se personal and social intimacy of its members, bonds of warm ndship, the meeting in social gatherings of themselves and their lies, which, alas, seems to have disappeared. It was to such r and into this atmosphere Judge Hammond came in 1868, and soon recognized as a fit and equal associate. His firm did a practice, and he was often engaged in many of the most im- ant and intricate cases of those years. He was a laborious and e student, prepared his cases and briefs with great care and arch, and presented them to the courts forcibly.

he next theater of his acting was as judge of the United States rict Court for the Western District of Tennessee. At the time is appointment the United States courts were nowhere popular ne South. Sectional antagonisms and hatreds had not yet died Unfortunately, previous appointees to the federal bench in South were mostly aliens to the South, and, it was felt, were isters of vengeance, more than dispensers of justice. It is a ous and remarkable fact that Judge Hammond was made the ge of a court where there was then on the records of that court, isposed of, an indictment for treason against the very govern- t from which his commission as judge came. It still stands on record undisposed of, except by the general amnesty act. After ng upon the bench, he should have done as it is related another nent lawyer of Memphis did, who, shortly after being fined by court, was himself called to the same bench to try some special s, and his first official act was to remit the fine which stood im- ed against himself. Under these circumstances and with this osphere surrounding the court, few cases were brought into se courts, and the business was limited. The appointment of ge Hammond was opportune and fortunate. He was a South- r and an ex-Confederate. He was identified by birth, educa- , habit, and splendid service in the army with all the sympathies aspirations of his people. He was a fine lawyer, and a courteous, l-hearted gentleman. With these traditions and qualities car- l to the bench, his administration of that court soon popularized He presided over this court for more than twenty-six years. his qualities as a judge we can scarcely speak with unbiased rds. His personality was so charming, his administration of his ce so pleasing, that the promptings of feeling may tend to undue lation of the judge. But it may be safely summarized that he s as a judge a diligent student, "scorning delight and loving orious days." He was absolutely impartial. He knew no man, ner as litigant or lawyer, closer than he did the other side. He

heard patiently and ruled with firmness, but always with such courtesy as to disarm criticism. In all the twenty-six years of his judgeship there was never a single unpleasant incident of our knowledge between the court and the bar.

He wrote voluminously, and with great research and force, and his qualities as a judge for learning and judicial acumen can only be gathered from his opinions published in the Federal Reporters of these years. This habit of analysis of every question presented in a case, of painstaking examination of every adjudged case bearing upon the question, and of voluminous written opinion, caused of necessity much delay in the handing down of opinions and adjudication of cases. This was the only criticism we ever heard passed upon him as a judge. He seemed to adopt in many cases the habit of exhaustive research, and consequent delay in decision, of Lord Eldon; but he did not resemble Lord Eldon in another respect, of whom it was said that he read nothing but equity reports and cases, forgot his classic lore, and remained wholly unacquainted with modern authors, so much so that in his latter days he could neither speak nor write grammatically, and he was actually compared to the Duke of Orleans, who said of spelling: "We quarreled at the outset of life, and never made up our differences." Judge Hammond was an omnivorous reader of nearly every branch of polite history and scientific reading. He was keenly alive to current events, and took great interest in the welfare and the growth and progress of his city, and it might be said of him, as of Lords Mansfield and Stowell, that "their celebrity as judges is in no small degree owing to their having continued to refresh and to embellish their professional labors by perusing the immortal productions of poets, historians, and moralists." May we not say also that from this exhaustive research and carefully prepared written opinions the good done to the law as a science far outweighs the individual inconvenience and hurt done to the litigants. His courtesy on the bench was especially noticeable. He had a habit, almost single to himself, of inviting others to a seat beside him on the bench, to help him and the jury, as he said, do right. If a lawyer of standing, especially a nonresident and often of his own bar, not engaged in the case, came into his court, he was invited to a seat by him to interest him in the case on trial. And this was not confined to the lawyer. Let a lawyer's wife appear in court (especially the young brides of lawyers) to hear their young hero distinguish himself, and immediately Judge Hammond would descend from the bench and with the kindly smile of a father and the grace of a courtier lead her to a seat beside him, all without interruption, but serving as a refreshing episode in the monotony of trial. Pleasing remembrances of such an event linger now with many wives in this circuit.

This brings us naturally to his personal habits and characteristics, to E. S. Hammond, the man. Upon this theme superlatives only can express. No danger of overdrawing the picture here. Here he stood supreme. Upon the street, in the courthouse, at social

erings, and especially in the home circle, he was an enter-
ng and genial gentleman. A great Englishman has said: "An
oid courage is at best but a holiday kind of virtue, to be sel-
exercised, and never but in case of necessity. Affability,
ess, tenderness, and a word which I would fain bring back
original signification of virtue—I mean good nature—are of
use." He had this good nature in an eminent degree. He
eady wit, bright eye, a face that beamed with kindness and
ly glowed with mirth, a hearty, manly, welcome handshake,
presence always genial. He told a story well, and his laugh
s ready over others' wit as his own was always contagious.
as a welcome and delightful companion in every circle. He
lways solicitous of the welfare and happiness of others, and
ally the younger members of the bar. Let one of them ac-
imself well in his court, and the judge's face would beam
satisfaction and the pride of a father. He was helpful to
He took them by the hand, and encouraged them to success,
elped them to fees when possible. But it was as a husband
ther and in the virtues which make up the happiness of home
shone most. This sweet and tender relation with his fam-
best portrayed by this statement: His own children being
, he made companions of his grandchildren, and with them
zed a club to which each grandchild was eligible by birth.
e else was admitted. They had a form of initiation, to which
as soon as old enough to comprehend, was subjected, with
promise of loyalty to the club and each other, and a small
dge which each was always to wear. It always appeared in
el of his coat, and few knew its significance of tender and
onate relations. When he lay cold and placid in his coffin,
still there, more worthy than the Cross of the Garter or of
gion of Honor.

Respectfully submitted.

L. B. McFARLAND,
Chairman.

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Hon. WILLIAM W. COTTON, District Judge, Oregon [2].....Portland, Or.
Hon. EDWARD WHITSON, District Judge, E. D. Washington.....North Yakima, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

[1] Died May 12, 1905.

[2] Appointed June 17, 1905.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

UNITED STATES BOBBIN & SHUTTLE CO. v. THISSELL.*

(Circuit Court of Appeals, First Circuit. November 3, 1904.)

No. 522.

1. ACCORD AND SATISFACTION—ACTS CONSTITUTING—ACCEPTANCE OF CONDITIONAL TENDER.

Where an employer sent to an employé a check for wages, and a statement showing the rate at which they were computed, which was a matter in dispute between them, and a receipt in full to a date given to be signed and returned, directing that, if the account was not found correct, the check be returned, the acceptance and cashing of the check created an accord and satisfaction of the claim, and also determined the employé's wages for the future, in the absence of further contract, although he did not return the receipt, but assumed to hold the matter open for future consideration.

In Error to the Circuit Court of the United States for the District of Massachusetts.

William M. Richardson, Cyrus M. Van Slyck, and Van Slyck & Mumford, for plaintiff in error.

Warren Ozro Kyle, for defendant in error.

Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges.

LOWELL, District Judge. This is an action at law to recover the balance of wages due upon an account annexed. The jury returned a verdict for the plaintiff, and the defendant's exceptions are before us. We need consider but one question.

The plaintiff was in the defendant's employ at a rate of wages in dispute between the plaintiff and the defendant. The defendant admitted that it owed the plaintiff a certain sum. The plaintiff contended that the debt was larger. Under these circumstances the defendant wrote the plaintiff as follows:

"Dear Sir: Referring to yours of the 17th, calling our attention that you had not drawn full amount of salary at hand. We are enclosing statement

*Rehearing denied May 10, 1905.

up by our bookkeeper, and he understands you have drawn only thirty s ($30.00) per week since September 1st, 1900. We are also enclosing heck # 6151, payable to your order for four hundred sixty-four dollars venty-two cents ($464.22) which is in full settlement for balance of your up to and including September 7th, 1901. Unless you find above cor- ou will return our check and statement. In future you will please draw mount due you weekly."

account was inclosed, and a receipt as follows:

22 Check No. 6151 No. ———.

ceived from U. S. Bobbin & Shuttle Co., Four hundred & sixty-four Dollars, being balance of salary due to and including week ending 7, 1901, as per statement rendered."

this the plaintiff replied as follows:

ar Sir: Your several communications of the 20th inst. with two checks, tively for $464.22 & $376.71, are received. I have deposited the checks. I have time and opportunity affords the privilege, I will examine the unications and if found correct, they shall receive proper attention."

e receipt was neither signed nor returned.

e defendant moved that the jury be instructed to return a verdict e defendant on the grounds:

That it appears that there was an accord and satisfaction of plaintiff's to September 7, 1901, and that from said September 7, 1901, the rate xed by the then acceptance of the check sent to plaintiff September 20, at $1,800 a year, and that plaintiff has been fully paid at said rate.

That on the whole testimony the jury should be instructed to return a t for the defendant."

s motion was refused, and the defendant thereupon requested the ving instructions:

That the plaintiff, by accepting and cashing the check inclosed in the of September 20, 1901, from the treasurer of the defendant corporation , and in which was also inclosed the statement showing that the wages ary of the plaintiff were computed at the rate of eighteen hundred s ($1,800) per year from October 11, 1899, became entitled to be paid fter for his services at the rate of only eighteen hundred dollars per

That the acceptance and cashing of the check sent to the plaintiff in tter to him of September 20, 1901, from the treasurer of the defendant ation, with the acts of the parties, was an accord and satisfaction of aim of the plaintiff against the defendant for salary from the time he commenced working for the defendant corporation, down to Septem- 1901.

That on all evidence in the case the plaintiff is not entitled to recover, e verdict must be for the defendant."

ese requests were refused by the learned judge, who charged the

That it was for the jury to determine whether the correspondence of mber 20 and 21, 1901, and the acts of the parties thereunder, were an and satisfaction."

e plaintiff did not sign the inclosed receipt, and his letter shows e wished to keep the matter open. Notwithstanding this, we are nion that his appropriation of the check, under the circumstances , was an acceptance of the terms upon which payment was offered. veight of authority is to this effect. Nassoiy v. Tomlinson, 148 326, 42 N. E. 715, 51 Am. St. Rep. 695; Talbott v. English, 156

Ind. 299, 315, 59 N. E. 857; Neely v. Thompson (Kan. Sup.) 75 Pac. 117; Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089; Hull v. Johnson, 22 R. I. 66, 46 Atl. 182; McDaniels v. Bank of Rutland, 29 Vt. 230, 70 Am. Dec. 406. Some of these decisions have been approved by the Supreme Court in Chic., Mil. & St. Paul R. R. v. Clark, 178 U. S. 353, 367, 20 Sup. Ct. 924, 44 L. Ed. 1099. There are, indeed, decisions to the contrary (see Day v. McLea, 22 Q. B. D. 610; Rosenfield v. Fortier, 91 Mich. 29, 53 N. W. 930; 17 Harv. Law Rev. 459, 469), but the great weight of authority is with the defendant. It follows that the seventh instruction requested should have been given, and that the third instruction given was erroneous.

If the plaintiff's cashing the check above mentioned was conclusive evidence of an accord and satisfaction, it amounted also to an acceptance by the plaintiff of wages at the rate of $1,800 a year. We find no evidence of a contract to increase the rate of wages after the date of the defendant's letter. It follows that the learned judge should have directed a general verdict for the defendant. We have thus disposed of the whole case, and need not consider the defendant's other exceptions.

The judgment of the Circuit Court is reversed, and the plaintiff in error recovers its costs of appeal.

In re TRIBELHORN.

(Circuit Court of Appeals, Second Circuit. March 24, 1905.)

1. BANKRUPTCY—INVOLUNTARY PETITION—PETITIONING CREDITORS—SPLITTING CLAIMS.

Where a landlord—one of the petitioning creditors in an involuntary bankrupt petition—assigned his claim, or a part thereof, to the attorney for the petitioning creditors after the petition was filed, the attorney was not entitled to join in the petition, to make up the number of creditors prescribed by Bankr. Act July 1, 1898, c. 541, § 59d, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445].

2. SAME—INTERVENTION—TIME.

Where an involuntary bankruptcy petition had been dismissed for insufficiency of petitioning creditors, it was then too late for a nonparticipating creditor to intervene as a matter of right, and the denial of such application was a proper exercise of discretion.

3. SAME.

Where creditors of an involuntary bankrupt, alleged to have been withheld from the bankrupt's answer, had all been informed of the pendency of the proceedings, but had not appeared or asked to intervene, and there was nothing to indicate that they could be induced to join in the proceedings, it is not error for the court to refuse to withhold an order dismissing the proceedings for want of sufficient petitioners until the clerk could notify such creditors.

4. SAME—SERVICE—MODE.

Under Bankr. Act 1898, requiring an alleged involuntary bankrupt to file with his answer, when it alleges a larger number than 12 creditors, a list, under oath, of all his creditors, with their addresses, and providing that the court shall cause such creditors to be notified of the pendency of the petition, and shall delay the proceedings to enable them to be heard, the mode of service of notice on such creditors is immaterial; the creditors named being actually served in time to intervene if they desired so to do.

l from the District Court of the United States for the South-rict of New York.

l by petitioning creditors from order denying the adjudication elhorn as a bankrupt.

Myers, for appellant.

C. Prime, for appellee.

e WALLACE, TOWNSEND, and COXE, Circuit Judges.

CURIAM. The court below refused to adjudicate Tribelhorn ıpt, and dismissed the petition for his adjudication as such, up-round that, his creditors being more than twelve in number, less ee had joined in the petition. If this decision was correct, the of the court upon the other questions in the case, of which s been assigned, do not require consideration.

vidence does not authorize us to disturb the finding of the trial at all the creditors but two who had united in the petition were s of the corporation, Carnegie Hill Hotel, and not of Tribel-rsonally. The court also correctly ruled that Tull should not ed as a petitioning creditor. He became a creditor by an as-t from Schmidt, the original petitioning creditor, made some nths after the filing of the petition. Schmidt's debt was for e from Tribelhorn upon a lease. It would seem, from Tull's that he was an assignee of the same rent. It may be, how-t he was an assignee of installments of rent which subsequently due to Schmidt under the lease. He was the attorney for the ng creditors, and manifestly acquired a part of the demand of for the purpose of being joined with Schmidt as a petitioning

The bankrupt act does not sanction the splitting up by a editor of his demand into several demands in order to create isite number of petitioning creditors, and, if such a practice erated, the provisions of section 59d (Act July 1, 1898, c. 541, 561 [U. S. Comp. St. 1901, p. 3445]) would become prac-ullified.

rulings challenged are these: (1) At the close of the hearing judge announced his decision dismissing the petition, but, at the of counsel for the petitioning creditors, reserved for further ation the single question whether Tull was entitled to be count-petitioning creditor. On the subsequent day assigned for the of the question, the court having ruled that Tull could not be as a petitioning creditor, the latter asked that one Geiler be d to intervene. The court denied the request. Geiler had not his appearance, or filed any petition, or made himself a party roceedings in any way. After the proceeding had been heard ded, it was too late for any new creditor to intervene as a f right, and the court was justified in treating the application atory one, and in refusing to delay the proceeding further in ascertain whether Geiler was really a creditor, and whether he in in the proceeding. (2) The counsel for the petitioning cred-ed the court to withhold any adjudication upon the proceeding clerk of the court should notify certain creditors whose names

were not set forth in the answer of the alleged bankrupt of the pendency of the proceedings. One of these creditors was the Wells & Newton Company, another was Saxton & Co., and another was the Park & Tilford Company. The first two appear to have been creditors of the Carnegie Hill Hotel Corporation, and not of Tribelhorn personally. The latter was the holder of certain promissory notes made by the Carnegie Hill Hotel Corporation, and indorsed by Tribelhorn. All of these creditors had been informed of the pendency of the proceeding, their employés having been produced as witnesses for the petitioning creditors during the taking of testimony. They had not entered any appearance or asked to intervene, and there was nothing to indicate to the court that they could have been induced to join in the proceeding.

The ruling in respect to the propriety of the mode of service of notice upon the creditors named by the alleged bankrupt is challenged. The act requires him to file with the answer, when it alleges a larger number than 12 creditors, a list, under oath, of all his creditors, with their addresses; and it provides that "thereupon the court shall cause all such creditors to be notified of the pendency of the petition, and shall delay the hearing upon such petition for a reasonable time, to the end that parties interested shall have an opportunity to be heard." The act thus gives the petitioning creditors an opportunity to ascertain whether those named in the answer of the alleged bankrupt are creditors, and whether they desire to intervene, but leaves it to the alleged bankrupt, if he is willing to commit perjury, to withhold this opportunity, in part, by omitting to name all of his creditors. It does not prescribe in what mode the court shall cause the other creditors to be notified, and thus leaves it to the discretion of the court to determine whether the notice shall be served personally or by mail, and by whom the service shall be made. While we cannot commend the procedure which was sanctioned in the present case, and think it would be safer to cause the service to be made by some officer of the court, instead of by a person not sustaining this relation, and designated by a party to the proceeding, we cannot say that it was unwarranted. It is not contended that any of the creditors who were named were not actually served in due time to intervene if they had desired to do so.

We have considered the other rulings of which error has been assigned, and find none which merits detailed notice.

Adjudication affirmed.

FIELD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1905.)

No. 2,122.

KRUPTCY—CONSTRUCTION OF SECTION 29b.

he officer of a bankrupt corporation, who is not and has not been a krupt, is not liable to punishment under section 29b of the bankruptcy of July 1, 1898, c. 541, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), having fraudulently and knowingly concealed the property of the es- of the corporation in bankruptcy from its trustee.

he present or past bankruptcy of the person accused is an indispensable nent of the offense denounced by the statute.

TRUCTION OF PENAL STATUTES STRICT—MAY NOT EXTEND THEM TO SSES NOT INCLUDED.

penal statute which creates and denounces a new offense must be ctly construed. Where it is plain and unambiguous, the courts may lawfully extend it by interpretation to a class of persons who are luded from its effect by its terms for the reason that their acts may be nischievous as those of the class whose deeds it denounces.

Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 322,]

s by the Court.)

rror to the District Court of the United States for the West- strict of Arkansas.

es F. Read (James B. McDonough, on the brief), for plain- error.

. Youmans (James K. Barnes, on the brief), for defendant r.

re SANBORN, Circuit Judge, and PHILIPS and RINER, t Judges.

BORN, Circuit Judge. The plaintiff in error, who was not rupt but who was a vice president and one of the directors Brown-Rollosson Company, a corporation which was a pt, was indicted, a demurrer to the indictment was overrul- l he was convicted under section 29b of the bankruptcy law 1, 1898, c. 541, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), offense of having knowingly and fraudulently concealed ty which belonged to the estate of the corporation in bank- from its trustee. Section 29b reads:

rson shall be punished, by imprisonment for a period not to exceed two upon conviction of the offense of having knowingly and fraudulently ed while a bankrupt, or after his discharge, from his trustee any of the belonging to his estate in bankruptcy."

her the offense nor the punishment here described exists the common law. They are the creatures of the act of ess. In the absence of that act, no one could be legally ed by imprisonment for having concealed property from stee in bankruptcy. In the presence of the act, therefore, no n be lawfully punished by imprisonment for this conceal- who is not by the terms of the statute subject to this pun-

ishment. The act specifically designates the persons liable to the punishment which it prescribes. They are those who commit the offense denounced while they are bankrupts or after they have received their discharges in bankruptcy. Under a familiar rule, this specification by the statute of those who are bankrupts, and those who have been bankrupts, as the persons liable to the punishment, necessarily excludes all others from that liability, and no other person can be lawfully punished under this section for the offense it denounces. As the plaintiff in error was not and never had been a bankrupt, it is difficult to perceive how he could have been guilty of the offense of having concealed while a bankrupt, or after his discharge, from his trustee, any of his estate in bankruptcy.

The argument by which counsel attempt to sustain the indictment and conviction is that clause 19 of section 1 of the bankruptcy law (30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]) broadens the meaning of section 29b so that it includes the officers of a bankrupt corporation, who conceal the property of its estate in bankruptcy from its trustee, in the class subject to the punishment it prescribes. That clause reads in this way:

"'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations."

A careful reading of this clause, however, in connection with the terms of section 29b, convinces that it can have no effect to extend the terms or broaden the true interpretation of the latter subsection. All who are punishable under this subsection 29b are persons who are or who have been bankrupts. Hence none of those whom the word "persons" is made to include under section 1, cl. 19—no officers, partnerships, women, participants in forbidden acts, agents, officers, or members of any board of directors or trustees—can be guilty of the offense specified in this subsection, unless they are either bankrupts when they conceal the property, or have been such and have obtained their discharges before that time. Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute. Since the plaintiff in error was not a bankrupt when he was charged with concealing the property of the corporation, since he had never been a bankrupt and had not been discharged in bankruptcy, and since he had neither estate in bankruptcy nor trustee therein, he could not have concealed while a bankrupt, or after discharge, any of the property belonging to his estate in bankruptcy, from his trustee, and he was not amenable to the punishment prescribed by subsection 29b.

The suggestion that concealment by an officer of a bankrupt corporation of the property of its estate in bankruptcy from its trustee is clearly within the mischief of this subsection, and therefore within its true interpretation, is unworthy of serious considera-

A penal statute which creates and denounces a new of-
must be strictly construed. A man ought not to be punished
he falls plainly within the class of persons specified by such
ute. An act which is not clearly an offense by the express
the legislative department of the government must not be
so after its commission by a broad construction adopted
judiciary. The definition of the offense and the classifica-
f the offenders are legislative and not judicial functions.
here, as in the case at bar, a penal statute is plain and un-
ous in its terms, the courts may not lawfully extend it,
struction, to a class of persons who are excluded from its
by its terms, because, in their opinion, the acts of the latter
mischievous as those of the class whose deeds the statute
ibes. U. S. v. Wiltberger, 5 Wheat. 96, 5 L. Ed. 37; U. S.
ton, Fed. Cas. No. 14,814; In re McDonough (D. C.) 49
0; U. S. v. Lake (D. C.) 130 Fed. 490.

judgment below must be reversed, and the case must be
ded to the District Court with instructions to sustain the
rrer to the indictment and to discharge the plaintiff in error,
is so ordered.

BALTIMORE & O. R. CO. v. CONNELL.

(Circuit Court of Appeals, Third Circuit. May 8, 1905.)

No. 23.

ROADS — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — QUESTION
JURY.

n an action for the death of plaintiff's husband by being struck by
endant's railroad train at a crossing, evidence *held* to require submis-
n of deceased's contributory negligence to the jury.

—SPEED—EXPERTS—EVIDENCE.

n an action for the death of plaintiff's intestate at a railroad crossing,
onductor, who had been in defendant's service for a long time, and
s familiar with the locality at the place where the accident occurred,
s competent to testify as an expert as to the rate of speed at which
locomotive would have to go in order to haul the train across the street
question, and into the yard of defendant's railroad.

Error to the Circuit Court of the United States for the West-
strict of Pennsylvania.

n S. Wentz, for plaintiff in error.

H. Guffey and Lee C. Beatty, for defendant in error.

ore ACHESON, DALLAS, and GRAY, Circuit Judges.

HESON, Circuit Judge. This was an action brought by
L. Connell against the Baltimore & Ohio Railroad Company
over damages for the negligent killing of her husband, James
ll, on March 10, 1904, at about 6:40 o'clock a. m., at Marion
on Cut-Off, which crosses Second avenue in the city of
urg. The main line of the Baltimore & Ohio Railroad in the
Pittsburg runs in a general way parallel with Second ave-

nue, a highway of the city. In the locality where the accident in question occurred the main tracks of the railroad and Second avenue run east and west in parallel lines. The distance between the south rail of the east-bound track (the south track) and the north curb line of Second avenue is 40 feet. Second avenue, including the sidewalk, is 48 feet wide. There is only one sidewalk, and it is along the south side of the avenue, and is 12 feet wide. At Marion Junction there is a branch of the railroad running from the main line and crossing Second avenue at grade, and extending therefrom into the switching yard. The branch begins to leave the main line about 250 feet westwardly from the place of the accident, and crosses Second avenue at an angle of about 30°. The distance from the point where Connell was struck to the junction of the branch track with the main track, measuring along the branch track, is from 250 to 270 feet. There are some houses between Second avenue and the main line at a distance of 650 feet west of the point of the accident, which obstruct the view of an approaching train coming east along the main track. All passenger trains and many freight trains run over the main track of the railroad, not using the Marion Junction branch. On each side of the crossing the railroad company had erected, and for a number of years had used, safety gates extending, when lowered, entirely across Second avenue and at right angles therewith. These safety gates are lowered and raised together by an interlocking system worked from the signal tower at Marion Junction. The safety gates on the west side of the crossing, measuring along the south line of the sidewalk, are 105 feet from the crossing, and measuring along the north curb line of the avenue are about 29 feet from the crossing. The safety gates on the east side of the crossing, measuring along the south line of the sidewalk, are 18 feet from the crossing. The foregoing statement is applicable to the situation at the time of the accident.

James Connell, on his way from his house, which was westwardly of the railroad crossing, to his work at Hazelwood, which is east of the crossing, was walking eastwardly on the sidewalk of Second avenue. The safety gates on both side of the crossing were standing up. Upon his stepping on the crossing he was immediately struck and killed by the tender of a locomotive which was running backwards and was hauling a train of freight cars over the crossing into the switching yard. This freight train, which consisted of 20 loaded cars and 33 empties, had come from the west over the east-bound main track to Marion Junction, where it turned into the branch track. The witnesses differ as to the speed of the train, but there was evidence on the part of the plaintiff tending to show that it ran into the branch track and over the crossing at the rate of 20 miles an hour. If the train was running at that speed, it was going at the rate of 29 feet per second, and, assuming the distance from the point where Connell was struck to the junction to be 250 feet, it was about 8½ seconds from the time the train turned into the branch railroad until he was struck. There was conflict of evidence as to whether or not the bell was rung or

whistle was blown for the crossing. Witnesses for the plaintiff fied that the bell was not rung and that the whistle was not rn. Anderson, who was the railroad company's tower man at ion Junction before and at the time of the accident, testified llows:

. How are the safety gates worked? A. They are operated by levers, the as the switches. Q. Now, suppose that you got a call for a block from in that wished to go into the Glenwood yards, and you knew it was all to let them in, then what would you do? A. I would put down the gates irst thing, and lock the switches, throw down the gates—the safety —and then throw the main line signal to red for danger, and then throw itch leading onto the junction, and then throw the lock on this switch, hen throw the lower block white. Q. Then the train could come on? A. rain can come on a clear track. Q. Could you throw the switch or give lock until you put the gate down? A. No, sir. Q. State if the safety were out of order that particular morning? A. They were. Q. And if they were standing up? A. Yes, sir; they were standing up. Q. Did have them disconnected from the switching apparatus? A. They were nnected from the levers—the levers were thrown back. Q. What was natter with the safety gates? A. They were frozen up at this time. Q. there a watchman there to take the place of the safety gates? A. Yes, Q. Who was the watchman? A. Anthony Gawhan. Q. Where was he e time that this train came over the crossing? A. He was at the tower is time. Q. Where was he? A. He was lying in the tower asleep, on the at this time."

appeared by the evidence that the safety gates had been out vorking order and disconnected from the levers for several , but there was nothing in the evidence tending to show that nell knew the safety gates were out of order, or that they were working.

ne plaintiff's witness McLaughlin testified that he was walking wardly on the sidewalk of Second avenue, and had passed over crossing, and that between the crossing and the safety gates on west side, which were then standing up, and when he had got in a few feet of these gates, he met Connell, who was walking rd Hazelwood, and that when he (the witness) had gone past west side safety gates, and when not very far therefrom, he saw the train, which was then on the main east-bound track, was just coming around the block of houses which stood be- n the main line and Second avenue, 650 feet west of the place ne accident.

here was testimony to show that after the head of the train got past the block of houses a person walking on the side- eastwardly toward the crossing, as Connell was, would have to almost directly around to see the train, and, furthermore, that n he saw it he could not tell that it was coming over the cross- until it turned into the branch road at the junction. The fol- ng testimony of the defendant's witness Cooper relates to the vledge such pedestrian would acquire if he looked back when 40 feet eastwardly of the west side safety gates:

Now, suppose a man would look here—say 30 or 40 feet from the safety —he would hear a train coming, and that train would be coming along would there be anything to indicate to him whether that train was g across or going up the main track? A. Unless he looked at the sig- Q. He would have to understand the signal? A. Yes."

The signal here meant is the semaphore near the junction tower. The witness McLaughlin testified that at this time and place other persons besides himself and Connell were walking along the sidewalk in both directions.

The railroad company, the plaintiff in error, asked the court below to give the jury binding instructions in its favor on the ground that Connell was guilty of contributory negligence, but the court refused such instructions and left the question of contributory negligence to the jury. The refusal of the court to direct a verdict for the railroad company is the principal matter complained of by the plaintiff in error. We proceed then to consider whether this complaint is well founded.

Now, in Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 683, 36 L. Ed. 485, the Supreme Court, after remarking that there is no fixed standard in the law by which the court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent and what shall constitute ordinary care under any and all circumstances, said:

"The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

And in Gardner v. Michigan Central Railroad, 150 U. S. 349, 361, 14 Sup. Ct. 140, 144, 37 L. Ed. 1107, the court said that:

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

The circumstances of the present case were very peculiar, and the situation was unusual. The following statement of facts and inferences is justified by the evidence: The main tracks of the railroad ran parallel with the street (Second avenue) and at a distance of only 40 feet north therefrom. The branch to the switching yards crossed the street at an acute angle. The train was coming from the west over the east-bound track. Whether it was an east-bound through train or was destined for the switching yards south of the street could not be discovered by pedestrians on the street until it turned off from the main track at the junction. Connell was walking eastwardly on the sidewalk. When he passed the upstanding west side safety gates, the train was not visible to one looking back from that point. If, hearing the puffing of a locomotive, he turned to look when he was 30 or 40 feet east of the west side safety gates, he would see that the train was on the main east-bound track. The safety gates on both sides of the crossing were standing up. Connell did not know that they were out of order and not working. The flagman employed by the com-

ny to warn the public of danger from an approaching train out to cross the street was absent from his post, asleep in the gnal tower. The point of junction where the train left the ain east-bound track was distant from the sidewalk only about 0 feet and about 8½ seconds in time. The train did not ap- oach Connell on a line crossing his pathway at right angles, t it came behind him on a line diagonal to the street. More- er, there was testimony that no bell was rung or whistle blown. pon such evidence, and in view of the principles enunciated the Supreme Court in the above-cited cases, how could the al judge properly have withdrawn from the jury the determina- on of the question of the alleged contributory negligence of e deceased and directed a verdict for the defendant? That the fety gates on both sides of the crossing were standing up was most important fact, and was properly for the consideration the jury, in connection with the other circumstances of the se. It was for the jury to say whether or not the upright posi- on of the safety gates misled Connell. We think that their standing position on this occasion might well indicate to one alking on the sidewalk eastwardly toward the crossing that e oncoming train from the west was an east-bound through ain going over the main line. The very purpose of the safety tes was to give public warning, when they were lowered, of e approach of a train intending to cross the street by the branch ne. The upstanding safety gates on the west side would signify a man of prudence that no train was about to cross the street, d he would be confirmed in that belief as he neared the crossing on seeing the safety gates in front of him on the east side stand- g up.

In Baltimore & Potomac Railroad v. Landrigan, 191 U. S. 461, 5, 24 Sup. Ct. 137, 141, 48 L. Ed. 262, Mr. Justice McKenna, eaking for the court, forcibly said:

"Gates at a railroad crossing have a useful purpose. Open, they proclaim fety to the passing public; closed, they proclaim danger."

In Glushing v. Sharp, 96 N. Y. 676, 677, the plaintiff attempted cross the railroad in a covered milk wagon, which he drove. He oked some distance from the track, and saw no train. The gate as up. Had he stopped a second time, nearer the track, he could ve seen the train in time to save himself, but he did not do so. he Court of Appeals held that the plaintiff's alleged contributory gligence was properly submitted to the jury under all the circum- ances, and said:

"The raising of the gate was a substantial assurance to him of safety, just significant as if the gateman had beckoned to him or invited him to come ; and that any prudent man would not be influenced by it is against all man experience."

In Railway Company v. Schneider, 45 Ohio St. 678, 690, 698, 17 N. 321, 324, the court said:

"To persons in the street who are approaching the railroad tracks with a ew to crossing, an open gate is notice that the track is clear, and that it is

safe to cross. * * * Persons approaching such crossings have the right to presume, in the absence of knowledge to the contrary, that the gatemen are properly discharging their duty, and govern themselves accordingly; and it is not negligence on their part to act on the presumption that they are not exposed to dangers which can arise only from a disregard by the gatemen of their duties."

In Pennsylvania Company v. Stegemeier, 118 Ind. 305, 310, 312, 20 N. E. 843, 845, 10 Am. St. Rep. 136, the court said:

"The case at bar is to be discriminated from those in which the injured person enters upon a track where there are no affirmative assurances of safety, for here the fact that the gates were up and no warning given by the flagman was an affirmative assurance of a safety upon which a citizen might act without being chargeable with negligence. * * * The deceased was not simply thrown off his guard, but he was also assured that there were no approaching trains, and this assurance dispensed with the vigilance that under other circumstances would have been required of him. This assurance too completely relieved him from the imputation of negligence in going upon the tracks."

In Evans v. Railroad Company, 88 Mich. 442, 445, 50 N. W. 386, 387, 14 L. R. A. 223, the court said:

"It has been frequently held that when gates are provided the public have a right, the gates being open, to presume, in the absence of knowledge to the contrary, that the gatemen were properly discharging their duties, and that it was not negligence on their part to act on the presumption that they were not exposed to a danger which could only arise from a disregard of their duties by the gatemen."

In Roberts v. Delaware & Hudson Canal Company, 177 Pa. 183, 190, 35 Atl. 723, 724, the court affirmed as correct the proposition that:

"Safety gates, which should be closed in case of danger, if standing open are an invitation to the traveler on the highway to cross; and, while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances."

Upon the whole we think it was for the jury to determine whether Connell, in the peculiar circumstances, acted with that degree of care which persons of common prudence and intelligence would exercise when placed in a similar situation, and that the court below was right in submitting to the jury the question of contributory negligence.

We think that the assignment of error to the admission of testimony of the witness P. J. Biggy should not be sustained. He had been a conductor in the defendant's service for a long time prior to 1901, and was quite familiar with the locality at Marion Junction, and with the branch railroad at that place. His competency as an expert was sufficiently shown. We think there was no error in permitting him to testify as an expert as to the rate of speed at which the locomotive would have to go in order to get the train across the street and into the yards.

We find no error in this record, and therefore the judgment is affirmed.

UNION PAC. R. CO. v. FIELD.

(Circuit Court of Appeals, Eighth Circuit. April 8, 1905.)

No. 2,103.

RIAL—DUTY OF COURT AND COUNSEL—MISCONDUCT OF COUNSEL.

It is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, of incompetent evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial.

AME—COUNSEL MUST OBJECT TO PRESERVE RIGHTS OF CLIENT.

It is the duty of the trial judge, without objection from opposing attorneys, to prevent counsel in his address to the jury from discussing extraneous issues, from introducing irrelevant facts, and from insinuating erroneous views of the law.

But opposing attorneys must except to the erroneous argument of the speaker, if the court fails to act, in order to preserve the rights of their client.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 312.]

AME—ADMISSION OF IRRELEVANT FACTS OR OF ERRORS OF LAW BY ARGUMENT.

The admission of unsworn statements of irrelevant facts by counsel in his address to the jury is as fatal as the introduction of testimony to prove them.

The suggestion of erroneous views of the law by counsel in argument, unless extracted by the charge of the court, is equally fatal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 284, 292.]

PEAL—ERROR IS PRESUMED PREJUDICIAL.

The presumption is that error produces prejudice. It is only when it appears so clearly as to be beyond doubt that the error challenged did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4038–4046.]

bus by the Court.)

Error to the Circuit Court of the United States for the District ansas.

ile the plaintiff, James E. Field, was riding in a caboose attached to a t train of the Union Pacific Railroad Company at about 3 o'clock in the ng on the 7th day of May, 1902, another train of that company ran into boose and injured him. He brought an action against the company for d negligence, which he averred resulted in his injury. One of the wit- for the company was a man named Morgan. In his address to the he counsel for the plaintiff said: "Mr. Morgan, who was upon the wit- tand, or who was in the town of Hoxie, presumably, or at least there t he could give his testimony, and conversed with the railroad attor- nd after conversing with the railroad attorney then and there, he was he railroad attorney was of the opinion that he better not take his tion then, and now the testimony is of value, when he comes here upon d passes with which they could bring all of Sheridan county here." el for the railroad company excepted to this remark of the attorney e plaintiff, and he continued: "The testimony there of this witness is We will just say they can bring them any old way, but they pick out tness to bring here, of Mr. Morgan's type. Why could not Mr. Morgan when the others testified by deposition? Why must there be some spe- ason or some special inducement to get him there before he will testify?

Because there are a class of men who must be urged in some manner, gentlemen." There was no testimony in the case that Mr. Morgan or any other witness came to the trial upon a pass. The following colloquy occurred during the same address of counsel for the plaintiff, who said: "Suppose we go to one question upon this matter of liability. I want to suppose that my friend Loomis here, who is defending this case for this company, and defending it ably. He is doing it, as far as his part of the matter is concerned, fairly, and very decently and creditably, and I want to ask him to tell this jury, if he will, when he comes to argue this case, how much he, starting with the health which he has and assuming that he has physical strength to go out and husk corn— By Mr. Loomis: I except to this illustration of counsel. I do not think it is a fair one to use to this jury. The Court: I think not. I think you will have to conform to the facts concerning the man who claims to have been injured. Mr. Guthrie: I was going to put that to Mr. Loomis, if the court please—Mr. Loomis' own estimate, if he cared to give it. Mr. Loomis: I still except. He is repeating what I am excepting to. Mr. Guthrie: I thought it was the comparison, only. I beg your pardon, Mr. Loomis. (Continuing): I say to you on my own behalf, however large a sum of money the $20,000, the amount asked in this case, may be, that it would not compensate me— Mr. Loomis: We still except to that remark. The Court: I think you should compare it with the man who under the testimony this man was shown to be. Mr. Guthrie: I see now the basis of the exception. I say to you then, gentlemen, put it in that way: that no verdict that you can render in this case within the limitation that is put upon your powers in this case can compensate that man for the prospect he has to go through life with, of sitting upon his front porch a useless adjunct to the farming operations which he continues or which he had conducted theretofore." There was a verdict and judgment for the plaintiff, which is challenged by the writ of error.

N. H. Loomis (R. W. Blair, H. A. Scandrett, and A. L. Williams, on the brief), for plaintiff in error.

W. F. Guthrie (L. C. Boyle, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Under our system of jurisprudence it is the province of the jury in actions at law to try and determine the rights of parties according to the law and the evidence. It is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty, or a persistent violation of it, is a fatal error, because it makes the trial unfair. The property of a defendant may not be lawfully transferred to a plaintiff without an impartial trial of the controversies between them. A trial is not fair and impartial in which a discussion of irrelevant issues, a statement of a persuasive but immaterial fact, or the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury, may have had an influence favorable to his client. The trial judge has the power, and in the first instance it is his duty, in the absence of objections by opposing attorneys, to stop and reprimand an attorney who undertakes to indulge in remarks of this nature, and, if possible, to immediately

t from the trial the vice of his obnoxious observations. And
s often the case, it is impossible to accomplish this, it is the
of the court to at once discharge the jury, and to direct a
ial. This is primarily the duty of the judge because the con-
f the trial and the task of making it fair and impartial are
intrusted to him, and because it is a delicate and irksome
or a lawyer to interrupt and censure his opponent in the
of his argument, a duty from the discharge of which the
should as far as possible relieve him. Nevertheless, this is a
which an attorney must perform to protect the interests of his
if the court fails to do so without his suggestion. Cudahy
ng Co. v. Skoumal, 60 C. C. A. 306, 313, 125 Fed. 470, 477.
xceedingly difficult to withdraw from the minds of jurors,
n any mind, suggestions of immaterial facts, insinuations of
ding rules of action, or arguments which arouse passion or
ice; and yet in cases in which the address of counsel con-
uggestions of this nature to the minds of the triers of the
t is only when it is certain that these have been withdrawn
ne trial is fair and impartial. It is therefore of the gravest
ance that the conveyance of such suggestions to their minds
be prevented at the very threshold of the attempt, and
ourt and counsel should guard the jury with zealous care
t all illegal, improper, or unfair arguments or suggestions.
on v. Waldron, 156 U. S. 361, 367, 383, 384, 15 Sup. Ct. 383,
Ed. 453; Graves v. U. S., 150 U. S. 118, 120, 14 Sup. Ct. 40,
Ed. 1021; Hall v. U. S., 150 U. S. 76, 14 Sup. Ct. 22, 37 L.
03; Wilson v. U. S., 149 U. S. 60, 68, 13 Sup. Ct. 765, 37 L.
0; St. Louis & S. F. Ry. Co. v. Farr, 6 C. C. A. 211, 216,
3 Fed. 994, 1000; St. Louis & S. F. Ry. Co. v. Bennett, 16
A. 300, 305, 69 Fed. 525, 529, 530; Cudahy Packing Co. v.
nal, 60 C. C. A. 306, 313, 125 Fed. 470, 477; Bullard v. Bos-
M. R. Co., 64 N. H. 27, 5 Atl. 838, 840, 10 Am. St. Rep. 367;
s v. Burley, 64 N. H. 524, 15 Atl. 21; Magoon v. Boston &
Co. (Vt.) 31 Atl. 156, 163; State v. Hannett, 54 Vt. 83, 89;
v. Swineford, 44 Wis. 282, 294, 28 Am. Rep. 582; Mitchum
e of Georgia, 11 Ga. 615.

remark of counsel for the defendant in error in his address
jury to the effect that one of the witnesses of the railroad
ny came to the trial upon passes, and that he was present
the jury when his deposition might have been taken, was
ionable, because there was no evidence that this witness
ed upon passes, and because, if that fact existed, it was not the
subject of comment, since in a trial at law every litigant has
right to produce his witnesses in the presence of the jury,
ere to present their testimony.

argument of counsel upon the measure of damages was
ore objectionable. The attempt to compel opposing counsel
wer or to refuse to answer how much he would accept to
the alleged injury of the plaintiff, and thereby to insinuate
of law and a measure of damages which he knew to be
ous, was a plain attempt to lead the minds of the jury aside

from those considerations requisite to a fair and impartial trial. No pecuniary compensation is adequate to induce an ordinarily prudent man to submit to grave physical injury, and it goes without saying that such is not the measure of compensation which courts or juries may award for injuries to the person. When objection was made to this argument the vice of the erroneous rule of law was not extracted. The court merely remarked that counsel must apply the rule to the man who was injured, and not to the attorneys in the case. The rule suggested, however, presented an erroneous measure of damages when applied to the plaintiff, as well as when applied to the counsel for the railroad company. Not only this, but the attorney for the plaintiff, after exception had been twice taken to his attempt to present this measure to the minds of the jury, said: "I say to you on my own behalf however large a sum of money the $20,000, the amount asked in this case, may be, that it would not compensate me." In other words, he again presented the erroneous measure of damages, and at the same time stated a fact which there was no evidence to prove, and which it would have been a fatal error to have admitted testimony to establish—the fact that he would not be willing to receive an injury like that of the plaintiff for $20,000. The admission of the unsworn statement of irrelevant facts by counsel in his address to the jury is as fatal as the introduction of testimony to prove them. Bullard v. Boston & M. R. Co., 64 N. H. 27, 5 Atl. 835, 840; State v. Hannett, 54 Vt. 83; Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582; Mitchum v. State of Georgia, 11 Ga. 615.

In Brown v. Swineford, 44 Wis., at page 293 (28 Am. Rep. 582) the Supreme Court of Wisconsin says:

"The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts in jury trials to interfere in all proper cases of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court."

In Mitchum v. State of Georgia, 11 Ga. 615, 634, the highest judicial tribunal of that state said:

"When counsel are permitted to state facts in argument and to comment upon them, the usage of the courts regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied. It may be said in answer to these views that the statements of counsel are not evidence, that the court is bound so to instruct the jury, and that they are sworn to render a verdict only according to the evidence. Whilst all this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in any degree influence the finding the law is violated, and the purity and impartiality of the trial are tarnished and weakened. If not evidence, then without doubt the jury have nothing to do with them, and the lawyer no right to make them. * * * To an extent not definable, yet to a dan-

is extent, they are evidence, not given under oath, without cross-examina- and irrespective of all those precautionary rules by which competency is d."

State v. Hannett, 54 Vt. 83, 89, it is said that:

ounsel in their arguments to the jury are bound to keep within the limits ir and temperate discussion. The range of that discussion is circum- ed by the evidence in the case. Any violation of this rule entitles the rse party to an exception which is as potent to upset a verdict as any error committed during the trial."

he argument of counsel for the plaintiff introduced into the trial s which it was not competent to prove under the issues, and nuated an erroneous view of the law and a measure of damages demned both by reason and by the decisions of the courts. It oduced into the trial grave errors, which probably resulted in venting a fair and impartial trial. If any of these statements any influence favorable to the plaintiff, the trial was not fair. vas the duty of his counsel to do everything in his power to ify the wrong, and to restore to the trial the impartiality of ch he had deprived it. The rule upon this subject is well stated Sullard v. Boston & M. R. Co., 64 N. H. 27, 32, 5 Atl. 838, 840, re the Supreme Court of that state said:

le is legally and equitably bound to prevent his statement having any t upon the verdict. This he cannot do without explicitly and unqualifiedly owledging his error, and withdrawing his remark in a manner that will s far as any retraction can go to erase from the minds of the jury the ession his remark was calculated to make. But it is by no means cer- that the jury will, at his request, disregard the fact stated. It is neces- they should be instructed that the unsworn remark is not evidence, and have no weight in favor of the party improperly making it. It is the of the wrongdoer to request such instructions. The other party does his when he objects to the wrong inflicted upon him, and does not allow it e understood that he waives his objection."

here was no withdrawal of the objectionable remarks by coun- for the plaintiff. There was no specific instruction by the rt that the fact which he stated or the measure of damages ch he repeatedly insinuated should not be considered. Their oduction into the case was error. The presumption always is error produces prejudice. It is only when it appears so clear- s to be beyond doubt that the error challenged did not preju- and could not have prejudiced the complaining party that the that error without prejudice is no ground for reversal is ap- able. U. S. v. Gentry, 55 C. C. A. 658, 663, 119 Fed. 70, 75; lroad Co. v. Holloway, 52 C. C. A. 260, 267, 114 Fed. 458, 465; ociation v. Shryock, 20 C. C. A. 3, 11, 73 Fed. 774, 781; Rail- Co. v. McClurg, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863; ry v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653; Smith v. emaker, 17 Wall. 630, 639, 21 L. Ed. 717; Moores v. Bank, U. S. 625, 630, 26 L. Ed. 870; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; Railroad Co. v. O'Brien, 119 U. S. 103, 7 Sup. Ct. 118, 30 L. Ed. 299; Mexia v. Oliver, 148 U. S. 673, 13 Sup. Ct. 754, 37 L. Ed. 602; Railroad Co. v. O'Reilly, U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; Peck v. Heu-

rich, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302. It does not appear in the case at bar that the error which has been considered was not prejudicial, and it is fatal to the judgment challenged.

The question which has been considered is not a novel one in this court, and the danger of permitting an excess of zeal to urge counsel beyond the limits of fair argument has been repeatedly called to the attention of the courts and the bar. In St. Louis & S. F. Ry. Co. v. Farr, 6 C. C. A. 211, 216, 217, 56 Fed. 994, 1000, the judgment was reversed because counsel presented an erroneous measure of damages in his closing argument to the jury, the error of which was not extracted by a general charge which presented the proper rule, and the remark was made that "the jury is sworn to determine the issues of the case according to the law and the evidence given them in court, and no argument is fair which misstates the evidence, or misleads the jury as to the law."

In St. Louis & S. F. Ry. Co. v. Bennett, 69 Fed. 525, at page 529, 16 C. C. A. 300, at page 305, we said:

"While, as we have said in Railway Co. v. Curb, 12 C. C. A. 587, 66 Fed. 519, considerable latitude may be allowed to counsel in their criticism of the testimony of witnesses and of the evidence in their arguments to the jury, they ought not to indulge in extended discussion of questions not presented by the evidence, for the obvious purpose of exciting passion and prejudice, or in gross misstatements of the evidence, or in clearly erroneous declarations of the law when it has been announced by the court, which tend to deceive and mislead the jury and to prevent a fair and impartial trial of the case."

In Cudahy Packing Co. v. Skoumal, 125 Fed. 470, at page 477, 60 C. C. A. 306, at page 313, this court remarked:

"It goes without saying that a trial judge has the power, and is always at liberty, of his own motion to reprimand counsel when they make use of language or indulge in a line of argument that is improper, unfair, or that is calculated to arouse the prejudices of jurors, or divert their attention to extraneous matters, or to issues that are foreign to the case; and no trial judge should hesitate for a moment to exercise such power, although his intervention is not solicited."

In that case one of the defendant's attorneys was called to the stand by counsel for the plaintiff and asked if it was not a fact that he represented the Maryland Casualty Company of Baltimore, Md. An objection to this question was sustained. In his closing argument counsel rehearsed this incident, and said that, if a judgment was rendered against the defendant company, he did not know whether it would be paid by it or by the Maryland Casualty Company. Of this observation this court said:

"The remark that is said to have been made by plaintiff's attorney on the trial of the case is subject to just criticism, and should not have been made. We entertain no doubt on this point, and feel free to condemn it."

The judgment in that case was not reversed, because counsel for the defendant had not properly saved his exception. In the case at bar the zeal of counsel for the plaintiff carried him beyond the limits of fair argument, presented to the jury facts that were not in evidence, and insinuated a misleading measure of damages. The vice of his action was not extracted by retraction, or by any specific charge of the court. It is not certain that it was not prejudicial

o the defendant; nay, it is probable—almost certain—that it was rejudicial. The trial therefore was not fair and impartial, and ne defendant is entitled to another.

Other questions were presented by the writ of error, and were rgued at the hearing. But it is unnecessary to consider them ow, because they will probably be conditioned by other facts t the second trial, and will be ruled by the court below in the light f later decisions. Northern Pac. R. Co. v. Adams, 192 U. S. 440, 4 Sup. Ct. 408, 48 L. Ed. 513; Cau v. Texas & Pac. Ry. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053; Queen of the Pacific, 80 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419; Chicago & N. W. Ry. Co. v. O'Brien (C. C. A.) 132 Fed. 598. Where there has been a mistrial through the misconduct of counsel, the Supreme Court requently considers no other question. Graves v. U. S., 150 U. S. 118, 120, 14 Sup. Ct. 40, 37 L. Ed. 1021; Hall v. U. S., 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003; Wilson v. U. S., 149 U. S. 60, 70, 13 Sup. Ct. 765, 37 L. Ed. 650.

The judgment below is reversed, and the case is remanded to the court below, with instructions to grant a new trial.

PITTSBURGH, S. & N. R. CO. v. LAMPHERE.

(Circuit Court of Appeals, Third Circuit. May 1, 1905.)

No. 24.

MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—ACTIONS—EVIDENCE.

In an action for injuries to a brakeman by striking a low trestle, with which he was not familiar, as his train was passing under it, an expert in railroad management was entitled to testify what, in his opinion, good railroading required with respect to the erection of telltales on each side of overhead bridges.

SAME—INSTRUCTIONS.

Where, in an action for injuries to a brakeman by striking a low overhead trestle, the issue was whether defendant had been guilty of negligence in not providing a reasonably safe place and safe appliances for plaintiff's use, instructions that it was the duty of the railroad to use due care to provide a reasonably safe place and safe appliances for the use of the workmen, and if it failed so to do, and injury directly resulted therefrom, the railroad company was guilty of negligence; that the servant was entitled to assume that the master had used due diligence in providing suitable appliances, except that where the defect was known to the servant, or so patent as to be readily observed by him, he thereby assumed the hazard; and that, if the servant was not informed by the master of dangers not incident to a careful performance of the work, and which are known to the master, and such servant remains in ignorance and suffers in consequence, the employer is guilty of negligence—were not objectionable as abstract propositions not applicable to the facts.

SAME—KNOWLEDGE OF DANGER—ASSUMED RISK.

In an action for injuries to a brakeman by striking a low trestle, evidence as to plaintiff's knowledge or means of knowledge thereof *held* not such as to require a finding that he assumed the risk as a matter of law.

[Ed. Note.—Assumption of risk incident to employment, see note to 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Edward W. Smith, for plaintiff in error.
L. K. Porter, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The defendant in error and plaintiff below (hereinafter called the plaintiff), a brakeman on the railroad of the plaintiff in error and defendant below, was seriously hurt while in the employment of the defendant company. He had been railroading about 14 years, upon several roads, and was thoroughly trained in the duties of a brakeman. He went into the service of the defendant company in August, 1901. He ran upon other divisions of this company until May 22, 1903, when he was put on a mixed passenger and freight train, as a brakeman, running between Larrabee and Mt. Jewett. Before the date last mentioned, he had never been upon this division. The division is about 26 miles long, and the train made two trips each day between these stations. He ran on this train on May 22d and the two following days. He then had other work until June 15th, when he again acted as brakeman on this mixed train until June 17th, the day on which he was hurt. The usual custom in running this mixed train to Mt Jewett was that the rear brakeman (which the plaintiff was) should turn a switch, two miles or more from Mt. Jewett, at the end of a switch-back, and ride on the engine down to a switch about one mile from the terminal station at Mt. Jewett, which turned off to the right about 200 feet to a turntable. There it was the duty of the plaintiff to cut the engine off from the train, the freight cars being next the engine, and ride on the pilot down to the turntable, where he helped turn the engine. He rode on the pilot back to the main track, coupled up the engine, and then got on the passenger car at the rear of the train as it passed him, his duty then being to turn such seats as were not occupied, for the return trip, and cut the passenger coach off at some point near the station at Mt. Jewett. From the switch into Mt. Jewett, the main track curves sharply to the left, running through a deep cut, over which, upon a bridge, there was a switch track from the main line of the Buffalo, Rochester & Pittsburgh Railroad Company. The lower stringer or cross-beam of the bridge was 15⅔ feet from the track, and about 3½ feet from the top of a standard freight car. On the day of the accident, for some reason not material in the present case, the train did not stop at the switch, but ran on towards Mt. Jewett. The plaintiff was riding upon the engine, as usual, for the purpose of getting off at the switch. Finding that it was not to stop, he started to go back to the passenger coach in the rear of the freight cars, by climbing over the tender and onto the first freight car, his back being towards the bridge. Just after he had straightened himself up upon the first freight car, he was struck by the bridge and thrown to the ground and received the injuries for which compensation was sought.

he plaintiff testifies that he was not informed or warned by any connected with the defendant company of the existence of this ge; that he had not observed it himself, and that from the ch down to the turntable, riding as he did on the pilot and hold- on, as it was necessary to do, with his face toward the engine, ad no opportunity of looking in the direction of the bridge le passing over that portion of the switch, about 40 feet, from ch it was visible. After he returned from the turntable, he ifies that he had always ridden in the passenger coach, from ch the bridge could not be seen, except by a special effort for purpose.

here was other testimony, giving distances of the switch from bridge, from the switch to the turntable, and as to points from ch the bridge could or could not be seen, which tended to cor- orate the testimony of the plaintiff. No telltale or whiplash nings were placed on either side of the approach to the bridge. he judgment below was for the plaintiff, and the case is brought by writ of error. The bills of exception set out all the testi- ny, together with the charge of the court. There are 10 as- ments of error, which may be grouped. The first and second gnments are to the admission, under objection, of the testi- ny of two witnesses, as follows:

Ir. Fawcett, what is, if you know, the custom of well-regulated railroads placing telltales on each side of low overhead bridges?" Under objection nswered: "The custom is to place telltales on each side of obstructions h are too low to clear a man on a box car—I should say too low to clear n standing on a box car."

. Mr. Fawcett, is a telltale or whiplash a usual and ordinary appliance se on well-regulated railroads for the purpose of giving the warning of overhead bridges, or other obstructions, to employés?" Under objection nswered: "It is; yes, sir."

Ir. Butler, taking into consideration your experience as a practical rail- er, what is, if you know, the custom of well-regulated railroads as to ng telltales on each side of low overhead bridges?" Under objection he vered: "Yes, sir; it is customary."

ounsel for plaintiff in error strenuously objects to the admis- lity of this testimony, on the ground that the questions call n the witness to form an opinion as to what is a well-regulated l before answering; that there is nothing in the question or wer to indicate what is or is not a well-regulated railroad, ex- the presence or absence of the telltales, or to indicate how ny well-regulated railroads there were in the minds of the wit- ses at the time they answered, and that neither of these wit- ses said that it was the usual or general custom for those rail- ds to have the telltales. Strangely enough, the court below had tained an objection to a previous question, "What appliances e customarily put in front of low bridges on railroads on which worked?" and also ruled out an offer to show, by the witness, t telltales were the usual and ordinary appliances. If the negli- ce charged against the defendant company be, in its essence, the ence of due and ordinary care to render reasonably safe the ces in which and along which its servants are employed, it would

seem that no more appropriate or relevant testimony could be adduced by a plaintiff in such a case as the present, than that which would tend to show what were the ordinary or customary means used by other persons engaged in a like business, to safeguard an admittedly dangerous situation. Undoubtedly it was the right of the plaintiff to show, by testimony, how the approaches to such bridges were usually guarded in the operation of railroads. If the court below had persisted in excluding all such testimony, then the jury would have been left to form its own opinion of what, under all the circumstances, was a reasonably safe place and conditions, in which and under which the railroad's servants should work, and to apply its own standard of what would be the exercise of ordinary care under the circumstances, on the part of a railroad employer, to provide such place or conditions. To deprive the jury of the benefit of such testimony, in cases where the work to be done requires a high degree of technical knowledge and experience, would oftentimes leave employers at the mercy of the variant or, perhaps, capricious judgment of a jury. Of course, to show what was customary in the practice of other railroads in this respect, testimony as to the practice on more than one railroad is necessary, and it is reasonable to require such testimony as to a sufficient number, to establish what might properly be called a custom in the business of railroading. It would, of course, be unreasonable to require testimony as to all railroads, or as to more than would be fairly within the power of parties to produce in the ordinary conduct of a suit. The reasons assigned by the counsel for the defendant company for the objection to showing what was the custom on well-regulated railroads seem to us, in the present case, hypercritical. The question, though technically objectionable in the form stated, did not in the present case involve an answer prejudicial to the defendant. Nor do we see why a witness, who has qualified himself as an expert in railroad management, cannot testify what good railroading in his opinion requires, in the respect under consideration, nor do we think if defendant had shown that upon another railroad no such warning signals were given on the approach to a low bridge, objection could be made to testimony that such railroad was not a well-regulated one, but on the contrary was notoriously badly equipped and managed. At all events, in view of the general charge of the court, and of the points affirmed for both plaintiff and defendant, there was no possible prejudice to the defendant in the admission of the answers to the questions as stated.

The third, fourth and fifth assignments of error are the answers of the court to the first, second, and third points of the plaintiff, which points and answers are as follows:

"1st. I say to you as a matter of law that it is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use the same degree of care to provide properly constructed roadbeds, structures and tracks to be used in the operation of the road, and if it fails so to do, and injury directly results to any of its employés by reason thereof, then said railroad company is guilty of negligence."

swer. This point correctly states the law as laid down by the Supreme of the United States, and it is affirmed."

d. The servant of a railroad company has a right to assume that the r, the railroad company, has used due diligence in providing suitable nces for the operation of his business. The servant is not obliged to judgment upon the employer's methods of transacting his business, but assume that reasonable care will be used in furnishing the appliances sary for its operation. This rule is subject to the exception that where a t is known to the servant, or is so patent as to be readily observed by he can not continue to use the defective apparatus in the face of knowl- and without objection, without assuming the hazard incident to such ion. But the court says to you that if such defect was not known to the nt, or plainly observable to the servant, then the servant does not as- such risk."

swer. That point also is drawn from an opinion of the Supreme Court e United States, and should be affirmed."

l. That if the servants of a master engaged in dangerous occupations are nformed of dangers not incident to the careful performance of the work e master and which are known to the master, and such servants remain norance of the danger and suffer in consequence, the employer is guilty gligence."

swer. This point is affirmed, with the qualification that where a defect own to the servant or is so patent as to be observed by him as a prudent xperienced man in such line of work as his, he cannot continue his em- ent in the face of actual or imputed knowledge and without objection, ut assuming the risk as one incident to such employment."

e objection of the counsel for plaintiff in error is that each ese points is an abstract proposition of law; that there is pplication in them to the facts in this case, nor does there pre- to be; that such being the case, it was error to submit them e jury, as the jury naturally assumes that an affirmed propo- n has some application to the case on trial, and may make a pplication of the principle.

ese assignments require very little comment. It is not de- that the three propositions quoted correctly state the law. plaintiff in error is mistaken in his contention that they do not y to the case in hand. The issue which the jury and the court w had to try was, in the first place, whether the defendant pany had been guilty of negligence in not using due care to ide a reasonably safe place and safe appliances for the use of ervants. Surely the top of a freight car is an unsafe place, n passing under this bridge, and while the unsafe situation be necessary in the operation of the road, and one which is unlawful for the road to maintain, a workman required to in such a place is entitled to the exercise of ordinary care is employer to guard him against its dangers. The absence of ings of the approach to the bridge, such as the telltales or lashes described in the testimony, as customary on other s, might be evidence to a jury of the want of due care to ren- the place on the top of a car approaching such bridge a rea- bly safe one. It seems to us that the second proposition is applicable to the facts of the present case, and that the servant railroad company, required to ride on the top of a freight car, a right to expect from the railroad company the use of due ence in making the passage under the bridge as little dan-

gerous as possible, and the use of the customary means for so doing. We may remark in passing that, even though it were admitted that the employé, riding on top of a freight car, knew of the existence of this bridge and had often passed under it, thus knowing its height and the necessity of stooping to avoid it, still it might be a question for the jury to determine whether the circumstances were such that a moment's forgetfulness would be excusable and argue no contributory negligence on the part of the plaintiff, leaving the railroad company liable for its want of care in not furnishing the telltale warnings, which would have rendered the position on the car one of reasonable safety. Kane v. Northern Cent. Ry., 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339. We think the court, too, were right in considering and affirming the third proposition above stated, and that the same was not an abstract proposition, as respects the facts in this case.

The eighth, ninth and tenth assignments of error are the answers to the fourth, fifth, and eighth points of the plaintiff in error, as follows:

"Fourth. That under the uncontradicted testimony that Lamphere passed under that bridge twenty-two times in broad daylight before the accident, the court must charge as a matter of law that he had an opportunity to learn of this danger, and assumed the risk of it, and the verdict must be for the defendant."

"Answer: Refused."

"Fifth. As under the uncontradicted evidence in this case this bridge or part of it, was in sight to plaintiff in the performance of his duty in the vicinity of the turntable, the court must say, as a matter of law, that he had an opportunity to know of the existence, character and danger of this bridge, and the verdict must be for the defendant."

"Answer: Refused."

"Eighth. That under all the evidence in this case the verdict must be for the defendant."

"Answer: Refused."

The plaintiff denied all knowledge as to the existence of this bridge. Whether he had such knowledge, or not, was a question, of course, for the jury; but the question here raised by the plaintiff in error is that it was the duty of the court, under the facts in the case, to say, as a matter of law, that the plaintiff had opportunity to learn of the danger, and therefore assumed the risk, and that under all the evidence the verdict must be for the plaintiff in error. The duty of the court in such cases depends, of course, upon the testimony. The question of assumption of risk, like the question of contributory negligence, is primarily one for the jury, but the facts may be such, as to either defense, that all reasonable men must draw the same conclusion from them, and that no recovery could be had upon any view which could be properly taken of them. It is well settled that in such cases it is the duty of the court to withdraw the case from the consideration of the jury, by a peremptory instruction to find for the defendant.

Do the facts in the case at bar warrant such a conclusion? We think they do not. It is true, that the testimony shows that altogether in the six days of the plaintiff's work upon this train, he had passed under this bridge 22 times. On each occasion, except

st one, when he was hurt, he was in the passenger car, where uld not observe the bridge. It is in testimony that the opportunity he had of seeing this bridge, even at a great ce, was in a space of about 40 feet on the switch leading to rntable. While passing through this space, the testimony is ie was riding on the step of the pilot, holding on with his , and facing the engine. To have had even a distant view of idge, while riding in this position, he would have had to turn ad considerably to the right or left,—a thing which he would aturally do unless he was looking for the bridge, his natural on, and regard perhaps for his own safety, requiring him to traight before him.

e sixth and seventh assignments were not insisted upon at gument, and we are clearly of opinion that they present no ible error.

the whole, we think the court below properly and fairly sub- l the questions of the negligence of the defendant and the as- ion of risk by the plaintiff, to the jury, and in its charge was vorable to the defendant as, under the facts, it could have

e judgment below is affirmed.

INGHOUSE AIR BRAKE CO. v. KANSAS CITY SOUTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1905.)

No. 2,106.

ADING—MULTIFARIOUSNESS—IMPRACTICAL OR INCONVENIENT JOINDER.

The vice of multifariousness is the union of causes of action which, or parties whose claims, it is either impractical or inconvenient to hear and judicate in a single suit. Where it is as practical and convenient for urt and parties to deal with the claims and parties joined by a petition one suit as in many, there is no multifariousness.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 340.]

E—JOINDER OF TWO CAUSES FOR SAME RELIEF PERMISSIBLE.

The union of two or more causes of action for the same demand or re- f does not render the bill or petition which presents them multifarious.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 341, 5.]

E—JOINDER OF MECHANIC'S LIEN AND EQUITABLE LIEN PERMISSIBLE.

The union of a cause of action upon a mechanic's lien and a cause of ion upon an equitable preference in a bill to enforce the same demand ainst the same property does not render the pleading multifarious.

ERAL COURTS—CONSTRUCTION OF STATUTES—FOLLOWING DECISIONS DE- RUCTIVE OF CONTRACT RIGHTS.

Decisions of the state courts which so construe their statutes as to stroy or impair rights previously acquired through contracts between izens of different states under statutes and constitutions which war- nted and sustained them when they were vested are not obligatory upon e courts of the United States.

[Ed. Note.—State laws as rules of decision in federal courts, see notes Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

5. MECHANIC'S LIEN—FURNISHING MATERIALS IN GOOD FAITH SUFFICIENT.
The furnishing to a railroad company of proper materials to be used by it in the construction or improvement of its railroad or equipment is sufficient to sustain a mechanic's lien under sections 4239 et seq., Rev. St. Mo. 1899, without proof of the application and use of them for that purpose.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 490.]

6. SAME—WAIVER BY NOTE DUE AFTER TIME TO ENFORCE LIEN.
The acceptance for a debt secured by a mechanic's lien of a promissory note which matures subsequent to the time fixed by the statute for the commencement of an action to foreclose the lien estops the creditor from enforcing the lien, and destroys it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens § 389.]

7. SAME—NOT REVIVED BY SUBSEQUENT DELIVERIES OF MATERIALS.
A mechanic's lien once destroyed is not capable of revival, in the absence of fraud or mistake.
The subsequent delivery of materials under the same original contract will not revive a lien for a prior debt which has once been destroyed.

8. SAME—FORECLOSURE OF MORTGAGE—PREFERENTIAL CLAIMS IN EQUITY—TIME OF ACCRUAL.
The general rule, subject to exceptions on account of peculiar equities, is that preferential claims for labor or materials furnished for the operation of a railroad must accrue within approximately six months preceding the impounding of the income and seizure of the property by the mortgage bondholders.
One whose claim accrued more than 17 months before the impounding of the property by the mortgage bondholders, and who extended the time of its payment for 18 months after it was due, is not entitled to a preference over the mortgage bondholders in the payment of his claim either out of the income or the proceeds of the mortgaged property.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Western District of Missouri.

For opinions below, see 128 Fed. 129; 129 Fed. 455.

This is one of the remnants of the foreclosure of the mortgage of the Kansas City, Pittsburgh & Gulf Railroad Company. It is an appeal from a decree which dismissed the intervening petition of the Westinghouse Air Brake Company.

On April 1, 1893, the Gulf Company mortgaged its property to the State Trust Company and another, as trustees, to secure the payment of its bonds to the amount of $23,000,000. On April 6, 1899, the Trust Company exhibited its bill to the Circuit Court for the Western District of Missouri for a foreclosure of this mortgage, and on April 28, 1899, that court appointed receivers of the railroad and of the other mortgaged property, and ordered them to pay out of any revenues which came to their hands all debts lawfully contracted by the Gulf Company after May 1, 1898, for materials and supplies and in the maintenance and operation of the railroad, and that other claims and demands should only be paid upon orders of the court subsequently made. On February 5, 1900, a decree of foreclosure and sale was rendered, which provided that the purchaser or purchasers of the property thereunder, their successors and assigns, should take it subject to the condition that they should pay any indebtedness or liability of the Gulf Company which should be finally decreed to be prior in lien or superior in equity to the mortgage of April 1, 1893. The Kansas City Southern Railway Company is the successor of the purchasers under this decree, and it took the mortgaged property subject to the conditions of the decree, and became a party to the foreclosure suit on March 20, 1900.

On January 1, 1896, the Gulf Company agreed to purchase of the Westinghouse Air Brake Company all the air brake and signal apparatus and materials it should use on its railroad at certain specified prices, subject to cer-

ates on certain conditions. Between February 19, 1897, and November
, the Brake Company furnished to the railroad company under this
brake and signal materials for which there is a balance due of $12,-
which is evidenced by a note of the Gulf Company, dated November 17,
ich is the last renewal of a note of that company for $32,316.21, which
le November 11, 1897. Between November 11, 1897, and the appoint-
the receivers, the Brake Company furnished to the Gulf Company
nd signal materials, the schedule price of which was $14,659.63. After
g the rebates to which the Gulf Company was entitled, and a payment
1.66 made by the receivers, there remained $11,271.05 owing on this
Of this amount $8.404.71 was due for materials used by the Gulf
y between May 1, 1898, and April 28, 1899.
ese amounts of $12,316.21, evidenced by the note of the Gulf Company,
271.05, due for materials furnished after November 11, 1897, the Brake
y filed a statement for a lien on the property of the railroad company,
ections 4239 et seq. of the Revised Statutes of Missouri, on May 10,

ne 15, 1899, the Brake Company intervened in the foreclosure suit and
petition, in which it set forth its contract, the furnishing of its ma-
the filing of its statement for a lien, and prayed that it be adjudged
a statutory lien upon the mortgaged property superior to that of the
lers, and that its claim be paid out of the income or proceeds of the
ed property. On September 8, 1900, the Brake Company filed its
l petition, in which it again set forth its statutory lien, and also plead-
the materials it furnished were essential to, and that the debt incurred
was a part of the current expenses of, the operation of the railroad;
er these materials were furnished, the Gulf Company and the receivers
erted the income of the mortgaged property from the payment of cur-
penses to the payment for permanent improvements and of interest
mortgage debt in amounts far in excess of the claim of the Brake
y; and it prayed for a decree that it had both a statutory lien and
ential equitable lien upon the mortgaged property, and that its claim
out of its income or out of the proceeds of its sale. The Kansas City
y interposed an answer to this petition, in which it denied its aver-
A replication was filed, and the case was referred to the master.
d the evidence, and reported that the Brake Company had both a me-
lien and a preferential equitable lien for the $11,271.05 due for ma-
furnished after November 11, 1897, but that it had no lien for the
21 owing for materials delivered before that time. Exceptions were
this report by both parties, and, after argument, the court held that
nded petition was multifarious, because it counted upon both the me-
and the preferential equitable lien, and ordered the petitioner to elect
hich it would rely. The Brake Company chose the equitable lien.
on the Southern Railway Company prayed and was granted leave to
mended answer, in which it claimed for the first time that the Brake
y had an adequate remedy at law on its mechanic's lien, and that by
s statement for that lien it had waived its claim for a preferential
e lien. The Circuit Court sustained this claim, and dismissed the pe-
the Brake Company.

rt Blair and Delbert J. Haff (William C. Michaels and
W. McCandless, on the brief), for appellant.
uel W. Moore and Fred H. Wood (Gardiner Lathrop and
s H. Reynolds, on the brief), for appellee.

re SANBORN and HOOK, Circuit Judges, and RINER,
t Judge.

BORN, Circuit Judge, after stating the case as above, de-
the opinion of the court.
rding to the averments of the intervening petition, the
Company had furnished to the Gulf Company within two

years of the appointment of the receivers of its property in the foreclosure suit brake and signal materials which were essential to, and which were used by it in, the maintenance and operation of its railroad, which were worth at least $23,587.26 more than the Brake Company had been paid for them. It had done this in reliance upon the expectation of the payment of its claim out of the income of the Gulf Company, and, in reliance upon the statutes of Missouri which give to the holder of such a claim a lien upon the property of a railroad company superior to that of a prior mortgage. Rev. St. Mo. 1899, §§ 4239–4241. After it had furnished these materials the Gulf Company and its receivers diverted its income from the payment of current expenses to the payment of interest on the mortgage debt, and to the payment for permanent improvements to an amount in excess of the aggregate amount of the claim of the Brake Company and of other claims of like character. These facts gave to the petitioner a lien upon the property of the Gulf Company superior to that of the mortgage for at least that portion of the claim due for materials furnished within six months of the receivership, on two grounds: (1) Because the statutes of the state of Missouri granted to it such a lien, and (2) because an established principle of equity jurisprudence vested in it such a lien. Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 285, 286, 20 Sup. Ct. 347, 44 L. Ed. 458; Illinois Trust & Savings Bank v. Doud, 105 Fed. 173, 44 C. C. A. 389, 52 L. R. A. 481.

The Circuit Court, sitting in equity, had taken possession of the property covered by this lien for the purpose of foreclosing the mortgage upon it. It was in the custody of that court, and the Brake Company presented to it its petition for the allowance and enforcement of its superior lien, both on the ground that it was granted to it by the statute, and on the ground that it was assured to it by the rule in equity that the liens of unpaid claims for the current expenses of the ordinary operation of a railroad for a limited time before the receivership are superior to those of prior mortgages.

It is said, and the court below ruled, that because the petitioner presented two causes of action, one founded on the statute and the other on the rule in equity, in support of its demand, its petition was multifarious, and it must necessarily abandon one of its grounds for relief before the courts will listen to the other. This contention is supported by arguments (1) that the statutory or mechanic's lien and the preferential equitable lien are distinct and independent matters (Story's Equity Pleadings [10th Ed.] § 271; Fletcher on Equity Pleading and Practice, §§ 107, 108), (2) that the claims for the two liens are inconsistent and repugnant, and (3) that the measures of relief permissible in enforcing them differ.

The claim that one of the liens may secure more of the debt of the petitioner than the other, and hence that one of them may warrant a larger measure of relief than the other, is not denied. Neither can the proposition that both secure that portion of the debt incurred for materials furnished within six months of the re-

rship be successfully gainsaid. Hence they both secure the debt, though one of them may secure an additional debt which ther does not protect. They cover the same property, for the rsion of the income makes the equitable claim a lien on the us of the property as well as the claim under the statute, if the mechanic's lien reaches the property in Missouri only, the equitable lien covers all the property, they both attach e former, and this alone is ample to satisfy the demand of the ioner. The controversies over the two liens arise between the parties. The petitioner seeks the identical relief under each payment of its claim by the purchaser of the property, the hern Railway Company. These facts persuade, nay, they ince, that neither the liens nor the facts which condition their rcement are distinct and independent matters, but that they nt homogeneous and correlative claims between the same par-

is said that the claims for the two liens are inconsistent be- an express or implied reliance upon the corpus of the prop- for payment is essential to the mechanic's lien, and such a re- upon the income and its subsequent diversion are indispen- to the equitable preference. But a reliance upon the corpus is nconsistent with a reliance upon the income also. A vendor borer may, and the legal presumption is that he does, rely both, because it is a fact, so universally perceived that courts not be blind to it, that those entitled to mechanics' liens gen- rely not only on the property which by a tedious course of tion they may apply to the payment of their claims, but also the vendee's agreement to pay in money, and upon the ex- tion that he will pay for the property he buys out of his in- , and thus relieve them from the expense and delays of law-

r does the argument that the two claims are repugnant use the Gulf Company extended the time of payment of the beyond the time prescribed by the statute for the filing of tatement for a mechanic's lien persuade. It is true that a or may, by an agreement to renounce his claim to a mechan- en, or by acts clearly inconsistent with its enforcement, which e his vendee to change his position so that he will sustain a by its assertion, which he would have escaped if the vendor not thus misled him, waive his lien. But, so long as the ac- t remained open and running, the time to file the statement ne lien advanced pari passu with the delivery of the materials. as always 90 days ahead of the delivery of the last item, and was nothing in the agreement to pay out of the income h in any way extended the time for the payment for the mate- furnished after November 11, 1897, beyond that 90 days. One take and rely upon a mortgage on personal property and another on real estate to secure the same debt. Bondholders upon liens under the same mortgage upon the income and upon eal property of railroad companies, and the assertion of one ese liens is not a waiver of the other. And there is neither

inconsistency nor repugnance between a claim of an equitable lien on the income and a claim of a mechanic's lien on the property of such a company to secure the same debt.

The third objection to the joinder of the claims to the two liens is that the measures of relief to which the Brake Company is entitled under them differ. This may be technically true, because under the mechanic's lien the mortgaged property in Missouri only is liable, while under the equitable preference and the diversion of income all the mortgaged property is liable to the payment of the debt. But this fact is without actual or practical effect upon the remedy, and it ought not to prevent substantial relief, because the mortgaged property in Missouri is ample to satisfy the claim, and it is patent that the result will be that its purchaser, the Southern Railway Company, will immediately pay the amount secured by either lien upon a final decision of the controversy. Moreover, the petitioner may receive from the court the largest measure of relief to which either lien entitles him. He may recover the largest portion of his debt which either lien secures, and the fact that the other lien also secures a part of the same debt is a reason, not for independent petitions and hearings upon the claims for the two liens, but for a single presentation, hearing, and adjudication of both. The claims and causes of action for a mechanic's lien upon the real property of the Gulf Company, and for an equitable lien upon that property and its income to secure the same debt, were not, therefore, distinct and independent, but cognate and connected, matters, and they were neither repugnant to nor inconsistent with each other.

An intervening petition in a foreclosure suit for the preferential payment of a claim on both grounds is not without precedent. Cleveland, C. & S. R. Co. v. Knickerbocker Trust Co. (C. C.) 86 Fed. 73, 74; Southern Ry. Co. v. Carnegie Steel Co., 76 Fed. 492, 22 C. C. A. 289; Id., 176 U. S. 258, 272, 20 Sup. Ct. 347, 44 L. Ed. 458; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 516, 33 L. Ed. 905; International Trust Co. v. Townsend Brick & Contracting Co., 95 Fed. 850, 855, 37 C. C. A. 396, 401.

The vice of multifariousness is the union of causes of action which, or of parties whose claims, it is either impractical or inconvenient to hear and adjudicate in a single suit. Where this vice does not exist, where it is as practical and convenient for the court and the parties to deal with the claims or causes of action presented, and the parties joined by a petition, in one suit as in many, the pleading is not multifarious, and it should be sustained. It is more practical and convenient to hear and determine all the claims a petitioner makes for the same relief against the same defendant in a single suit than in several actions, and, to prevent a multiplicity of suits and compel the presentation of all such claims in the same action, the rule has been established that a judgment between the same parties upon the same demand estops them from again litigating every admissible matter which might have been offered to sustain or defeat that claim or demand. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Board of Com-

ɔners v. Platt, 25 C. C. A. 87, 91, 79 Fed. 567, 571. Hence the of several causes of action for the same demand or relief ill or petition does not constitute multifariousness. Stephens Cargo, 9 Wheat. 502, 504, 6 L. Ed. 145; Gerrish v. Towne, 3 (Mass.) 82; Chaffin v. Hull (C. C.) 39 Fed. 887, 889, 891; y v. Goddard (C. C.) 86 Fed. 25; Davis v. Berry (C. C.) 106 761; Cutter v. Iowa Water Co. (C. C.) 96 Fed. 777; Williams abb, 117 Fed. 193, 202, 54 C. C. A. 213, 222, 59 L. R. A. 425; v. American Bell Tel. Co., 128 U. S. 315, 9 Sup. Ct. 90, 32 l. 450; Rincon Water & Power Co. v. Anaheim Union Water C. C.) 115 Fed. 543, 552; Moody v. Flagg (C. C.) 125 Fed. 320; Barcus v. Gates, 89 Fed. 783, 791, 32 C. C. A. 337, 345; ey v. Converse, 4 Cliff. 366, 375, Fed. Cas. No. 1,775; Hayden ɔmpson, 71 Fed. 60, 67, 17 C. C. A. 592, 599; Kelley v. Boettch- Fed. 55, 64, 65, 29 C. C. A. 14, 23.

Stephens v. McCargo, 9 Wheat. 502, 504, 6 L. Ed. 145, the com- ınts claimed title to the lands under two surveys and grants, the defendant claimed under a third. The decree was chal- d on the ground that the complainants had united the two sur- and titles under which they claimed. But Chief Justice Mar- said:

may be admitted that two persons cannot unite two distinct titles in ginal bill, although against the same person. * * * But we know principle which shall prevent a person claiming the same property by nt titles from asserting all his titles in the same bill."

Gerrish v. Towne, 3 Gray (Mass.) 82, the complainant alleged s bill that he was entitled to the conveyance of the land by erms of an express written contract with the defendant, and hat he was entitled to the lands under a resulting trust which from the fact that the defendant acquired the title while onfidential relationship of principal and agent existed between ɔmplainant and him. Judge Bigelow said:

e bill is framed with a double aspect, and alleges the right of the plain- the conveyance which he seeks on two grounds. * * * This is en- consistent with the established rules of equity pleading. A party may ame his bill in an alternative form, and aver facts of a different nature support."

Halsey v. Goddard (C. C.) 86 Fed. 25, 28, the complainant ıt to compel the trustees under the will of Halsey to convey n lands to him. He pleaded two causes of action: First, ınder the terms of the will he was the sole devisee of the lands estion, and hence was entitled to a conveyance; and, second, ıe was the heir at law of Halsey, and, if his will was invalid, ıs entitled to a conveyance of the lands as heir. Judge Brown

seems clear that a bill may state the facts and properly ask relief in the ative according to the conclusions of law that the court may draw."

Chaffin v. Hull (C. C.) 39 Fed. 887, 889, 891, Chaffin sought to t Hull and others of the title to certain lands upon the grounds hat a conveyance under which they claimed had, by a mistake

of the scrivener, been made to convey only a life estate when it was intended to convey a fee, and (2) that the defendant, Hull, was the confidential agent of the complainant, and, after he had been informed of this mistake, obtained the title to the lands for himself and certain co-conspirators by virtue of certain legal proceedings. There was a demurrer to the bill on the ground that it was multifarious, and this was heard before Judge Brewer, now Mr. Justice Brewer, and Judge Thayer. They sustained the bill, and Judge Brewer said:

"So, there being a unity of interest in the parties complainant and the parties defendant, a single property the subject of litigation, and a single ultimate purpose the object of the suit, we have concluded that in the interests of justice and equity, and a speedy settlement of the title to that property, the court is justified in holding that the bill is not multifarious."

In Davis v. Berry (C. C.) 106 Fed. 761, the complainant pleaded two separate grounds to secure an avoidance of a lease: First, that the president and secretary of a certain corporation, who executed it, had no authority to do so; and, second, that the defendant had forfeited the lease by a failure to comply with certain of its terms. A demurrer to the bill for multifariousness was overruled.

In Barcus v. Gates 89 Fed. 783, 791, 32 C. C. A. 337, 345, the Circuit Court of Appeals of the Fourth Circuit says:

"A bill is not multifarious because there are several causes of action. If they grow out of the same transaction, and if all the defendants are interested in the same rights, and the relief against each is of the same general character, the bill may be sustained."

Daniel, in his Chancery Pleading and Practice, vol. 1, *343, *344 (6th Am. Ed.) says:

"When the matters are homogeneous in their character, the introduction of them into the same bill will not be multifarious; and it is to be observed that this distinction will not be affected by the circumstance of the plaintiff claiming the same thing under distinct titles, and that the statement of such different titles in the same bill will not render it multifarious."

Story's Equity Pleadings lays down the rule that:

"Where there is a joinder of distinct claims between the same parties, it has never been held as a general proposition that they cannot be united, and that the bill is of course demurrable for that cause alone, notwithstanding the claims are of a similar nature, involving similar principles and results; and may therefore without inconvenience be heard and adjudged together. * * * On the contrary, a different doctrine has been maintained, and it seems now supported by the most satisfactory authority." Sections 531, 532, p. 461 [10th Ed.].

Fletcher in his Equity Pleading and Practice, § 108, at page 145, says:

"A bill is not multifarious because it alleges several grounds in support of the same claim, and is not multifarious because it joins two good causes of complaint growing out of the same transaction."

The petition of the Brake Company presented but a single demand—a demand for the preferential payment of its claim. It set forth two titles to this relief—the mechanic's lien and the equitable lien. The demand and the liens arose out of the same

saction, involved the same property and the same parties. liens secured the same debt, and the failure to present either nem in support of the proceeding of the Brake Company for preferential payment of its claim would have inevitably estop- it from subsequently enforcing that lien, because it was an ad- ible matter which the Brake Company had the right and the er to present in that proceeding to sustain its demand. The ding of the two liens did not, therefore, render the petition mul- ious, and the order of the Circuit Court to compel the Brake pany to elect between them was erroneous. The joinder of a e of action to enforce a mechanic's lien and a cause of action nforce an equitable lien upon the same property, to secure the e debt, in a bill or petition to enforce the preferential payment ne debt, does not render the pleading multifarious, because it is e convenient and practicable to try and adjudicate these causes ction in one suit than in several.

s the petitioner was erroneously compelled to elect upon which it would rely after the issues relative to both had been tried decided by the master, these issues are now here for our ad- cation under the master's report and the exceptions thereto, those which relate to the mechanic's lien will first be consider- The report of the master was that the petitioner had a statu- lien for the agreed price of the materials which it furnished equent to November 11, 1897, which amounted to $11,271.05. conclusion is assailed (1) because some of the materials were ished to the Gulf Company without the state of Missouri, because some of them were applied to cars of other railroad panies, (3) because some of them were used upon cars owned car trust but which were in the possession of the Gulf Com- under a contract of purchase, and (4) because the evidence insufficient to sustain the claim for the lien.

n March 17, 1904, about five years after the petitioner furnished naterials, the Supreme Court of the state of Missouri decided one who furnishes materials to a railroad company without state is not entitled to a lien upon its railroad property within state, under section 4239 of the Revised Statutes of Missouri of . That statute reads:

ll persons who shall do any work or labor in constructing or improving oad-bed, rolling-stocking, station houses, depots, bridges or culverts of ailroad company, incorporated under the laws of this state, or owning erating a railroad within this state, and all persons who shall furnish fuel, bridges or material to such railroad company, shall have for the done and labor performed, and for the materials furnished, a lien upon oad bed, station houses, depots, bridges, rolling-stock, real estate and im- ements of such railroad, upon complying with the provisions hereinafter ioned."

his legislation gave the lien in broad terms to every one who ormed labor or furnished materials anywhere to any railroad pany which owned a railroad in the state of Missouri, with- any exception of work done or materials furnished to it with- the state, and without any restriction or limitation to supplies ished within the state. As the Legislature granted the lien

in unambiguous terms for all materials furnished either within or without the state, and made no exception, the conclusive legal presumption is that it intended to make none, and it is not the province of the courts to do so. This question was deliberately considered by the Supreme Court of Missouri in the year 1880, and it so held. It decided that "the statute is express that whoever shall furnish ties, fuel, bridges, etc., to a railroad company under a contract with said company, shall have the lien specified. There is nothing in the act to restrict this right to a lien to those who perform work on, or furnish materials for, that part of the road lying in this state." And that court enforced a lien upon the property of the defendant railroad company in Missouri for the value of materials which were furnished to it and were used by it to construct a bridge in the state of Kansas. St. Louis Bridge, etc., Co. v. Memphis, etc., R. Co., 72 Mo. 664, 666, 667. The law of the state of Missouri declared by this decision in 1880 remained unchallenged until March 17, 1904, when the highest judicial tribunal of that state announced the opposite conclusion. Meanwhile the Brake Company had made its contract, furnished its materials, and perfected its lien. Counsel invoked the familiar rule that the national courts uniformly follow the construction of the constitution and statutes of a state announced by its highest judicial tribunal in all cases which involve no question of general or commercial law and no question of right under the Constitution and laws of the nation, and they insist that this court is bound to follow the latest construction of this statute by the Supreme Court of Missouri, and to strike down the lien and the claim of the petitioner under its contract. There is, however, a commendable exception to this rule, as well recognized and as firmly established as the rule itself. It is that decisions of the state courts which so construe their statutes or constitutions as to destroy or impair rights previously acquired under contracts between citizens of different states pursuant to statutes and constitutions which, at the time the contracts were made, warranted and sustained those rights, are not obligatory upon the courts of the nation. Burgess v. Seligman, 107 U. S. 20, 27, 2 Sup. Ct. 10, 27 L. Ed. 359; Pleasant Tp. v. Ætna Life Ins. Co., 138 U. S. 67–72, 11 Sup. Ct. 215, 34 L. Ed. 864; Speer v. Board of Commissioners, 88 Fed. 749, 760, 32 C. C. A. 101, 113; Clapp v. Otoe Co., 45 C. C. A. 579, 104 Fed. 473; U. S. Sav. & Loan Co. v. Harris (C. C.) 113 Fed. 27, 38. The case at bar falls not under the rule, but under the exception. The statute by its plain terms gave a lien for materials furnished without as well as within the state. The Supreme Court of the state so adjudged. The law declared by both the legislative and judicial departments of the state of Missouri invited the petitioner, a citizen of another state, to make its agreement and to acquire its lien, and it may not now be lawfully deprived of its contract rights or of its statutory lien because the highest judicial tribunal of the state has changed the law after the event and after its rights were vested. An ex post facto change of the law by construction is as vicious as by legislation.

In the operation of its railroad the Gulf Company necessarily repaired the cars of other companies which were broken while they were passing over its railroads, and a small portion of the materials furnished by the petitioner were used for this purpose. It owned some of the cars with which it operated its railroad, and some of them were owned by a car trust, and were used by it under a contract of purchase upon which it had been making payments by installments. Some of the brakes and other materials were supplied to the cars owned by the trust. But these facts are not fatal to the lien. A vendor is not required to follow every valve, piston ring, and drain cup to the car to which it is attached, to trace the title of the car to the vendee, and to prove the application to and use of the article upon the car, in order to sustain his lien. It is sufficient that he complies with the statute in good faith, and furnishes fit materials to the railroad company to be used by it in the construction or improvement of its railroad or equipment. Central Trust Co. v. Chicago, K. & T. Ry. Co. (C. C.) 54 Fed. 598, 603; Thompson v. St. Paul City Ry. Co., 45 Minn. 13, 16, 47 N. W. 259; Neilson et al. v. Iowa Central R. R. Co., 51 Iowa, 184, 190, 1 N. W. 434, 33 Am. Rep. 124; Phillips on Mechanics' Liens, §§ 149, 150.

Nor can the objection that the evidence in support of the lien was insufficient to sustain the master's conclusion or to enable him or the court to determine its amount prevail. The contract, the orders for the materials, and evidence of the times and places of their delivery were presented, and the finding of the amounts delivered and the times when they were received by the Gulf Company is not without substantial support in the record. The conclusion is that the Brake Company had a lien upon the property of the Gulf Company in the state of Missouri, under sections 4239 et seq. of the Revised Statutes of that state of 1899, for $11,271.05 and interest, which was superior to that of the mortgage of April 1, 1893.

The right to recover interest upon this portion of the claim of the petitioner rests upon the same basis as the right to recover the principal. It is granted by the statute. Rev. St. Mo. 1899, § 4247.

The master reported that the petitioner had waived its claim for a mechanic's lien, and its claim for an equitable lien for $12,316.21, evidenced by the note of November 17, 1898, and this conclusion is specified as error by the appellant. The facts which condition the question here presented are these: On November 11, 1897, the Brake Company had delivered materials to the railroad company of the agreed price of $49,601.77, and it was pressing for an adjustment. The purchasing agent of the Gulf Company went to the president of the Brake Company and adjusted the account by receiving a credit for rebates to the amount of $7,440.26, by paying $9,845.30, and by giving the note of the Gulf Company for $32,316.21, payable six months after its date, and by making an agreement whereby the Gulf Company promised to pay $10,000 upon this note when it fell due, and the Brake Company agreed to

accept the Gulf Company's note for the balance, payable six months later. When the note matured the Gulf Company paid $2,099 upon it, received a credit of $7,901 for rebates, and gave a renewal note for the remaining $22,316.21, payable six months thereafter. When the second note fell due the Gulf Company paid $10,000, and executed the note now before us for $12,316.21, payable six months after November 17, 1898. The manager of the Brake Company, who was not present at this settlement, testified that the notes were not intended as payment, but as evidence of the debt. The president of the Gulf Company, who was also absent at the time of the settlement, testified that the purpose of giving the note at that time was to pay for the equipment according to the contract. The purchasing agent of the Gulf Company, who was the only witness present at the adjustment, said that the intention was to give the note representing the amount of the account at that date, with the understanding that the road should pay $10,000 of it every six months as the earnings would allow, so that it could place an order with the Brake Company for some additional equipment; that the note was given for the net amount the same as if the account had been settled in cash; that it was a sort of a striking of a balance to find the amount due up to that time, and to get that much of the indebtedness in easy circumstances; and that one purpose of putting the account due into a note was to get further credit, and to start a running account under the contract from that time.

The rules of law by which these facts must be tried are that any contract made by one who claims a mechanic's lien which is inconsistent with its foreclosure estops him from enforcing the lien and destroys the lien itself; that the legal presumption is that a promissory note taken in settlement of an account is simply evidence of the debt, and does not constitute a payment of it, but this is a rebuttable presumption, and the fact that the note was made and accepted in payment of the account may be established by competent evidence; that the acceptance, for an account secured by a lien, of a promissory note which matures within the time limited for the commencement of an action to foreclose the lien, does not waive the right to enforce it nor destroy the lien. Wisconsin Trust Co. v. Robinson & Cary Co., 32 U. S. App. 435, 441, 15 C. C. A. 668, 671, 68 Fed. 778, 781. But the acceptance for a debt secured by a mechanic's lien of a promissory note which does not mature until after the time fixed by the statute for the commencement of an action to enforce the lien destroys the lien and estops the creditor from enforcing it. Harris v. Youngstown Bridge Co., 90 Fed. 323, 326, 33 C. C. A. 69, 72; Blakeley v. Moshier, 94 Mich. 299, 54 N. W. 54, 56; Flenniken v. Liscoe, 64 Minn. 269, 270, 271, 66 N. W. 979; Willison v. Douglas, 66 Md. 99, 6 Atl. 530; Ehlers v. Elder, 51 Miss. 495; Pryor v. White, 16 B. Mon. 605; Quinby v. City of Wilmington, 5 Houst. 26; The Highlander, 4 Blatchf. 55, Fed. Cas. No. 6,475; Scudder v. Balkam, 40 Me. 291; Phillips on Mechanics' Liens, § 281. The reason for the last rule is patent. It is not founded upon the proposition, nor conditioned

the fact, that the note is accepted in payment of the debt. It s upon the fact that the acceptance of a note extends the time ayment of the debt until the note matures. The taking of a nissory note for a debt already due suspends the right of ac- to collect it, and the right of action to enforce any lien that ires it until the maturity of the note. If its due date is subse- nt to the expiration of the time limited by the statute for the mencement of the action to enforce the security, the lien is essarily renounced, and the payee of the note has estopped him- to enforce it the moment the note is accepted, because he not bring an action for that purpose without violating his con- t to extend the time of payment of the debt until the note ma- s.

he statutes of Missouri required an action to be commenced nforce this lien within 180 days after the last item of materials which the debt was incurred was furnished, and they provided . if such an action was not commenced within that time, the should no longer exist. Sections 4241, 4244, Rev. St. Mo. 1899. first note accepted by the Brake Company was not payable l after the time for commencing an action to enforce the lien, ch secured the debt for which it was taken, had expired, and Brake Company agreed, when it took this note, that it would end the time for the payment of the portion of the debt it lenced, which now remains unpaid for at least one year from date. Both the note and the agreement to extend the time ayment of $22,316.21 of the debt were inconsistent with, and essarily waived, the right to enforce the lien for it.

ounsel for the Brake Company attempt to escape from this con- ion by a plausible and earnest contention that the debt evi- ced by the notes still remained after the adjustment a part of running account for materials furnished under the contract, hat subsequent orders and deliveries became a part of it, and s repeatedly advanced the time within which an action to fore- e the lien for the debt evidenced by the notes could be com- nced six months ahead of the respective items as they were vered, so that the due dates of the notes were never really sequent to the time for commencing the action. But, after most careful consideration, this argument does not prove con- cing. The first note was given on November 11, 1897. It not due until after the time for commencing an action to fore- e the mechanic's lien which secured the debt it evidenced had ired. At the time this note was given the Brake Company eed that the portion of it which now remains unpaid should not ome due until November 11, 1898, more than six months after time to institute a suit to foreclose the lien would expire. The ment the note and this contract were made, the Brake Com- y had agreed that it would not enforce the lien, since it could do so without a violation of its note and contract. It was reby estopped from enforcing the lien, and the lien itself was troyed. The first item of materials ordered by the Gulf Com- y after this transaction was on December 30, 1897, more than

a month after the note and contract were made. During the time between the execution of the note and contract and the delivery of this item the lien did not exist, and the Brake Company was estopped to enforce it. The materials furnished under the orders isued subsequent to November 11, 1897, were secured by a subsequent lien. But they had no relation to the prior debt, and their delivery had no effect upon the defunct lien for the price of the materials for which the note had been taken. There was therefore no extension or revival of the old lien. In the absence of fraud or mistake, a mechanic's lien once dead may not be revived. A lien once renounced may not be recovered. Phillips on Mechanics' Liens, § 295; Blakeley v. Moshier, 94 Mich. 299, 54 N. W. 54, 56.

In the discussion of this question the fact has not been overlooked that the agreement to extend the time of payment of the balance of the note after the payment of the first $10,000 was not a binding contract. But the execution of the note estopped the Brake Company from enforcing, and renounced, the lien, and the agreement has been mentioned because it so strongly indicates the fact that the Brake Company was pursuing, and had decided to pursue, a course inconsistent with the retention of its lien.

In view of the acceptance of the notes and the extension of the time of payment of that portion of the debt now in suit beyond the time limited for the commencement of an action to enforce a lien for it, of the stated account which was the foundation of the first note, and which marked a separation of the debt it evidenced from that for materials subsequently delivered, and of the length of time which intervened between the execution of the first note and the subsequent delivery of materials, the conclusion of the master that the acts of the parties were inconsistent with the enforcement of a lien for any part of the debt evidenced by the note for $12,316.21 was neither unsupported by the evidence nor unwarranted by the law, and it must be affirmed.

Was the Brake Company entitled to a preference in equity over the mortgage bondholders in the payment of this note for $12,316.21 out of the income or out of the proceeds of the mortgaged property? The debt evidenced by that note was due on November 11, 1897. The Brake Company extended its payment until May 17, 1899, 18 months. Receivers were appointed on April 28, 1899. Meanwhile three installments of semiannual interest upon the bonds became due. The mortgage pledged the income as well as the property of the Gulf Company to the payment of the mortgage debt and interest, and contained covenants that the Gulf Company would pay all sums which should "become due and payable and which if left unpaid remain a lien upon said property or any part thereof paramount or superior to the lien of" the mortgage as well as the interest on the mortgage debt, and that, if it failed to do either, the bondholders might seize the property and its income and foreclose the mortgage. This claim of the petitioner was one of those which, if it was incurred within a limited time, approximately six months, before the impounding of the income and property by the bondholders, was secured by an

itable lien paramount to that of the mortgage. Illinois Trust avings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A.

But the class of claims is very limited which may be permitto displace the contract lien of a prior mortgage, and those o would enforce them must act in good faith and exercise reaable diligence. The considerations which inspire the deciis of the federal courts upon this question are well expressed by Justice Brewer in these words in Kneeland v. American Loan 136 U. S. 89, 97, 98, 10 Sup. Ct. 950, 953, 34 L. Ed. 379:

"No one is bound to sell to a railroad company or to work for it, and who has dealings with a company whose property is mortgaged must be assed to have dealt with it on the faith of its personal responsibility, and in expectation of subsequently displacing the priority of the mortgage liens. s the exception, and not the rule, that such priority of liens can be dised. We emphasize this fact of the sacredness of contract liens, for the on that there seems to be growing an idea that the chancellor, in the exse of his equitable powers, has unlimited discretion in this matter of the lacement of vested liens."

Iortgage bondholders have the right to the payment by the rtgagor of the current expenses of the operation of the rail- l by their debtor with reasonable promptness. The reason that months is approximately the limited time within which preferal claims must accrue is that there is usually an interval of months between the dates when installments of interest upon bonds fall due, and the mortgages generally provide, and the rranted inference is, that, when an installment of interest is l, current expenses to that time have either been paid, or funds pay them have been lawfully provided. The failure of the f Company to pay this debt of the petitioner in November, 1897, en it was due, was a violation of the covenant in its mortgage, ess the creditor released its paramount lien, and thus withdrew claim from the class of claims covered by that covenant from class entitled to a paramount lien.

'he approval of the extensions of the times of payment of ferential claims by agreements between the debtor and the mants which are not placed of record and are generally unwn to the bondholders and their trustees would enable simple tract creditors to pile up large debts of the mortgagor secured secret liens paramount to railroad mortgages, would permit m to thus impair the security and to evade the legal effect of the tracts contained in the mortgages, and, by concealing the actual aults of the mortgagor, would allow them to indefinitely deprive bondholders of the possession and application of the property the payment of their bonds and coupons until their security ght be practically destroyed. Morgan's Co. v. Texas Central lway Co., 137 U. S. 171, 196, 11 Sup. Ct. 61, 34 L. Ed. 625; ckawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 S. 298, 316, 20 Sup. Ct. 363, 44 L. Ed. 475; Bound v. South rolina Ry. Co., 58 Fed. 473, 480, 7 C. C. A. 322, 329; Thomas Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; Kneeland American Loan Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, 34 L. Ed. . In Morgan's Co. v. Texas Central Ry. Co., 137 U. S. 171, 196,

11 Sup. Ct. 61, 69, 34 L. Ed. 625, Mr. Chief Justice Fuller, in delivering the opinion of the Supreme Court upon the question whether those who, like the petitioner, assist in the diversion of income to the payment of interest and thereby prevent defaults which entitle the bondholders to the property, may enforce liens paramount to that of the mortgage, said:

"By the payment of interest the interposition of the bondholders was averted. They could not take possession of the property, and should not be charged with the responsibility of its operation. It is true that a railroad company is a corporation operating a public highway, but it does not follow that the discharge of its public excuses it from amenability for its private obligations. If it cannot keep up and maintain its road in a suitable condition, and perform the public service for which it was endowed with its faculties and franchises, it must give way to those who can. Its bonds cannot be confiscated because it lacks self-sustaining ability. To allow another corporation, which for its own purposes has kept a railroad in operation in the hands of the original company, by enabling it to prevent those who would otherwise be entitled to take it from doing so, a preference in reimbursement over the latter on the ground of superiority of equity, would be to permit the speculative action of third parties to defeat contract obligations, and to concede a power over the property of others which even governmental sovereignty cannot exercise without limitation."

The cases in which special circumstances have induced courts to prefer claims which accrued more than six months before the appointment of receivers, and in which extensions of times of payment have not proved fatal, are not out of mind. But those decisions were induced by the peculiar equities of the respective cases, and the fact remains that the general rule is that the time within which claims which are entitled to payment out of the income or proceeds of the mortgaged property in preference to the mortgage debt must accrue is six months preceding the impounding of the income and the seizure of the property by the mortgagees. 23 Am. & Eng. Enc. of Law, 816.

The debt of the petitioner evidenced by the note of $12,316.21 accrued long prior to that limited time within which preferential claims must ordinarily arise. The Brake Company extended the time of payment of this debt for 18 months after it was due, and in that way assisted the debtor to conceal its real default and to keep its property from the possession of the holders of the bonds secured by its first mortgage. The rights of the latter by the express terms of their contract, and in equity, under the judicial discretion of the chancellor, are alike superior to those of the petitioner, and its claim to be preferred to them in its payment of this debt was rightly denied by the master.

The conclusions which have now been reached dispose of this case, and the discussion of other questions presented at the argument cannot now be indulged. The silence of the court, however, is not to be construed as an assent to the proposition that a creditor has an adequate remedy at law which bars him from a suit in equity because he has a cause of action in a state court to foreclose a mechanic's lien (National Surety Co. v. State Bank, 120 Fed. 593, 602, 603, 56 C. C. A. 657, 666, 667, 61 L. R. A. 394; Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, 49 C. C. A.

29, 234, 111 Fed. 81, 86), or that his perfection or enforcement of is mechanic's lien at any time before it is satisfied by payment aives his preferential lien in equity for the same debt.

The decree of the court below must be reversed, and the case ust be remanded to the Circuit Court with instructions to enter decree that the petitioner has a mechanic's lien on the property in ie state of Missouri which was owned by the Gulf Company on lay 10, 1899, for the sum of $11,271.05, and interest thereon from iat date, under the statutes of the state of Missouri, paramount in en, and superior in equity to the mortgage of April 1, 1893; that ie defendant, the Kansas City Southern Railway Company, pay the petitioner, the Westinghouse Air Brake Company, this nount, together with the costs of this suit, within a reasonable me to be fixed by the court; and that in default of such payment ie property be sold to satisfy this demand; and it is so ordered.

SCHURMEIER et al. v. CONNECTICUT MUT. LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1905.)

No. 2,123.

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATES—FEDERAL COURTS—CONCURRENT JURISDICTION.

The federal courts have concurrent jurisdiction with the courts of the states to hear and allow claims against the estates of deceased persons which involve controversies over the requisite amounts between citizens of different states, notwithstanding the fact that the states have by their legislation conferred exclusive jurisdiction to hear and adjudge such claims upon their probate or other state courts.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1410.]

SAME—PRACTICE—FEDERAL COURTS—DISTINCTION BETWEEN LAW AND EQUITY.

In the national courts, an action at law cannot be maintained in equity, nor is an equitable cause of action nor an equitable defense available at law.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts. § 913.]

SAME—FEDERAL COURTS—ACTION AT LAW FOR ALLOWANCE OF CLAIM.

An action at law may be maintained in a federal court to secure the allowance of a claim against an estate and a certificate of it to the proper state court for payment in its class, when the action is commenced within the time limited by the statute or by the order of the state court for the presentation of claims against the estate, and no relief in equity is requisite to permit the allowance of the claim.

SAME—FEDERAL COURTS—SUIT IN EQUITY INDISPENSABLE TO ALLOWANCE OF CLAIM.

When, in the federal courts, the allowance of a claim for good cause shown out of the time limited, or the extension of such time for such a cause, or other relief which can be secured by the exercise of the judgment of a chancellor only, is indispensable, resort must be had to a suit in equity to invoke the jurisdiction of the national courts over the estates of deceased persons which they derive from the English Court of Chancery.

SAME—FEDERAL COURTS GOVERNED BY SAME RULES AS LOCAL TRIBUNALS.

In allowing claims against the estates of deceased persons the federal courts are administering the laws of the states, and they are governed

by the same rules which direct the local tribunals, where those rules violate no right secured by the Constitution or laws of the United States.

6. SAME—CONTINGENT CLAIMS—LIMITATIONS.

In Minnesota the probate court may, by order, fix the time within which claims against estates of decedents may be presented, and may for good cause shown allow such claims to be presented after the expiration of this time, and within 18 months after notice of its order.

Actions upon claims which are so contingent that they are not susceptible of ascertainment and proof within the time limited by the order of the probate court, but which become absolute and provable a sufficient length of time before the expiration of the 18 months to give the creditors a reasonable opportunity to present their claims and to show cause within the 18 months, are barred unless the claims are presented and the cause is shown within that time. Jorgenson v. Larson, 88 N. W. 439, 85 Minn. 134, 136; Hunt v. Burns (Minn.) 95 N. W. 1111.

7. FEDERAL COURT—JURISDICTION IN EQUITY.

A federal court has jurisdiction to entertain a suit in equity to permit the presentation of and to allow such claims for good cause shown, after the time limited by the order of the probate court, and within the 18 months.

But actions at law for the allowance of such claims cannot be maintained, because they are barred in the absence of judicial permission to present them after the time limited by the order of the probate court, and this permission can be granted in the federal court in a suit in equity only.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

This writ of error challenges a judgment of $7,922.45 against the defendants below as executors of the will of John H. Schurmeier upon a demurrer to their answer. These are the material facts which the pleadings disclose: John H. Schurmeier was a citizen and resident of the state of Minnesota when he died on July 16, 1900. At the time of his death the Connecticut Mutual Life Insurance Company held his promissory note and mortgage for $50,000, payable on July 2, 1904, and for interest on this amount payable semiannually. The mortgage contained an agreement that the mortgagor should pay the taxes and the premiums for insurance upon the property, and that, if he failed to do so, or to pay any installment of interest when due, the entire debt should, at the option of the mortgagee, become due. Prior to June 2, 1901, taxes and assessments upon the property became delinquent. Default was made in the payment of the semiannual installments of interest which became due on July 2, 1901, and on January 2, 1902. On January 25, 1902, the mortgaged premises were sold in foreclosure proceedings. The proceeds of the sale were applied to the payment of the debt, and there remained a balance of $7,074.90 of the debt unpaid. The judgment below was for this deficiency. Meanwhile, on December 27, 1900, the will of Schurmeier was allowed. The defendants were appointed executors, and the period of six months from that date was fixed by an order of the probate court of Ramsey county, Minn., for the presentation to it of claims against the estate of the deceased. The claim of the insurance company was never presented to it, but this action was commenced on February 7, 1902, in the Circuit Court for the District of Minnesota.

Harris Richardson, for plaintiffs in error.

George W. Markham (James E. Markham, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The judgment in this case is assailed on the ground, among others, that this action at law is barred by limitation, because the claim upon which it is founded was not presented to the probate court or to the court below for allowance within the time fixed by the former court for the presentation of claims against the estate of the debtor. On the other hand, counsel for the insurance company argue that until the sale of the mortgaged premises and the application of their proceeds to the payment of the mortgage debt on January 27, 1902 (Gen. St. Minn. 1894, § 4529), this was a contingent claim, the liability of the estate for which depended entirely upon a future uncertain event, which might or might not happen, so that it was impossible to determine before that time whether or not there would ever be any liability, and so that it was impossible to present the claim until after June 27, 1901, the date of the expiration of the time limited by the order of the probate court for the allowance of claims against the estate of the decedent. For the purposes of the decision of this case this argument will be conceded to be sound without entering upon a discussion or determination of the questions which involve the nature of contingent claims. Notwithstanding this concession, the claim of the company became absolute, actionable, and susceptible of presentation, proof, and allowance on January 25, 1902, five months before the time expired within which claims might be allowed by the probate court for good cause shown.

The material provisions of the statutes of Minnesota upon this subject are:

"At the time of granting letters testamentary or of administration the court shall make an order limiting the time in which creditors may present claims against the deceased for examination and allowance, which shall not be less than six months nor more than one year from the date of such order. * * * No claim or demand shall be received after expiration of the time so limited, unless for good cause shown the court may in its discretion receive, hear and allow such claim upon notice to the executor or administrator, but no claim shall be received or allowed unless presented within one year and six months from the time when notice of the order is given." Gen. St. Minn. 1894, § 4509.

"All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to the probate court within the time limited in said order, and any claim not so presented is barred forever." Section 4511.

The federal courts have concurrent jurisdiction with the courts of the states to hear and adjudicate claims against the estates of deceased persons between citizens of different states, notwithstanding the fact that the states have by their legislation conferred exclusive jurisdiction to adjudge such claims upon their probate or other state courts. Union Bank of Tennessee v. Vaiden, 18 How. 503, 15 L. Ed. 472; Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. In the exercise of this jurisdiction the national courts administer the laws of the state of the domicile of the decedent, and in the enforcement of these laws they uniformly follow the rules and decisions which govern the state tribunals in all

cases in which those rules and decisions violate no right secured by the Constitution or laws of the nation. Aspden v. Nixon, 4 How. 467, 498, 11 L. Ed. 1059; Walker v. Walker's Ex'r, 9 Wall. 743, 754, 19 L. Ed. 814; Yonley v. Lavender, 21 Wall. 276, 22 L. Ed. 536; Morgan v. Hamlet, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043; Byers v. McAuley, 149 U. S. 608, 615, 13 Sup. Ct. 906, 37 L. Ed. 867; Security Trust Co. v. Black River National Bank, 187 U. S. 211, 227, 237, 23 Sup. Ct. 52, 47 L. Ed. 147.

The statutes of Minnesota empowered its probate courts to receive and allow claims at any time within 18 months after notice of the order which fixed the time within which they were to be presented. If the time fixed was less than 18 months, those courts nevertheless had jurisdiction after its expiration for good cause shown to receive and allow the claims at any time within the 18 months. The rules for the enforcement of the provisions of these statutes have been announced and established by the decisions of the Supreme Court of Minnesota. Actions upon claims that are so contingent and uncertain that they are not susceptible of ascertainment or proof within the 18 months after notice of the order which fixes the time for the presentation of claims against the estate of the decedent are not barred by a failure to present the claims to the probate court. Hantzch v. Massolt, 61 Minn. 361, 368, 63 N. W. 1069; Oswald v. Pillsbury, 61 Minn. 520, 523, 63 N. W. 1072; Lake Phalen Land & Improvement Co. v. Lindeke, 66 Minn. 209, 68 N. W. 974; Berryhill v. Peabody, 72 Minn. 232, 234, 75 N. W. 220. Actions upon claims which are susceptible of ascertainment and proof within the time fixed by the order of the probate court for the presentation of claims are barred if the claims are not presented within that time. Hantzch v. Massolt, 61 Minn. 361, 63 N. W. 1069. Actions upon claims which are so contingent and uncertain that they are not susceptible of ascertainment and proof within the time fixed by the order of the probate court for the presentation of claims, but which become absolute and provable a sufficient length of time before the expiration of the 18 months after the notice of the order fixing the time to give the creditors a reasonable opportunity to present their claims and show cause within the 18 months, are barred unless the claims are presented and the cause is shown within that time. Jorgenson v. Larson, 85 Minn. 134, 136, 88 N. W. 439; Hunt v. Burns (Minn.) 95 N. W. 1111.

The case in hand falls under the last rule, which is well illustrated by the case of Jorgenson v. Larson. It is conceded that the claim upon which this action is based was so contingent and uncertain that it was impossible to ascertain or prove, prior to January 25, 1902, whether or not there would ever be any liability of the estate upon it. But it became absolute and provable 5 months before the expiration of the 18 months within which the probate court had jurisdiction to receive and allow it for good cause shown, and the failure to present it and to show that cause within that time is fatal to the action at law upon it under the rule and authorities last cited. In Jorgenson v. Larson the latter had a claim against the estate of K. O. Jorgenson, which was so contingent that it was

impossible to determine whether any liability of the estate would ever arise upon it until August 17, 1899. Jorgenson died August 28, 1898, and on October 10, 1898, the probate court, by order, limited the time for presentation of claims against the estate to six months from that date. The claim was therefore not provable within the time limited by the order, but it became absolute after the expiration of that time, but nearly eight months before the expiration of the eighteen months within which, for good cause shown, the probate court was authorized to permit its presentation and allowance. The Supreme Court of Minnesota held that the failure of the claimant to present his claim to the probate court and to show cause why it should be presented and allowed after it became absolute, and within the 18 months, was a perpetual bar to an action upon it.

This, then, was the situation of the case in hand. When the action before us was commenced, the probate court had the power to receive and allow the claim upon which this suit is founded upon the presentation to it of sound reasons why that course should be pursued. The court below had the same jurisdiction and power. Wherever the citizens of a state may secure a trial and decision of their controversies in its courts either by original suits, by appeals, or by other proceedings, citizens of different states have the right to the determination by the courts of the United States in appropriate proceedings either at law, in equity, or in admiralty, as the nature of the case may require, of like controversies between them which involve the requisite amounts. Darragh v. H. Wetter Mfg. Co., 23 C. C. A. 609, 615, 616, 78 Fed. 7, 13, 14; National Surety Co. v. State Bank, 56 C. C. A. 657, 667, 120 Fed. 593, 603, 61 L. R. A. 394; Barber Asphalt Paving Co. v. Morris (C. C. A.) 132 Fed. 945, 949, and cases there cited. But this power may be exercised and the relief sought may be obtained in the national courts by proceedings appropriate to the nature of the case and to the jurisdiction of those courts only. In the federal courts an action at law cannot be maintained in equity, nor is an equitable cause of action or an equitable defense available at law. While in many of the states statutes exist which permit the joinder of causes of action at law and in equity in the same suit, this course is not permissible in the federal courts. In truth the difference between causes of action at law and in equity is matter of substance and not of form, and no legislative enactment can really remove it. In the national courts this ineradicable difference is as sedulously preserved in the forms and practice available for their maintenance as it is in the natures of the causes themselves and in the principles upon which they rest. A legal cause of action may not be sustained in equity, because there is an adequate remedy at law, and it is only when there is no such remedy that a suit in equity can be maintained. Equitable causes and defenses are not available in actions at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law by the rule which entitles either party to a trial of all the issues of fact by a jury. Bagnell v. Broderick,

13 Pet. 436, 10 L. Ed. 235; Foster v. Mora, 98 U. S. 425, 428, 25 L. Ed. 191; Scott v. Armstrong, 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059; Lindsay v. Bank, 156 U. S. 485, 493, 15 Sup. Ct. 472, 39 L. Ed. 505; Schoolfield v. Rhodes, 82 Fed. 153, 155, 27 C. C. A. 95, 97; Davis v. Davis, 72 Fed. 81, 83, 18 C. C. A. 438, 440; Highland Boy Gold Min. Co. v. Strickley, 54 C. C. A. 186, 188, 116 Fed. 852, 854.

The relief indispensable to the allowance of the claim at bar and to its payment by the executors out of the property of the estate in their hands was the judicial permission to present the claim and to have it allowed after the time originally fixed for its presentation by the order of the probate court had expired. The demand for this relief was an appeal to the judgment and conscience of the chancellor. The claimant had no right to it upon which he could rely under the rules of the common law or of the statute. The demand presented an issue which was not triable by a jury or judicable in an action at law, but the allowance of which rested entirely in the discretion of a court of equity. A chancellor alone by the exercise of his conscience and judgment could determine whether or not the claimant presented good reasons why it had not urged its claim within the time originally fixed, and could determine whether or not permission should be granted to present it and have it allowed after the expiration of that time. The court below had no jurisdiction to hear or to determine that question in this action at law, and until it was heard and determined in favor of the insurance company its claim was forever barred, and no action at law upon it could be maintained. Hantzch v. Massolt, 61 Minn. 361, 368, 63 N. W. 1069; Hunt v. Burns (Minn.) 95 N. W. 1111; Security Trust Co. v. Black River National Bank, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147. An action at law may be maintained in a federal court to secure the allowance of a claim against an estate and a certificate of it to the proper state court for payment in its class, when the action is commenced within the time limited by the statute or by the order of the state court for the presentation of claims against the estate, and no relief in equity is requisite to permit the allowance of the claim. But where the extension of the time fixed for the allowance of claims or the allowance of a claim out of the time prescribed for good cause shown, or other relief, which may be secured by the exercise of the powers of a chancellor only, is indispensable, resort must be had by a suit in equity to the jurisdiction of those courts over the estates of deceased persons which is derived from the Court of Chancery in England. Borer v. Chapman, 119 U. S. 587, 598, 599, 7 Sup. Ct. 342, 30 L. Ed. 532; Green's Adm'x v. Creighton, 23 How. 90, 93, 16 L. Ed. 419; Hagan v. Walker, 14 How. 29, 14 L. Ed. 312; Comstock v. Herron, 5 C. C. A. 266, 55 Fed. 803; Attorney General v. Cornthwaite, 2 Cox, Ch. 44; 1 Story, Eq. Jur. § 532.

The danger signal was planted upon the rock upon which this action has stranded when it was here before. At that time the record disclosed a claim due and actionable during the time fixed

r the presentation of claims. The Supreme Court had recently ecided that an action at law upon a claim that was absolute and ovable, but was not presented during the time fixed by the pro- te court for the allowance of claims against the estate of a de- dent, was barred under the statutes of Minnesota, and had said:

"Moreover, it is obvious, and it has always been held, that the Circuit Court nnot, in the trial of an action at law, exercise the power of a court of equity. n application to the federal court to decree an extension of time beyond the riod previously prescribed by the probate court would have to be made a bill in equity, showing good cause." Security Trust Co. v. Black River ational Bank, 187 U. S. 211, 237, 23 Sup. Ct. 52, 47 L. Ed. 147.

In view of these facts this case was remanded to the court below vith leave to the plaintiff to reply to the answer or to amend s complaint, stating its cause of action at law or in equity, as it ay be advised." Schurmeier v. Connecticut Mutual Life Ins. Co., C. C. A. 51, 52, 124 Fed. 865, 866. No application has, however, een made by a bill in equity for the allowance of this claim out time or for an extension of the time originally limited for the al- wance of claims against the estate of the decedent, Schurmeier, nd in deference to the decision of the Supreme Court which has st been quoted there is now no escape from the conclusion that is action at law cannot be maintained upon the facts which this cord presents. The judgment below must accordingly be revers- l, and the case must be remanded to the Circuit Court for fur- er proceedings not inconsistent with the views expressed in this pinion, and it is so ordered.

TOLEDO TRACTION CO. v. CAMERON.

(Circuit Court of Appeals, Sixth Circuit. April 25, 1905.)

No. 1,374.

JURISDICTION OF FEDERAL COURT—DIVERSITY OF CITIZENSHIP—MINOR SUING BY GUARDIAN.

Where the plaintiff is a minor suing by his guardian, the question of the jurisdiction of a federal court is determined by his own citizenship, and not that of his guardian, which is immaterial.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 858.

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

SAME—ALLEGATION OF CITIZENSHIP.

An allegation in a petition that plaintiff is a citizen "of said county of Monroe, in the said state of Michigan," while inexact as an averment of citizenship of the state of Michigan for the purpose of showing jurisdiction in a federal court, will be treated as sufficient, especially in an appellate court, when it has been so construed and treated by both court and counsel in the trial court, which made a finding of the fact in accordance therewith.

SAME—EFFECT OF INSUFFICIENT AVERMENT IN AMENDED PETITION.

Where the original petition in an action contains the requisite averments to give a federal court jurisdiction, such jurisdiction is not lost

because an amended petition alleges plaintiff's citizenship in the present tense only.

4. SAME—ISSUE AS TO CITIZENSHIP—CONCLUSIVENESS OF VERDICT.

An averment of plaintiff's citizenship in an action in a federal court, in which jurisdiction depends on diversity of citizenship, is a material allegation, within the meaning of the Ohio Code, and is put in issue, under such Code, by a general denial in the answer; and a general verdict finding the issues in favor of plaintiff, followed by judgment thereon, is conclusive on such issue as against a defendant who has participated in the trial without objecting to the jurisdiction, or asking any ruling or instruction on the ground of the insufficiency of the evidence on the issue.

5. SAME—INQUIRY INTO JURISDICTION—PROCEDURE.

Under Judiciary Act 1875, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], where a defendant after verdict and judgment for the first time raises the question of jurisdiction, on the ground that there was no evidence to support the jurisdictional allegations of plaintiff's pleading, which were put in issue by a general denial, it is competent for the court to set aside the judgment for the purpose of inquiring into the question, either with or without a jury, as it may see fit; and, unless it shall appear from the evidence adduced or from the record that it is without jurisdiction, it may re-enter the judgment on the verdict.

6. SAME—CITIZENSHIP OF INFANT—EFFECT OF DIVORCE OF PARENTS.

Where the father and mother of an infant plaintiff had been divorced, and he had been awarded to the custody of his mother, his domicile and place of citizenship, for the purposes of the jurisdiction of a federal court, are determined by hers, so long as he remains with her and in her care; and the fact of the divorce decree does not prevent her from acquiring citizenship in another state for herself and him.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Domicile, § 26.]

7. PLEADING—ISSUES RAISED BY GENERAL DENIAL—OHIO CODE.

An allegation in the petition of an infant, suing in a federal court by his guardian, that such guardian was duly appointed by a probate court, etc., is not of a jurisdictional fact, nor is it a material averment, within the meaning of the provision of the Ohio Code prescribing what issues may be raised by a general denial in the answer; and, where not specifically denied, an objection to the sufficiency of the proof of such allegation cannot be raised after verdict and judgment.

8. FEDERAL COURTS—EVIDENCE IN ACTIONS AT LAW—STATUTORY LIMITATIONS.

Federal courts are not required by Rev. St. § 861 [U. S. Comp. St. 1901, p. 661], providing that "the mode of proof in the trial of actions at common law shall be by oral testimony and examining of witnesses in open court, except as hereinafter provided," to exclude evidence which, although not within the terms of such section or of the following provisions relating to depositions, is still admissible under the principles of evidence recognized by the common law before, and at the time of, that enactment.

9. SAME—TESTIMONY GIVEN ON FORMER TRIAL—GROUNDS OF ADMISSIBILITY.

Rev. St. Ohio, § 5242a, which authorizes the admission in evidence of the testimony given by a witness on a former trial of the same case when the witness is dead or beyond the jurisdiction of the court, is in conformity with the rule recognized at common law, which permits the use of such evidence generally where it is impossible to obtain a viva voce examination of the witness, and is not in conflict with Rev. St. § 861 [U. S. Comp. St. 1901, p. 661], and may properly be applied in an action at law in a federal court sitting within the state, where the witness is without the district, and more than 100 miles distant from the place of trial.

10. ERROR—ADMISSION OF SECONDARY EVIDENCE—HARMLESS ERROR.

In an action for personal injury, where plaintiff's injured leg was exhibited to the jury, the subsequent admission in evidence of a photograph showing the injury, even if it was incompetent as secondary evidence, was harmless error.

SAME—ARTICLES TAKEN TO JURY ROOM—PHOTOGRAPH.

Permitting the jury in a personal injury case to take with them to the jury room a photograph of plaintiff after the injury was not reversible error, where the accuracy of the picture was not disputed.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 735.]

STREET RAILROADS—ACTION FOR INJURY OF CHILD—INSTRUCTIONS.

In an action to recover for the injury of a child two years old by a street car in the daytime, requests for instructions that neither the failure of the motorman to sound the gong on approaching the plaintiff, nor the speed of the car, contributed to or had any effect in causing the injury, were properly refused, where there was testimony tending to show that plaintiff was or should have been seen by the motorman for a long distance before he was reached, and that the speed of the car was 15 or 20 miles an hour until plaintiff was struck.

n Error to the Circuit Court of the United States for the North- District of Ohio.

Barton Smith, for plaintiff in error.

Charles A. Thatcher, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit ges.

SEVERENS, Circuit Judge. The plaintiff in the court below, his guardian, brought this suit to recover the damages sus- ned by him in consequence of the alleged negligence of the de- dant in the management of one of its cars in a street of Toledo, ereby he was knocked down, and one of his feet was crushed by wheel of the car to such an extent that it became necessary amputate the foot and part of the leg between the ankle and knee. At the time of the occurrence the plaintiff was about years old. He had strayed away from the house where he was ving at the time, and wandered into the middle of the street and on the track of the defendant, a street car company; and while ving about near to the eastern rail he was struck by the for- rd right-hand corner of a car coming from the south and thrown vn, and his foot was crushed as above stated. The accident hap- ed in the daytime in a straight street, and with nothing to ob- re the sight of the child from the motorman. The evidence in ard to the speed at which the car was running differed consid- bly. From some of it the jury might have found that the speed s 15 miles an hour, and the jury might also have found that the ed was not stopped or lessened as the car approached the plain-

n the plaintiff's petition, in stating the grounds for the juris- tion of the court, the following allegations were made:

First. The said Joseph L. Cameron is a minor, and the said George L. Lit- nas been duly appointed and qualified by the probate court of Monroe coun- state of Michigan, as his guardian, and is now acting as such. The said or and his said guardian are residents and citizens of said county of Mon- in the said state of Michigan.

Second. The said defendant, the Toledo Traction Company, is a corporation y incorporated under the laws of the state of Ohio, and at the time of the pening of the grievances hereinafter set forth, and until the 10th day of ust, 1901, owned and operated a line of street railway in the city of Toledo, unicipal corporation duly organized under the laws of said state of Ohio."

Another street railway company was joined as defendant, which, as was alleged, had since the accident purchased the railway of the Toledo Traction Company, and had assumed and agreed to pay all its debts and liabilities. Such proceedings were had that the suit was dismissed as to said purchasing company, and the suit was thereupon prosecuted against the Toledo Traction Company. Subsequent to the commencement of the suit, the plaintiff, by leave of the court, filed an "amended petition," concerning which we only need to say that it repeated the allegations respecting the citizenship of the plaintiff in the identical language of the original petition. To this amended petition the defendant, the Toledo Traction Company, answered, admitting its incorporation under the laws of Ohio, that it was operating the street railway at the time of the accident, and that the plaintiff's foot was injured by a wheel of the defendant's car, but denied "each and every other statement and allegation in plaintiff's amended petition contained."

The case has been three times tried before a jury. Upon the last trial the jury rendered the following verdict:

"We, the jury in this case, being duly impaneled and sworn, do find upon the issues joined for the plaintiff, and do assess his damages at the sum of six thousand and five hundred dollars ($6,500).

"O. P. Norris, Foreman."

Judgment was entered accordingly. The defendant moved that the verdict and judgment be set aside and for a new trial, upon grounds, among which were two—one, that "the verdict was not sustained by sufficient evidence"; and another, that "the verdict is contrary to law." As we gather from the record, upon the hearing of this motion counsel for defendant urged that upon the trial no evidence had been offered by the plaintiff to prove that either he or his guardian were at the commencement of the suit citizens of the state of Michigan. Thereupon counsel for the plaintiff requested the court to impanel a jury and receive evidence which he proposed to offer in support of his allegations of the citizenship of the plaintiff and his guardian, and the due appointment of the guardian. The court ordered the judgment to be set aside, but not the verdict. It also denied the plaintiff's request to impanel a jury to determine whether the plaintiff was a citizen of Michigan, and whether the guardian had been lawfully appointed, and directed the hearing on those questions to be had before the court itself. The plaintiff produced witnesses who gave testimony tending to prove his contentions in these respects, and no opposing testimony was offered on the part of the defendant. But the defendant strenuously opposed this inquiry, denying at every step the authority of the court to entertain the question at all after the jury trying the case had rendered their verdict and been discharged, or, if it had such authority, to assume to try the question itself without a jury, and excepted throughout to the action of the court. The court made a finding in favor of the plaintiff upon all the questions involved in the inquiry, and thereupon restored the judgment.

Several exceptions were taken by the defendant to rulings of the

urt upon the trial of the merits before the jury, which are stated the opinion further on.

It is contended by counsel for the plaintiff in error that the court low did not acquire jurisdiction to try the case and render the igment, and this challenge must first be attended to. Inasmuch there are questions relating to the merits as well as to the juris-tion, we may choose whether we will first certify the latter estion to the Supreme Court, and, after receiving its answer, if at be in favor of the jurisdiction, proceed to determine the ques-ns relating to the merits, or decide the whole case in the first stance. McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 3. And as it seems to us that the question of jurisdiction here esented is concluded by decisions of the Supreme Court already ade, we adopt the latter course. The contention as made rests imarily upon the insufficiency of the showing that the plaintiff as at the commencement of the suit a citizen of Michigan. In r opinion, the citizenship of the guardian was unimportant upon e question of jurisdiction. The right of action was that of the aintiff. The recovery belongs to him. The guardian is a mere otector of the plaintiff's interest, differing in this respect from administrator or trustee in whom the legal title is vested. Wil-ms v. Ritchey, 3 Dill. 406, Fed. Cas. No. 17,734; Woolridge v. cKenna (C. C.) 8 Fed. 650, 668; Wiggins v. Bethune (C. C.) 29 d. 51; Voss v. Neineber (C. C.) 68 Fed. 947.

Some embarrassment arises, though it has not been urged by unsel, upon the form of the allegation in the petition, which that the plaintiff is a citizen "of said county of Monroe, in the ate of Michigan." It is certainly a very inexact form of allega-on. But considering the purpose for which it is made, and the cts subsequently developed in the record, we think it right to con-rue the allegation as one importing that the plaintiff is a citizen Michigan, residing in or being an inhabitant of the county of onroe. As it stands, it has no other meaning having any sig-ficance to the citizenship required by the law of federal jurisdic-on. Besides, the construction we are disposed to put upon this nguage has been the one which has been accepted and acted on throughout the case by counsel on both sides and by the al court. But the averment is helped out. In the finding of e court upon the special inquiry made by it, it is stated that he court finds, in favor of the plaintiff, that the said plaintiff, seph L. Cameron, and the said George L. Little were at the me of the commencement of this suit citizens and residents of e state of Michigan"; showing also, as we think, that the court eated the allegation as equivalent to one in due form. Thus it s served every purpose of a proper allegation. It is well settled at we may refer to the whole record to make out, if we fairly n, the conditions on which the jurisdiction may rest.

An objection upon which stress is laid by counsel for plaintiff in ror is this: The case was tried upon the amended petition filed considerable time after the commencement of the suit, and the nguage respecting the citizenship of the parties is in the present

tense; repeating in this respect, as we have said, the words of the original petition. Counsel urge that the amended petition superseded the original, and becomes the only one to which the court can have regard, and upon this assumption it is said the showing is only that the proper citizenship existed at the time of filing the amended petition. But the court had already acquired jurisdiction upon the filing of the original petition and service of process, and it would not lose it by a mere amendment of the pleadings touching the merits of the case. A similar question was presented in Mexican Ry. Co. v. Pinkney, 149 U. S. 195, 13 Sup. Ct. 859, 37 L. Ed. 699, and received a similar answer. Besides, the original petition remains a part of the record, and may be looked into to find whether the necessary conditions appear for entertaining the suit.

It is further contended that there was no evidence upon the trial in respect to the citizenship of the plaintiff, and that therefore the court erred in not directing a verdict for the defendant, as requested by its counsel. It is to be noted in the first place that the counsel did not assign this as a reason why such a direction should be given, and it does not appear that any such question was raised during the trial. It was, indeed, one of the issues. By the rules of pleading prescribed by the Code of Ohio, all the material allegations of the petition which are not defective or insufficient on their face must be answered; otherwise they are admitted. Objections in the nature of a plea to the jurisdiction or going to the merits must be raised by the answer. In this case the allegations touching the jurisdictional facts were material, and were met and covered by the general denial of the answer. Thus an issue was raised. The jury responded that the allegation was true. We have some doubt whether the defendant, in such circumstances, upon a bill of exceptions containing all the evidence, and showing that there was no proof upon that subject, but showing also that no question upon it was raised in the court below, could successfully urge that for such reason the verdict and judgment should be set aside. But it is not necessary to decide how far the court will extend its inquiry for reasons impugning its jurisdiction. In the case of Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579, which was tried under the Code of Nebraska, which is in all relevant particulars like that of Ohio, the question arose upon the failure of the special verdict to declare any finding upon the issue relating to the jurisdiction. If in that case the verdict had found the fact to be as alleged in the petition, as the jury have done in the case before us, it may well be doubted whether the court would have searched the evidence to find whether there was any proof justifying the finding.

It is contended for defendant in error that, under the practice in the courts of Ohio, averments which qualify the plaintiff to bring the action must be met by a specific denial, if the defendant proposes to deny them, and that a failure to specifically deny them admits them to be true; and it is thereupon insisted that the question came to an end by the failure of the defendant below to con-

vert by proper pleading the qualifying averments of the peti-
n. The case of Brady v. National Supply Co., 64 Ohio St. 267, 60
E. 218, 83 Am. St. Rep. 753, which is relied upon by defend-
t in error, holds that the description of the plaintiff in the peti-
n as an administrator, executor, or the like, is not a material
erment, within the meaning of the Code, and that a general
nial is not sufficient to raise an issue upon it. But in the fed-
al practice an averment of the citizenship of the plaintiff in a
it depending upon a diversity of citizenship as the foundation
the jurisdiction is a material averment, and the reasons given
the ruling in the case of Brady v. National Supply Co., supra,
not apply. Roberts v. Lewis, supra, is of itself a sufficient
thority for this distinction, and for the different consequences
hich result therefrom. It is upon these grounds that we con-
ide that the averment of the citizenship of the plaintiff was put
issue and determined by the verdict. But for the decision in
berts v. Lewis, we should have supposed that the burden of
oof was upon the defendant to disprove the prima facie sufficient
erment of the plaintiff, as was always held upon pleas in abate-
ent in the earlier practice. But the decision in that case seems
assume that the burden was on the plaintiff, and that the origi-
l presumption was rebutted by the defendant's denial in his
eading. Probably the conclusion of the Supreme Court was rest-
upon the different mode of pleading brought in by the regula-
ns of the Code. Accepting this conclusion, and assuming that
may go behind the verdict to find whether it rested upon any
idence sufficient to support this particular allegation of the pe-
ion, and that, if it did not, the question was still an open one,
come to the proceedings subsequent to the verdict and judg-
ent.

Counsel for the defendant insist here, as they did below, that the
rcuit Court transcended its authority when it took upon itself
e determination of the question which the counsel on both sides
d the court also seem to have supposed to remain unsettled.
nder the ruling in Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289,
L. Ed. 690, counsel for defendant might still have advanced by
me appropriate method a suggestion to the court that for reasons
ated the court did not have jurisdiction, and that the matter
ould be investigated. But they did not do this, and seem to
ve relied confidently upon their objection that the court had no
wer to make such an investigation, or, if it had, that it could
t do so without a jury. We are of opinion that the defendant
d already lost any right which it might have had under any
w in force prior to the act of 1875 to contest the jurisdiction, and,
rther, that it has no right under that act to complain of the
urse taken by the court in pursuing the investigation. All con-
rned had proceeded upon the trial as if the jurisdiction existed,
d the case had ended in a verdict and judgment. If the question
as not foreclosed, and, under the authority of the act of 1875,
e court for any reason doubted its jurisdiction, it might institute
inquiry. And in doing this the court was not required, as

counsel erroneously suppose, to impanel a jury. It might do that, or it might itself hear the evidence, and then say whether it appeared "to the satisfaction of the court" that for any reason it did not have jurisdiction. The language of the act of 1875 imports that the court may adopt such methods of satisfying itself as the nature of the case may require.

In Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, there had been, as here, a trial, verdict, and judgment in an action at law. During the course of the trial it was suggested that the amount or value involved was not sufficient to give jurisdiction to the court. But the court directed the trial to proceed to a verdict, and reserved the question raised for its own determination. After the verdict and judgment had been entered for the plaintiff, the court set aside the verdict and judgment, and entertained a motion made by defendant to dismiss the cause for want of jurisdiction, and gave leave to the parties to file affidavits in regard to the value of the land in controversy. Upon consideration of the motion, the court sustained it, and dismissed the suit for want of jurisdiction. The plaintiff excepted to this action of the court, and took a bill of exceptions. In delivering the opinion of the court, Mr. Justice Shiras said:

"The statute [referring to the act of 1875] does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, or how such question, when raised, shall be determined." And again: "The questions might arise in such a shape that the court might consider and determine them without the intervention of a jury. And it would appear to have been the intention of Congress to leave the mode of raising and trying such cases to the discretion of the trial judge."

No doubt was expressed as to the validity of the proceeding, and the court proceeded to review the decision of the trial judge upon the same data as he had done.

In Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171, the defendant pleaded that the damages were fraudulently magnified by the plaintiff in its petition for the purpose of giving the United States court jurisdiction. Before trying the merits, the judge took up the consideration of the plea, refused the plaintiff's demand for a jury, and, having found that less than $2,000 was really involved, dismissed the suit. On a writ of error sued out by the plaintiff, the action of the trial court was in all things affirmed. In both these cases the finding of the court below in respect to the jurisdictional fact was reviewed by the Supreme Court on a bill of exceptions, upon the consideration given in the first of these cases to the question of the proper mode of review. Pursuing that course, we come to the question whether the Circuit Court, in view of the evidence produced at the hearing, taken in connection with the facts appearing on the record, erred in finding that the plaintiff was at the commencement of the suit a citizen of Michigan. The court was acting under the authority of the act of 1875, and it is settled that it must clearly appear that the court is being imposed upon, in order to justify a dismissal of the cause; and we may add that this rule is applied with increased rigor when the presentation of the objec-

tion is long delayed, as when the case has been tried and a verdict and judgment on the merits has been reached before the attention of the court has been drawn to it; presupposing, of course, that the lack of jurisdiction is not apparent on the record. Deputron v. Young, 134 U. S. 241, 10 Sup. Ct. 539, 33 L. Ed. 923. On the hearing it was shown that on June 26, 1901, the mother of the plaintiff, upon the ground of extreme cruelty and willful neglect to provide her and their child with the necessaries of life, obtained a decree of divorce from her husband in the court of common pleas of Lucas county, Ohio, by which decree the care, custody, and control of the plaintiff was awarded to her; permission being given the father, "when here, to see the child at reasonable times." And at said hearing in the court below she testified that the plaintiff was born in Toledo, and that after the divorce and in February, 1902, she went to Monroe, in the state of Michigan, to accept a position which had been offered her there; that she took the plaintiff with her, and that she and the plaintiff had lived in that state ever since; that during that time she took care of the plaintiff, keeping him with her. Letters of guardianship of the plaintiff were granted to Little August 22, 1902, by the probate court of Monroe county, Mich. They were offered in evidence and received over an objection that the jurisdiction of the probate court to issue them was not shown. But whether the letters were granted with or without jurisdiction, the facts that they had been granted to a resident and citizen of Michigan, and that he had accepted and acted upon them, had some bearing upon the permanency of the plaintiff's residence in that state. No evidence on this issue was tendered by the defendant. It is true, she did not testify what her intention was in removing to Michigan, and while she resided there, in relation to the permanency of her residence; but it may be inferred from her continuing to "live" there, as she said, from February, 1902, to the time when she testified, which was in June, 1904. We think it cannot be held that the court erred in its finding in favor of the plaintiff. Certainly it cannot be said that it clearly appeared that the plaintiff was not a citizen of Michigan. Counsel for plaintiff in error contends, first, that the domicile of the father determines the domicile of the child, and that the father is not shown to have been at any time a citizen of Michigan; and, second, that the plaintiff became a ward of the court by virtue of the divorce proceedings in the Lucas county court of common pleas, and that the mother had no lawful right to transfer him from the domicile of his birth to another state, and thereby confer a foreign domicile.

It is doubtless true that the general rule is that the domicile of the child follows that of the father. But this rule does not hold when the parents are judicially separated, and the custody of the child is awarded to the mother. Barber v. Barber, 21 How. 582, 16 L. Ed. 226; Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604; Wiggins v. Bethune (C. C.) 29 Fed. 51.

It would be inconsistent with such a decree that the domicile of the child should continue to be that of the father, for the custody

and control of the child, upon which the father's domicile is imputed to the child, no longer exists, but is transferred to the mother. Nor can we think that the power of control of the Lucas county court of common pleas over the plaintiff acquired by the divorce proceedings prevented the plaintiff from acquiring a domicile in another state. It would be an unreasonable and anomalous thing to hold that the mother would be tied down to a fixed domicile in Ohio, if her necessities or interests required her to remove to another state; and it would be equally so to hold that the domicile of the child had become so fastened by the divorce proceedings that he could not acquire a domicile elsewhere, notwithstanding he had acquired a fixed home there and all his relations to the place of his original domicile have been broken off.

We do not consider it necessary to decide whether the objection to the guardian's authority under his letters from the probate court of Monroe county, because of the lack of proof of the necessary steps to confer jurisdiction upon that court, was valid or not. Probably it would have been a good objection to the letters if made at a proper time. The Supreme Court of Ohio, in the case of Brady v. National Supply Co., above referred to, held that under the Code the allegation in the petition that the plaintiff is an adminstrator, executor, or other trustee was not a material averment, within the meaning of that term in the provision of the Code prescribing what issues may be raised by a general denial in an answer. There are even stronger reasons for applying that rule when the question arises upon the status of guardian whose relation is that of a protector or next friend. We have already referred to the distinction between such averments and those of jurisdictional facts in pleadings in the courts of the United States. The defendant failed to plead specially any objection to the guardian's representation, and the propriety of it was thereby admitted. It was not a jurisdictional fact. At all events, such an objection as this could not be first raised after the verdict and judgment.

Several assignments of error in rulings upon the trial of the merits remain to be considered. The most important of these rulings was the admission of the testimony of a witness (Pease) given on a former trial of the cause. This witness at the time of this trial, as well as at the time of the former trial, resided at Elkhart, Ind.—a place without the jurisdiction of the court, and more than 100 miles distant from the place of trial. His absence was sufficiently proven. A stenographer employed by both parties, who took down his testimony on the former trial, was called, and testified that he had his shorthand notes of the testimony of the witness, and had written out a transcript thereof, which he produced. It was thereupon offered in evidence by the plaintiff. The defendant's counsel consented that the transcript might be used instead of the shorthand notes, but objected to the evidence; stating the grounds of the objection as follows:

"(1) That there is no statute authorizing the reading of this testimony.
"(2) That the state statute is not applicable to the practice in this court.
"(3) That the absence of the witness from the jurisdiction of the court has not been shown."

The objection was overruled, the evidence was admitted, and the defendant excepted. It is now insisted that this ruling was in contravention of section 861 of the Revised Statutes [U. S. Comp. St. 1901, p. 661], which declares that "the mode of proof, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

It seems to us very doubtful whether the objection was sufficiently definite to raise the question which counsel now propose. The evidence was not offered under the authority of any statute of the United States. And it is improbable that counsel had in mind the particular ground of objection they now urge, or that the court understood the objection to refer to the provision of the statute above quoted. But waiving this doubt, we will consider the objection now urged as having been duly taken. In order to a just construction of this statute, it is necessary to recur to the history of the common law relative to the subject, and the circumstances under which the statute was enacted. Although the courts of chancery and of admiralty had always exercised the power to issue commissions to take depositions abroad, as well as within their jurisdictions, yet in the common-law courts of England the mode of proof was and had always been the same as that prescribed by this statute. And they had not, or at least did not claim to have, the power to authorize the taking of depositions to be read upon the trial of causes before them. And they did not exercise such authority until the passage of the act of 13 Geo. III, c. 63, which empowered those courts to issue commissions for the examination of witnesses in cases where the cause of action arose in India. Afterwards, but not, as we understand, until after the date of the judiciary act of 1789, this authority was enlarged by other acts of Parliament and made general. When Congress was engaged in the establishment of the inferior courts authorized by the Constitution, and defining their jurisdiction, their powers, and their modes of procedure, it was mapping out a scheme for the judicial department of a government which succeeded the institutions of the older régime. Separating the jurisdictions into those of courts of law, of equity, and of admiralty by the familiar lines of demarcation, it was natural that the same motives and purposes as those which so universally, in this country, inspired the adoption of the substantive law of England, should induce, as far as practicable, provisions for retaining in the several courts similar modes of procedure. Congress therefore declared that the mode of proof in actions at law should be the mode familiar to the common-law courts. But being cognizant of the embarrassment which those courts had experienced in obtaining and using the evidence of persons who could not be brought into court and examined orally, and cognizant, also, as the authors of our statute undoubtedly were, of the precedent which had shortly before been set by the act of Parliament first mentioned, Congress added to the general language of the provision the exception which it proposed to make, whereby the court should have power to authorize the taking of depositions in the circumstances hereinafter specified. So that, in substance, what is called an "ex-

ception" was simply an opening for letting in an addition to the powers of the court as they had been customarily exercised. But there is no warrant for thinking that in doing this Congress had any thought of altering the rules of evidence which obtained in such courts, or intended to exclude evidence which, without reference to the use of depositions taken under that statute, would be admissible upon the generally recognized principles of evidence.

We are therefore of opinion that the question whether the testimony of this absent witness, taken and written down on the former trial by the common employé of the parties, was properly admitted, is to be tested by the general rules of evidence, rather than by any requirement in the statutory provisions above referred to concerning the mode of procedure. The case Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117, and the language of the learned justice who delivered the opinion of the court, are principally relied on by counsel for the plaintiff in error. But we think that nothing was there decided which is in conflict with the views we have expressed. The method of obtaining proof provided for by the statute of the state of New York was not a method known to the common law, nor could such evidence be used consistently with its rules of evidence, for the witness was within the jurisdiction, and there was no claim that he was going beyond it, nor was any other reason shown why he could not be brought in for oral examination at the trial. The rule prescribed by Rev. St. § 861 [U. S. Comp. St. 1901, p. 661], was a positive enactment of the rule of the common law. The New York statute was in conflict with that rule, and could not, therefore, prevail in the courts of the United States. Nor could the deposition be taken under the exceptions contained in the sections following section 861, for neither of those sections provided for the taking of depositions in such circumstances. If, therefore, the testimony which is the subject of contention in the case before us was admissible by the common-law rules of evidence, the provisions for taking depositions are not material. And we think that not only in the English courts, but in the federal as well as in the state courts, the admissibility of such proof has been quite constantly regarded as controlled by the general rules of evidence, and the proof held to be admissible when the witness who delivered the testimony on the former trial is dead or has become insane or resides beyond the reach of the process of the court, or, as held in some instances, when the witness has lost his memory of the events he had formerly testified about. Other circumstances have sometimes been recognized as sufficient to justify the admission of the former testimony. The meaning of the condition that the witness resides beyond the reach of process is illustrated by certain decisions of the Supreme Court of Michigan, where the court held, in Howard v. Patrick, 38 Mich. 795, and Labar v. Crane, 56 Mich. 585, 23 N. W. 323, that the testimony of a witness who resides abroad, taken on a former trial, is admissible on a subsequent trial, but in Kellogg v. Secord, 42 Mich. 318, 3 N. W. 868, held that the rule did not apply when a resident of the jurisdiction was only temporarily absent, and had not been subpœnaed, and no effort had been made to

secure his attendance. There was a like ruling upon similar facts in Stein v. Bowman, 13 Pet. 209, 10 L. Ed. 129. The parties must be the same, or at least in privity, with those who were in controversy in the former suit, and have had an opportunity to cross-examine the witness; and, when it is not the same suit, the issues must be substantially the same. In some instances the courts have declined to apply the rule in criminal cases, but in civil cases the decisions are quite uniform to the effect that such testimony is competent, except in Massachusetts and New York, where the rule is otherwise, as hereinafter explained. 1 Greenleaf on Evidence, § 173; 1 Wharton on Evidence, §§ 177, 178.

The last-named author collects a considerable number of cases, nearly if not quite all of them being cases decided in jurisdictions where either by the inherent power of the court or by statutory provisions the taking of depositions was authorized. Many other authorities than those cited by Wharton, but to the same effect, are cited in 2 Wigmore on Evidence, § 1404, note 5, in support of the doctrine of the text, which is the same as that of the other authors above cited. Among the more recent cases are McGovern v. Hays, 75 Vt. 104, 53 Atl. 326; Louisville Water Co. v. Upton, 36 S. W. 520, 18 Ky. Law Rep. 326; Radford v. Georgia & Ala. Ry., 113 Ga. 627, 39 S. E. 108; Atchison, T. & S. F. R. Co. v. Osborn, 64 Kan. 187, 67 Pac. 547, 91 Am. St. Rep. 189. We cannot make room for canvassing the cases in detail, but will refer to some of those in the courts of the United States, which, of course, are all later than the judiciary act, in which section 861 and the provisions for taking depositions are found.

In Sims v. Hundley, 6 How. 1, 12 L. Ed. 319, the certificate of a notary was held, under a statute of Mississippi, competent evidence of facts which by the general rule should have been proven by him as a witness.

In Philadelphia, Wilmington & B. R. Co. v. Howard, 13 How. 307, 334, 335, 14 L. Ed. 157, the plaintiff on the trial offered to prove certain testimony of a deceased witness given on a former trial of an action in a state court which involved the same subject, and the parties were privies with those in the later suit. The evidence was objected to, but the objection was overruled. Mr. Justice Curtis, delivering the opinion of the Supreme Court, said:

"We consider the evidence was admissible upon two grounds [stating one], and also because, the witness being dead, his deposition, regularly taken in a suit in which both the plaintiff and defendant were parties, touching the same subject-matter in issue in this case, was competent evidence on its trial."

In Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299, which was an action at law, the plaintiff offered to prove the contents of a deposition of a witness living beyond the reach of process, but which had been lost. This was objected to, but admitted. The Supreme Court held there was no error, saying by Mr. Justice Swayne, who delivered its opinion:

"In Harper v. Cook, 1 Car. & Payne, 139, it was held that the contents of a lost affidavit might be shown by secondary evidence. The necessity of re-

taking it was not suggested. In the present case the witness lived in another state, and more than one hundred miles from the place of trial. The process of the court could not reach him. For all jurisdictional purposes, he was as if he were dead."

In Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101, the witness was dead. The evidence offered to prove his former testimony was the oral evidence of witnesses who heard the deceased witness testify, and had taken notes of it. Upon an objection and exception, the Supreme Court affirmed the ruling of the court below admitting the evidence.

In Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641, the plaintiff proved that the depositions of certain witnesses in the case had been lost by fire, and thereupon offered copies in evidence. The objection made to the introduction of the copies was that the death of the witnesses was not shown, nor was it proven that they were incompetent to testify, or that their deposition could not be retaken. The objection was overruled. Upon an exception to this ruling the Supreme Court said at page 46 of 108 U. S., page 322 of 2 Sup. Ct. (27 L. Ed. 641):

"But if the witnesses had lived in another state, and more than a hundred miles distant from the place of trial, proof of the contents of their depositions would have been admissible. Burton v. Driggs, 20 Wall. 125, 22 L. Ed. 299. Therefore, to have made the objection tenable, it should have also been put upon the ground that the witnesses were not shown to reside in another state, and more than a hundred miles from the place of trial. This it did not do. When a party excepts to the admission of testimony, he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. Burton v. Driggs, ubi supra. The original depositions were taken in the city of Washington. It is therefore probable that the witnesses resided there. If the copy of the depositions had been objected to because it was not shown that the witnesses resided out of the district, and more than a hundred miles from the place where the court was held, the plaintiffs below might have supplied proof of that fact. The objection, as it was made, was not broad enough and specific enough, and was therefore properly overruled, and the evidence admitted."

In Mattox v. United States, 156 U. S. 239, 15 Sup. Ct. 337, 39 L. Ed. 409, the same question arose in a criminal case. The witness who had given the testimony on the former trial had since deceased, and the question was whether the stenographer's notes of his testimony taken on the former trial could properly be admitted in evidence on the new trial. The objection was that this infringed the constitutional provision that the accused shall "be confronted with the witnesses against him." But the Supreme Court held otherwise, and fortified its conclusion by reference to the long-continued practice in England and in this country, which showed that the admission of such evidence was not regarded as in violation of the constitutional provision. And Mr. Justice Brown, in delivering the opinion of the court, said at page 244 of 156 U. S., page 340 of 15 Sup. Ct. (39 L. Ed. 409), what seems to us a consideration of vital importance:

"The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination."

The question was presented to the Circuit Court of Appeals for the Eighth Circuit in the case of Chicago, St. P., M. & O. Ry. Co. v. Myers, 60 Fed. 261, 49 U. S. App. 279, 25 C. C. A. 486, in a civil case, where the witness who gave the evidence on the former trial was beyond the reach of process. The court held that in general such evidence is admissible, though, because the stenographer's notes were imperfect in that case, they were held properly rejected. Judge Thayer, in delivering the opinion of the court, said:

"The rule appears to be established in Minnesota, where this case was tried, that such testimony is admissible. Minn. Mill Co. v. Ry. Co., 51 Minn. 204, 53 N. W. 639; King v. McCarthy, 54 Minn. 190, 55 N. W. 900. And the same rule, it seems, prevails in some other jurisdictions. Ry. Co. v. Elkins, 39 Minn. 495, 58 N. W. 164, and cases there cited. We can see no substantial objection to the admission of such testimony, when on the first trial the witness was fully examined and cross-examined, provided always that the stenographic report of his testimony is proven to the satisfaction of the trial court to be correct, by the person by whom it was reported, and provided further that the witness is beyond the reach of process of the court, and his personal attendance cannot be secured. Such testimony, we think, may very properly be accorded the same weight as a deposition duly taken on notice."

And we think the statement that the testimony of all witnesses in common-law cases tried in the federal courts must find its warrant in the very terms of section 861, and the exceptions following it, providing for the taking of depositions, is not correct, and is not required by the proper construction of those statutes, and in many instances would work great hardship and injustice. The presence of the witness cannot be compelled. True, his deposition might have been taken. But that would not be his testimony in open court. There would be no confrontation of the jury with the witness. It is not disputed that a deposition once taken and used on a trial may be used on a subsequent trial of the same case. In the present instance the testimony taken on the former trial was the full equivalent of a deposition taken de bene esse.

The principal exceptions to the jurisdictions in which it is held that the permanent residence of the witness beyond the reach of the process of the court furnishes the same ground for the admission of his former testimony as would his death are the states of Massachusetts and New York. It is of interest to note how the rule that only the death of the witness furnishes ground for the admission of such testimony had its origin in those states. The leading case in Massachusetts was that of Le Baron v. Crombie, 14 Mass. 234. In that case the first trial was before a justice of the peace. Upon appeal a second trial was had in the circuit court. A witness who testified on the first trial had in the meantime become incompetent by reason of a conviction for larceny. The plaintiff offered proof of his former testimony, which was received. The Supreme Court held that this was error. In the opinion delivered by Parker, C. J., it was said:

"We believe that in England the proof of such declarations has been limited to the case where the principal witness is dead, for we find no case where such evidence has been admitted when the testimony of the principal has been lost by any other cause. Indeed, the depositions of witnesses taken in

chancery in a cause pending there—the witnesses being competent at the time —are not admitted at the trial of the same cause in the courts of common law if in the meantime the witnesses have become incompetent by reason of an interest devolved upon them without their agency."

While there is some discrepancy in the English Reports upon the point last mentioned in this quotation, it was certainly an erroneous impression that a rule for restricting the admission of the former testimony to cases where the witness has since died was settled by the law of England, as was the impression that no case was to be found admitting any other ground. It is true, there were a number of cases which held that death was sufficient reason, and where the rule was stated in that form. But that was not holding that no other cause would be sufficient. On the other hand, there had been for a long time a course of decisions that the continued absence from the jurisdiction furnished an equally valid reason for receiving the former testimony of the witness, and frequently these conditions were put in the alternative. Thus in the case of Thatcher and Waller, T. Jones, 53, it was held by the King's Bench, in 28 Car. II, all the judges agreeing, that the deposition of a witness taken before a coroner, when it was shown that the witness had gone beyond seas, might be read upon the trial, and the court said that "the case was all one as if he had been dead." And on the trial in King's Bench of an issue directed out of chancery in Lord Altham v. Earl of Anglesea, in 8 Anne, Gilbert's Eq. Rep. 18, it was held by Holt, C. J., all the judges agreeing, that the depositions of witnesses taken on a case in Ireland between the same parties involving the same matter might be read, the reason given being that "there is no way to fetch the person out of Ireland"; "no subpœna runs thither;" and the court added, "This is like the common case where the deposition of a person that is sick or dead or beyond sea is admitted as evidence." In 1707, as is said in Fry v. Wood, 1 Atk. 445, temp. Lord Hardwicke, "it was agreed in this case, when a person has been examined in chancery, that in a case at law between the same parties his deposition may be used in evidence if it can be proved that the witness is dead, or by reason of sickness, etc., is not able to attend, or that he is out of the kingdom, or otherwise not amenable to the process of the court." In Patterson v. St. Clair, Barn. 268, it was held by the King's Bench that the deposition of a witness who at the time of the trial was in Scotland might be read, notwithstanding the objection that "the witness ought to have given his testimony upon oath in person." And in Ward v. Sykes, Ridgeway, 193, it was said that depositions taken de bene esse will not be allowed to be read "without proof by oath of death or absence beyond sea." It would seem from the language of the report that this was said of a trial at common law, but this is not certain. However, the practice in allowing the use of depositions de bene esse in such circumstances appears to have been the same in the courts of common law and of equity. In Falconer v. Hanson, 1 Camp. 171, tried before Lord Ellenborough in 1808, the deposition of a witness who was a seafaring man, taken while his vessel was lying in the Thames, was offered in evidence. And the report

ates that the chief justice was disposed to receive the deposi-
on upon the presumption that the witness was absent from
e kingdom, if it could be shown that any efforts had been re-
ntly made to find him. But he thought that, in the absence of
ch proof, the evidence of his absence was too vague to admit the
position. But the rule stated in Le Baron v. Crombie has been
lhered to in Massachusetts. The leading case in New York
pears to be that of Wilbur v. Selden, 6 Cow. 164, which was de-
led by Chief Justice Savage on a motion for a new trial. On the
ial of the case the plaintiff had offered proof of what a witness had
vorn to in a former action relating to the same matter between
rties, with whom the then parties were in privity, upon proof that
e witness, who had resided in New York, had left the city, declar-
g that he was going to the back parts of Pennsylvania, and could
t be found on diligent inquiry. The evidence was objected to,
t admitted by the judge. The chief justice held that this was er-
r, and said that in order to admit such evidence the witness must
dead; citing 1 Phil. Ev. 215; Butler, N. P. 243–4, T. R. 290;
e Baron v. Crombie, 14 Mass. 234, above cited; and Lightner v.
ike, 4 Serg. & R. 203. In 1 Phil. Ev. 215, the author is treating
unsworn declarations, in the nature of hearsay, of attesting wit-
sses to wills, who have since died. In another part of his work
ide note "a," Sills v. Brown, 9 Car. & P. 601), he states the rule
regard to depositions thus:

"A book of authority [Buller's Nisi Prius], after stating the general rule
at depositions are not evidence where there can be no cross-examination,
ds, by way of exception, 'yet if the witnesses examined on a coroner's
quest, be dead or beyond sea, their depositions may be read, for the coroner
an officer appointed on behalf of the public to make inquiry about the
tters within his jurisdiction.'"

And Mr. Phillipps further states:

"It seems to be the prevailing opinion that they are admissible, though
e prisoner may have been absent at the time of taking the inquisition."

And in Sills v. Brown, Coleridge, J., held, in an action for dam-
ges, that the deposition, taken before a coroner, of a witness shown
be beyond sea at the time of trial, was admissible. It would
em to be a proper inference that the impartial attitude of a cor-
ner was a guaranty of a full examination of the witness. Buller's
isi Prius is not authority for the rule stated in Wilbur v. Selden.
t the page referred to (243) the author is speaking of a case where
stimony which the defendant had put into his case on a former
ial was offered in an action in which the other party was plaintiff,
d in such case it was said the evidence would be admissible "in
se the witness be dead or cannot be found." In the next para-
aph he restates the rule, but mentions only the death of the wit-
ss. But it is obvious this is only a short way of stating the prin-
ple, for he refers to the instance of depositions as analogous where,
says, the same exceptions in favor of the admissibility of such
idence obtain; and at page 239 other instances are stated in which
e former deposition is competent: First, where the witness is
ad; second, where he is sought for and cannot be found (which

obviously means within the jurisdiction); and, third, when he has been subpœnaed, but has fallen sick by the way.

In the case of King v. Jolliffe, 4 T. R., 285, 290, the question was whether an affidavit which had been taken and used as the basis of a criminal information could be used as the basis of another information concerning the same matter. It was held that it could. In delivering judgment, Lord Kenyon, C. J., said: "So, in courts of law, the evidence which a witness gave on a former trial may be used in a subsequent one if he dies in the interim." There was no actual decision upon any question relevant to the case of Wilbur v. Selden. And Lord Kenyon had himself recently said in Rex v. Eriswell, 3 T. R. 707, 721, that when the witness had become insane the case is the same as if he were dead. It would therefore seem that, when he spoke of the former testimony of a deceased witness, he was using that instance as typical of a rule or principle. The question in Lightner v. Wike was whether proof of what a witness had sworn to in another trial, relating to the same subject, was admissible in the later suit. The Supreme Court of Pennsylvania held that such evidence was competent in cases where the witness had deceased; that this was from necessity, because the witness could not be examined. But the court did not hold that the death of the witness was the only condition on which it would be received, but said that exceptions to the general rule requiring viva voce examination would not be extended further than necessity required. The case did not require the court to make any declaration as to what circumstances would create such a necessity, and no such declaration was made. The necessity which the court speaks of is that which arises from the impossibility of a viva voce examination. The same court, a month later, held in Magill v. Kauffman, 4 Serg. & R. 317, 8 Am. Dec. 713, that, for the purpose of the rule, the permanent absence of the witness in Ohio was the same thing as his death. The later cases in Pennsylvania have established the rule in that state upon the principle which we must think is the sound one—that if, from any cause, the viva voce examination of the witness cannot be had, his former testimony should be received, when the other recognized conditions which we have referred to are established.

The facts in the case of Wilbur v. Selden were like those in Kellogg v. Secord, 42 Mich. 318, 3 N. W. 868, and Stein v. Bowman, 13 Pet. 209, 10 L. Ed. 129, supra; that is to say, the witness had been a resident in the jurisdiction, and had gone away, but it was not shown that he was permanently absent. But the courts of New York have since followed the dictum that the witness must be dead, although the Supreme Court, in Crary v. Sprague, 12 Wend. 41, 45, 27 Am. Dec. 110, said: "It is obvious there can be scarcely a shade of difference between death and absence, either in principle or hardship." Of course, the only object of our reference to these decisions in Massachusetts and New York is to determine their accuracy in exhibiting the common-law rule of evidence.

For the defendant in error it is contended that a statute of Ohio ntaining provisions applicable to the question we are considering entitled to recognition and adoption in the federal courts sitting the state, by virtue of section 721 of the Revised Statutes [U. S. mp. St. 1901, p. 581], which provides that:

"The laws of the several states, except where the Constitution, treaties, statutes of the United States otherwise require or provide, shall be re-ded as rules of decision in trials at common law, in the courts of the ited States, in cases where they apply."

The statute referred to is section 5242a, Rev. St. Ohio (Bates' n. St. p. 2799), and reads as follows:

"Whenever a party or a witness, after testifying orally, die, or is beyond jurisdiction of the court, or can not be found after diligent search, or is ane, or through any physical or mental infirmity is unable to testify, or s been summoned, but appears to have been kept away by the adverse ty, if the evidence given by such party or witness has been or shall be in-porated into a bill of exceptions in the case wherein such evidence was en, as being all the evidence given by such party or witness, and which of exceptions shall have been duly signed by the judge or court before om such evidence was given, the evidence so incorporated into such bill exceptions may be read in evidence by either party on a further trial of case, and in case no bill of exceptions has been taken or signed as afore-d, but the evidence of such party or witness has been taken down by any mpetent official stenographer the evidence so taken by such steno-pher may be read in evidence by either party on the further trial of case, and shall be deemed and taken as prima facie evidence of at such deceased party or witness testified to orally on the former trial, if such evidence has not been taken by such a stenographer, the same may proven by witnesses who were present at the former trial, having knowl-e of such testimony. All testimony thus offered shall be open to all ob-tions which might be taken, if the witness were personally present."

It will be seen that it contemplates substantially such conditions were recognized by the common law as sufficient to justify proof the former testimony of a witness, and provides a mode of proof such conditions. It is insisted by counsel for plaintiff in error at this statute is in contravention of section 861 of the Revised atutes of the United States [U. S. Comp. St. 1901, p. 661], and e sections following. But if, as we have endeavored to show, ese sections of the Revised Statutes of the United States do not clude proof of former testimony in such conditions, there would em to be no conflict between the state and federal statutes, and at the former might be recognized as applicable to the case. nnecticut Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. 119, 28 L. Ed. 708; Bucher v. Chesire Railroad Co., 125 U. S. 5, 8 Sup. Ct. 974, 31 L. Ed. 795; Nashua Savings Bank v. Anglo-merican Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782.

It is assigned as error that the court admitted in evidence a otograph of the plaintiff against the defendant's objection. The l of exceptions shows that, upon its being offered, counsel for fendant objected upon the ground that it was incompetent, d because, "the injured leg having been exhibited to the jury, e photograph is not the best evidence on the subject." As the jection that it was incompetent, of itself, was too indefinite, we ust assume that the other ground was intended to present the

particular reason why it was thought the evidence was incompetent. But the objection to secondary evidence is harmless error where the same thing is shown by primary evidence. It is argued that the defendant was prejudiced by this repetition of the evidence of the plaintiff's injury. But we think no legal prejudice resulted. The plaintiff was present during the trial, and his condition as shown by the photograph was in constant view. It would not have been ground for reversal if the court had permitted the plaintiff's leg to have been shown a second time to the jury, or to have permitted a witness to the accident to repeat his evidence of the distressing incidents, or to have permitted an unnecessary number of witnesses to testify about them, whatever we might think of the uselessness of such a proceeding.

It is also complained that the court erred in overruling the defendant's objection to the photograph being sent out with the jury. The objection was that it was incompetent. The record does not show that the photograph was in fact taken to the jury room, but only that the court overruled the plaintiff's request that it might be. But waiving these suggestions, we cannot say there was error in the ruling. There is much diversity in the practice of the courts in permitting the jury to take out articles which have been received in evidence. Some of the cases are discussed in Cudahy Packing Co. v. Skoumal, 125 Fed. 470, 60 C. C. A. 306, where it was held not to be reversible error that certain tools which had been offered in evidence to prove the defendant's negligence in supplying the plaintiff with them were taken to the jury room and examined by the jury while making up their verdict. In giving the opinion of the court, Judge Thayer said:

"The jury were clearly guilty of misbehavior, if, in violation of directions given by the trial judge, the tools in question were taken to their room. But it does not follow that such misbehavior was fatal to the verdict. In our opinion, it ought not to have that effect unless it is reasonable to conclude that the defendant company was in some way put to a disadvantage or was prejudiced by the action of the jury, and did not have a fair trial of the issues involved in the case. It does not seem reasonable to conclude that either party was prejudiced by the action of the jury in taking the hammer and the flatter to their room for the purpose of making a further examination thereof. They were inanimate objects which had been introduced in evidence and frequently exhibited to the jury in the progress of the trial. The presence of the hammer and flatter in the jury room afforded the jurors an opportunity to make a closer inspection thereof than they had been able to make during the progress of the trial, and also enabled them to determine with greater accuracy whether the flatter had or had not been too highly tempered. As they could only be used for such a purpose, and were in a measure helpful to the jury in reaching a right conclusion, we can perceive no sufficient reason why they should have been excluded from the jury room, inasmuch as the object of all trials before a jury is to attain a right result as respects questions of fact."

Generally it is recognized as a matter largely in the discretion of the trial court; the danger being that the jury might get a wrong understanding of them, as of an indictment or other pleading, a deed, or of complex machinery. But we do not see how any harm could come from this photograph. It is not claimed that the photograph was not an exact representation of the plain-

f and of his condition after the accident. The jury could not be pected to forget the proof on that subject, and the only effect the photograph was to prolong the impression of facts which re not disputed. The defendant cannot complain that because ey were grievous they should not be recalled. The verdict is t so large as to excite apprehension that the jury were unduly ved to extravagance.

The refusal to give certain instructions to the jury as requested the defendant is assigned as error. The two requests upon ich counsel for plaintiff in error lay stress in their brief are: ie, that the failure of the motorman to sound the gong on ap- aching the plaintiff did not contribute to the injury; the other that the speed of the car was not a factor which had any ef- t in causing it. The assignment of error in refusing these re- ests is predicated upon the assumption that the plaintiff was o young to appreciate the danger or the meaning of a signal, l that the speed, whatever it was, was not so great but that car could have been stopped before it reached the child. But think neither of these requests should have been granted. The nding of the gong on an approaching car might have awakened instinct of danger in even so young a child, and induced it to ke some effort to keep out of the way. And in respect of the ed of the car, the testimony would have amply justified the y in finding that the plaintiff was seen or should have been n on or near the track by the motorman in ample time for the er to have checked his speed on approaching the plaintiff, and have proceeded cautiously, so as to avoid injuring him, and t, instead of doing this, he recklessly kept on at a rapid gait, l inflicted the injury which resulted. That being so, the re- est was properly denied. It was not limited to the time when plaintiff should have been first seen, but included the speed the car until it struck the plaintiff.

The judgment will be affirmed, with costs.

MALLON et al. v. WILLIAM C. GREGG & CO. et al.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1905.)

No. 2,115.

PATENTS FOR INVENTIONS—APPLICATION OF OLD DEVICE TO NEW USE NOT INVENTION.

The application of an old machine or combination to a new use is not in itself invention or the subject of a patent.

It is only when the new use is so recondite, or so remote from that to which the old device has been applied or for which it was conceived, that its application to the new use would not occur to the trained mind of the ordinary mechanic skilled in the art seeking to devise means to perform the desired function with the old machine or combination before him, that its conception rises to the dignity of invention.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 31, 32.]

2. SAME—APPLICATION OF ENDLESS CHAIN TO NEW USE OF RAKING SUGAR-CANE NOT INVENTION.

The conception of the application of an endless-chain rake which had been constructed and used to move ice, coal, hay, grain, lumber, and crushed sugar-cane to the new use of raking sugar-cane from a loaded car before it is crushed is not an exercise of inventive genius.

3. SAME—MECHANICAL EQUIVALENT—SIGNIFICATION PROPORTIONED TO CHARACTER OF INVENTION.

The term "mechanical equivalent" has a broad and generous signification in the interpretation of a pioneer patent, a very narrow and restricted meaning in the construction of a patent for a slight improvement, and, in the interpretation of patents for the great mass of inventions which fall between these extremes, its meaning is proportioned to the advance which the invention under consideration evidences.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 24.]

4. SAME—INFRINGEMENT OF COMBINATION.

The absence from a device that is alleged to infringe a patented combination of a single mechanical element of that combination is fatal to the claim of infringement.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 376, 387.]

5. SAME—GRADUAL ADVANCE IN ART—EACH INVENTOR ENTITLED TO HIS OWN IMPROVEMENT.

When the advance in an art is gradual, and many inventors form different combinations or make different improvements which materially aid to accomplish desired results, each is entitled to his own combination or improvement, so long as it differs from those of his competitors and does not include theirs.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 10.]

6. LETTERS PATENT NO. 583,408 VALID, BUT NOT INFRINGED BY MACHINE DESCRIBED IN LETTERS PATENT NO. 670,176.

Letters patent No. 583,408, to James Mallon, for an automatic mechanism for unloading and feeding sugar-cane, are not invalid for want of invention or of novelty in the combination which they portray.

But they are not infringed by the machine described in letters patent No. 670,176, to William C. Gregg, for a cane-unloading machine, because a mechanical element of Mallon's combination is absent from the latter's machine.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Minnesota.

For opinion below, see 126 Fed. 377.

This is a suit for the infringement of letters patent No. 583,408, issued May 25, 1897, to the complainant, James Mallon, assignor of one-half to James W. Bodley, upon an application filed February 20, 1897. The machine of the defendants which is alleged to infringe is described in letters patent No. 670,176, issued to William C. Gregg on March 19, 1901, upon an application filed December 18, 1900. The defenses are lack of novelty in the combination of the complainants, and no infringement of their monopoly by the use of the device of the defendants. The court below sustained the defenses and dismissed the bill.

George W. Rea (James L. Norris and James L. Norris, Jr., on the brief), for appellants.

A. C. Paul, for appellees.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The machines to be considered in this case were devised for ne purpose of unloading sugar-cane from cars. The patents which escribe them are for combinations of old and well-known mechanial elements.

In the process of manufacturing sugar, the cane is brought pon open box cars along to the side of a continuously moving onveyor, which carries and feeds it to the mill where it is crushd. When a car is to be unloaded, the side of it toward the onveyor, which is hinged at the lower edge, is turned down ntil its upper edge rests upon the floor or upon the top of the tationary wall by the side of the conveyor, so that it forms an nclined plane or chute down which the cane may be drawn from ne car onto the conveyor. When the cut cane arrives in the car varies in length from three feet to seven feet, and, while an atempt has been made to place it lengthwise of the car, some of it is rooked, and it forms an irregular, promiscuous, and confused mass. The stalks of the cane are heavy and slippery, so that a man can andle but a small quantity of it at a time, and that with much ifficulty. As the conveyor feeds the cane to the mill to be crushed, is essential that it be so placed upon the conveyor that a uniform nd proper amount of it shall be constantly borne forward to the ollers, and it may not be dumped upon the conveyor by the car oad or in large and irregular lots. Prior to the introduction of ne complainants' machines to accomplish this purpose, this result as attained by the use of manual labor. Men with long-handled ooks were stationed on the side of the conveyor opposite to that pon which the car stood, and they pulled the stalks of cane out of ne car down upon the conveyor with their hooks. The services f from 7 men to 15 men were required to unload the cane with ufficient celerity to properly feed a mill which used 800 tons per ay, and the work of these men is now performed by the machines nder consideration with a single attendant. From this brief statement of the method of handling and feeding sugar-cane to the ills it will be seen that the problem to be solved at the time when Iallon made his invention was to produce a machine which ould draw the cane from the car with constant and yet controllable peed, so that a uniform and suitable amount of it would be conuously carried forward and fed to the mill by the conveyor. he nature of this problem will be fully understood only after a ortrayal of the prior art. But the advances the machines of the espective parties evidenced may be most clearly disclosed by first resenting the solutions of this problem which they offer, and by nen comparing them with the state of the art before they were resented.

Counsel for the appellants write in their brief that "it must be orne in mind that the complainants' patent does not claim in and f itself an endless-chain rake provided with teeth. That element recognized and admitted to be old and well-known prior to the nvention of complainants' patent." Bearing this admission, which

is sustained by the record, in mind, let us consider the means by which the respective parties to this suit reached the result which they desired.

Mallon put rakes on two endless chains, placed these chains on a frame long enough to reach from a driving shaft on the opposite side of the conveyor from the loaded car to the farther side of the car, pivoted this frame on the driving shaft, and, having raised its free end above, lowered it upon the load and raked it onto the conveyor.

Gregg put an endless chain supplied with teeth around a triangular frame, suspended this frame above the load, then gradually lowered it upon it, and, by actuating the chain, raked the cane onto the conveyor.

Mallon sleeved one end of his frame loosely on his driving shaft, so that the other end might be raised or lowered. To the free end he attached a bail and a rope or chain which ran over a drum above the rake-section, by means of which and its connection with proper mechanism the operator could raise or lower that end of the frame at will. He keyed a pair of sprocket-wheels to the shaft to propel the endless chains. On each side of these wheels a box suitable to hold the end of a tubular stretcher-rod was loosely sleeved upon the shaft by means of an eye. The end of a stretcher-rod was placed in each of these boxes, and there secured by clips and nuts. On the outer or free ends of these rods a short fixed shaft which bore two idler sprocket-wheels was secured. Two endless chains were stretched over the sprocket-wheels upon this shaft and over those upon the driving shaft, and were propelled by the latter. The ends of the tubular stretcher-rods in the pivotal boxes were adjustable therein. The under side of each box was open, so that a flanged bushing provided with internal screw threads could be introduced into the stretcher-rod, and so that a screw plug which had a bearing against a shoulder of the box might engage the threads of the internal screw. By loosening the clips and turning the screw plugs which bore against the shoulders of the pivotal boxes the rods could be forced outward and the chains made taut, and when this was done the rods could be secured in their places by again tightening the clips. On the under side of the stretcher-rods cross-bars were fastened upon which three boards, one at each side of the rake-section and one between and equidistant from these side boards, were secured, so that the under faces of the side boards furnished bearings for the endless chains as they slid over them. The center board was provided with a longitudinal groove in which projections or tongues upon the cross-bars which form the heads of the rakes ran to guard the rakes against lateral movement. Cross-bars provided with rake-teeth to engage the sugar-cane, and with tongues upon their backs to follow the groove in the center board, were fastened to and carried by the two endless chains. A single rake-section has now been described. The patent portrays several placed side by side and driven by the same shaft.

The operation of Mallon's machine is simple. When out of use e free end of the rake-section is secured above the track upon hich the loaded cars come to the mill so that they may pass eneath it. When a loaded car has been placed upon the track id its side has been turned down preparatory to unloading, the dless chains which carry the rakes are driven by the sprocket-heels upon the shaft. There is a brake and a lever upon the rum by means of which the operator may lower the free end of e rake-section as rapidly as he chooses until the rakes reach e bottom of the car. He depresses the free end of the section, id, as it descends, the rakes engage the cane and pull it over onto e conveyor until the car is unloaded, when, by the use of the rum and the actuating machinery with which the operator may nnect it, the rakes and the frame which carries them are again ised out of the way of the cars. The claims of the patent of e complainants which are alleged to be infringed read in this ay:

"(1) In automatic mechanism for unloading and feeding sugar-cane from rs, an endless rake, or rake-section, pivotally supported at one end and apted to be lowered into position to engage the cane in a car and to be isted away from the emptied car, the said rake, or rake-section, comprising retcher-rods, shafts at the ends of said rods, sprocket-wheels on said shafts, dless chains connecting said sprocket-wheels, and cross-bars provided with ke-teeth and carried by said chains, in combination with driving mechanism r said endless chains, and means for hoisting and lowering the said rake rake-section, substantially as described."

"(4) The combination of a rotary shaft having sprocket-wheels keyed there-. boxes pivotally supported on said shaft, stretcher-rods having a longi-dinally-adjustable connection with said pivotal boxes, a fixed shaft carried the outer or free ends of the stretcher-rods, sprocket-wheels on said shaft, dless chains connecting the sprocket-wheels of the fixed shaft with the rocket-wheels on the rotary shaft, cross-bars carried by said chains and pro-ded with rake-teeth, and mechanism for hoisting and lowering the stretcher-ds and connected rake devices, substantially as described."

Gregg hung a driving shaft far enough above the tracks of the ilroad and the conveyor to enable him to suspend a triangular ame above the loaded cars. He keyed a sprocket-wheel upon this aft, and suspended a triangular frame at one of its angles by eans of a fork whose arms embraced the sprocket-wheel and were ceived upon the shaft by means of holes in their ends. At each the other angles of the frame he mounted an idler sprocket-wheel, id he stretched an endless-chain rake, which consisted of an end-ss chain to which teeth were directly attached, over the three rocket-wheels around the outside of the frame. To the end of ie of the three bars which composed the frame which was farthest om the driving shaft a cable or chain was attached, which ex-nded over sheaves above, and was attached to a counterweight. o this counterweight another chain or cable passed over pulleys id then over a winding drum, whereby the operator by turning e drum might elevate or depress the angle of the triangle to which e hoisting cable was attached. This device was provided to tight-the chain. One of the idler sprocket-wheels was mounted be-ween the arms of a fork, the shank of which was fastened to an

extension of one of the bars of the triangle by two bolts which passed through holes in this extension and through a longitudinal slot in the shank of the fork and were secured in place by nuts. A boss was cast on the shank, and a perforated internally-threaded boss on the extension of the bar. A screw which bore against the boss on the shank of the fork was inserted in the threaded boss. The frame was expanded and the chain-rake tightened by loosening the nuts of the two bolts and turning up the screw. When the chain had been made taut, it was secured in place by again tightening the nuts upon the bolts. The three bars which formed the sides of the triangle were attached to connecting pieces to which their ends were bolted, so that they could be readily removed, and so that longer or shorter bars could be substituted, to the end that a car might be unloaded at a longer or shorter distance below the driving shaft. The plan of operation contemplated that several of these machines should be suspended from and propelled by the same driving shaft, and, as two of them would unload a car more conveniently and speedily than one, they were generally operated in pairs. When not in use, the counterweight raised or swung the angle of the triangle to which the hoisting cable was attached up into a plane near that of the driving shaft, so that the entire triangle was above the loaded cars. When a car had been properly placed to be unloaded, the rake was driven by the sprocket-wheel on the shaft, the operator turned the drum, raised the counterweight, and in this way lowered the angle of the triangle to which the cable was fastened, as he chose. As this angle descended, the chain-rake engaged and drew the stalks of cane from the car upon the conveyor until they were all removed. The machine was so placed that when the chain-rake completed its work of unloading it was running along the lower side of the triangular frame in a horizontal plane parallel to that of the bottom of the car. When the unloading was completed, the operator unwound the cable upon the drum, and the counterweight again lifted the machine out of the way of the cars.

The description of the rival machines which has been given discloses the fact that the means devised by Mallon and Gregg to apply the endless-chain rake to the unloading of sugar-cane from box cars were not identical, and the concession that the rake itself was old and well known relieves from any review of the state of the art for the purpose of disclosing the prior use of the endless chain. It is only necessary to consider the means which had been devised before Mallon's invention to apply this rake to analogous uses. It is also obvious that in the study of these means it is not very material whether the endless chains carried teeth, shovels, buckets, slats, or other devices to collect or move the materials which were the subjects of its action, because the problems of applying the endless chain carrying such devices to remove grain, coal, ice, lumber, hay, straw, and sugar-cane are either identical or analogous. We turn to the consideration of the prior state of the art.

In 1866, Parlour, in letters patent No. 54,822, described the construction and operation of an endless chain which carried buckets

means of which grain in the hold of a vessel or other depository
ght be drawn into an elevator. This chain belt was pivoted at
elevator, its outer end was raised and lowered by means of up-
nt screw-shafts or permitted to descend by its own weight, so
t the chain and the buckets might rest at the will of the operator
n and engage the grain while they were in operation.

Giffhorn, in 1872, procured letters patent No. 123,391 for an ele-
or of ice, which consisted of an endless double chain mounted
n an inclined frame. The chain bore braced projections which
aged blocks of ice upon the ground at its lower end and pushed
m up an inclined chute to the icehouse.

Morey, in 1874, portrayed in letters patent No. 152,760 a machine
taking hay, straw, grain, and similar substances from a stack or
gon and conveying them to a threshing or cutting machine.
s mechanism was mounted upon a wagon bed or sled, and con-
ed, among other things, of an endless belt stretched around a
r-sided frame. This frame was pivoted and provided with roll-
at its corners, so that it was both extensible and adjustable.
ound the rollers and beyond the outside of the frame a belt which
ried hooked teeth was stretched, and it was driven by a shaft or
m and a belt. In operation these rake-teeth on the belt engaged
hay, straw, or grain, and took them away to the conveyor.

Letters patent No. 305,784, issued September 30, 1884, to Peter
t, show an adjustable elevator leg pivoted at one end, free to
and fall at the other, to which a rope or cable is attached, which
ses over one pulley and is secured to another, so that the op-
tor may raise and lower the free end of the leg at will by the
of this rope and pulley. Wheels are mounted at each end of
leg, and over these wheels an endless belt, which carries shovels,
laced. The lower end of the leg is not only pivoted, but it is
ustable, so that it may be moved about from place to place.
e work of the device is to break down bodies of coal with its
vels, so that the pieces of coal may be taken up by the buckets
n upright elevator at the lower end of the leg and carried out of
vessel or other depository. The endless belt and its shovels
operated by a chain which engages the wheels at the lower end
he leg and which is actuated by the driving shaft of the upright
ator.

n letters patent No. 295,185, issued to Lockhart on March 18,
4, there is a description of an endless toothed chain belt operat-
on a pivoted frame to regulate the feeding of grain to a thresh-
machine. The belt passes around two pulleys or drums. One
hese drums propels the toothed belt, and is itself driven by a
ley and belt upon its shaft. The other is supported by a like
ne from the axle of the former, so that the frame has a move-
nt about that axle as a center. A bail with a rope upon it is at-
ned to the free end of this frame, so that the operator may raise
lower it as he desires. This rope enables him to cause the
thed belt to rest upon the grain and to rake it forward to the
eshing machine.

There is a description of a conveyor of crushed cane designed for use in canemills in letters patent No. 481,837, issued August 30, 1892, to Wilson, that is instructive. It pictures an endless sprocket chain which carries knives and is stretched over two sprocket-wheels, one of which is mounted on a driving shaft, while the other is secured upon a shaft between the ends of the longitudinally-adjustable arms which are loosely bolted to and extend from the standards which support the driving shaft. The chain is mounted in an inclined plane, and a long box is shown beneath it in a similar plane to receive the crushed cane from the mill and to discharge it through a chute at its upper end. As the crushed cane is fed into the lower end of the box, the knives of the endless chain, which is propelled by the driving shaft, engage the cane, and rake or draw it up the box until they discharge it into the chute at its upper end. During operation the endless chain and its knives rest upon the crushed cane, and, as the arms between which its lower sprocket-wheel is mounted are loosely secured or pivoted to the standard, its lower end is free to rise and fall in conformity to the quantity of material which is fed beneath it. Each of the arms, or, to use the designation of Mallon, of the stretcher-rods, which assists to carry the idler sprocket-wheel, is divided, and its ends are again connected by screws which reciprocally engage, so that each arm may be lengthened or shortened to tighten or loosen the chain at will by turning these screws.

Letters patent No. 412,621, issued October 8, 1889, to Lyman D. Howard, portray means for applying an endless-chain rake to the movement of coal which are strikingly similar to those employed by Mallon to rake the sugar-cane. Howard's machine was a gatherer to facilitate the unloading of coal, grain, and like materials from the holds of vessels, and its work was to rake or draw the materials to or into the lifting buckets upon a vertical elevator which scooped them up and carried them away. He used a frame loosely journaled at one end upon his driving shaft, so that the other end could be raised and lowered without interfering with the operation of the gatherer. To the free end of the frame he attached a rope or chain by which that end of the machine could be elevated or depressed at will. He keyed a sprocket-wheel to propel his endless chain upon his driving shaft, which was located near the foot of the elevator and was actuated by the power which drove the elevator. He journaled one end of a long arm loosely upon his driving shaft on each side of his sprocket-wheel. He loosely mounted upon a shaft between the outer ends of these arms an idler sprocket-wheel. Over the two sprocket-wheels he placed an endless sprocket chain which carried flights or gatherers. When this machine was not in operation its outer end was raised by means of the rope attached to it until the frame and belts stood in a nearly vertical position by the side of the upright elevator. When the operator desired to use the gatherer, he lowered its free end by means of the rope until the chain and its gatherers came in contact with the coal or grain to be moved, propelled the chain by means of the sprocket-wheel upon

driving shaft, and the material was raked or drawn toward the
t of the elevator.

An endless chain provided with plates and adapted to move grain
shown upon a frame pivoted at one end in letters patent No. 258,-
, issued to Martin Maher, May 23, 1882, and the adaptation of
endless chain which carries slats to the use of removing lumber
m a crib or pile to a conveyor is disclosed in a patent numbered
,511, issued to Stillwell on April 18, 1882. There are other let-
s patent in the record, but those to which we have now referred
ficiently illustrate the state of the art when Mallon made his in-
ntion for the purposes of this case. They demonstrate the fact
t the endless-sprocket chain provided with rake-teeth, buckets,
ts, and projections of various kinds, the frame to carry it pivoted
one end upon a driving shaft and furnished with a bail, a rope or
hain attached to its free end by means of which it could be raised
lowered at will, the sprocket-wheel keyed to the driving shaft
drive the endless chain, longitudinally-adjustable arms pivoted
on the driving shaft at one end on each side of the sprocket-wheel,
l holding an idler wheel mounted upon a shaft between their
er ends, and various combinations of these mechanical elements
adapt the endless rake to the removal of hay, grain, straw, ice,
l, lumber, and crushed cane, were old and well known before
llon conceived his invention. What, then, was the novelty of
conception which proves that it was the product, not of me-
nical skill, but of inventive genius? Counsel for appellants an-
er that it was the burst of thought that this endless-chain rake
ght be used to unload sugar-cane from cars, and the mechanical
aptation of the old devices in which it had served to this new
e. Was there, however, an exercise of inventive genius in the
nception that an endless-chain rake which had been applied to the
vement of the materials which have been specified could also
used to rake sugar-cane from a loaded car? The thought that
machine or combination which is discovered in a remote art,
ere it is used to perform another function, a machine or com-
ation which was not designed by its maker, was never actually
d, and was not apparently suitable, to accomplish the desidera-
n, may be adapted to perform the requisite function, may be, and
quently is, with proper mechanical adaptation, the result of the
rcise of the inventive faculty. But a thought which would
urally occur to any mechanic familiar with the object to be at-
ned, and with an existing machine or combination discovered in
same art or in one nearly analogous to it, designed, suitable, and
d to perform a similar function, that this machine or combina-
n can be used or adapted to perform the function desired, is not
product of inventive genius, but the mere result of the applica-
n of the skill of the mechanic to the subject under consideration.
The application of an old device to a new use is not in itself an
vention or capable of protection by a patent. A prior patentee
o has plainly described and claimed his machine or combination
s the right to every use to which his device can be applied, and to

every way in which it can be utilized to perform its function, whether he was aware of all these uses or methods of use when he claimed and secured his monopoly, or not. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 709, 45 C. C. A. 544, 560; Roberts v. Ryer, 91 U. S. 150, 157, 23 L. Ed. 267; Miller v. Manufacturing Co., 151 U. S. 186, 201, 14 Sup. Ct. 310, 38 L. Ed. 121; Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co., 72 Fed. 67, 19 C. C. A. 13; Frederick R. Stearns & Co. v. Russell, 85 Fed. 218, 226, 29 C. C. A. 121, 129; Manufacturing Co. v. Neal (C. C.) 90 Fed. 725; Tire Co. v. Lozier, 90 Fed. 732, 744, 33 C. C. A. 255, 268.

It is only when the new use is so recondite and remote from that to which the old device has been applied, or for which it was conceived, that its application to the new use would not occur to the mind of the ordinary mechanic, skilled in the art, seeking to devise means to perform the desired function, with the old machine or combination present before him, that its conception rises to the dignity of invention. "If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may, at least, involve an exercise of the inventive faculty." Potts v. Creager, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; Hobbs v. Beach, 180 U. S. 383, 390, 21 Sup. Ct. 409, 45 L. Ed. 586; Adams Electric Ry. Co. v. Lindell Ry. Co., 77 Fed. 432, 447, 23 C. C. A. 223, 237; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 702, 45 C. C. A. 544, 553.

The application by Mallon of the endless-chain rake and pivoted frame of Howard to the unloading of sugar-cane instead of coal may be conceded to have been a new use and to have produced a new result. He was the first to successfully unload sugar-cane with the endless-chain rake. But Howard's device and the other machines described in the various patents to which we have adverted were not found in a remote or unrelated, but in a near and analogous, if not in the same, art. The problems of applying these machines to unload or move hay, straw, coal, grain, and crushed sugar-cane on the one hand and uncrushed sugar-cane upon the other were practically the same. In moving all these materials the various machines act upon the same principle and perform similar functions. The application of them to the unloading of sugar-cane involved the discovery of no new principle either of construction or of operation. A mechanic skilled in the art seeking to construct a machine to unload sugar-cane from a car with the endless chains, gatherers, and pivoted frames of Howard and Best suitable to unload coal, with the endless toothed chain and pivoted frame of Lockhart designed to feed grain to a threshing machine, with the endless chain, the knives upon it, and the longitudinally-adjustable arms of Wilson constructed to rake the crushed cane, with the toothed endless chain and pivoted rectangular frame of Morey designed to take hay from a wagon or stack and to convey it to a threshing machine

cutter, and with the shafts, sprocket-wheels, and gearing for op-
ting these machines which their descriptions disclose, before
n, could hardly fail to think that a device already adapted to
ve these articles might well be used to rake cane from a loaded
. Such a thought does not rise to the dignity of a creative con-
tion. It is but the natural suggestion of the mind of the or-
ary mechanic, and it may not take the machine which embodies
out of the category of the products of mechanical skill. The
w use was so near, so analogous, to the old uses to which the
vices shown in the prior art had been put, that its conception
s not invention.

The result is that, if there is any novelty which may sustain the
eged invention and patent of Mallon, it is not in the conception
the application of the endless-chain rake and its pivoted frame to
new use of unloading cane from cars, but in the specific com-
ation of mechanical elements by means of which he adapted the
devices to serve the new use. And in this realm his field of
ention was not broad. If he applied any of the prior devices
any of their mechanical equivalents without combining them
h other elements to the new use, he conceived no invention, and
patent cannot be sustained, because the prior patentees held a
nopoly of these devices and of all their mechanical equivalents.
the patent to Mallon protects an invention, therefore, it is only
ause the combination he describes falls without the limits of
mechanical equivalents of the prior devices. Those machines
re so many, so efficient, and so clearly portrayed, that the
nopoly which secures Mallon's invention is necessarily limited
them to the specific construction described in his patent and its
chanical equivalents, in a very narrow sense of that term, be-
se, if its signification is broadened and applied to the patent of
llon, that patent is anticipated and rendered void by the neces-
y application of the same signification of the term to the prior
chines and combinations. The term "mechanical equivalent"
s a broad and generous signification in the interpretation of a
neer patent, a very narrow and restricted one in the construc-
n of a patent for a slight improvement, and, in the interpreta-
n of patents for the great mass of inventions between these ex-
mes, its meaning is always proportioned to the character of the
vance or invention under consideration. National Hollow Brake-
am Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 711,
C. C. A. 544, 561.

The patent in the case at bar protects the discovery of no new
nciple. It does not secure the invention of the first machine or
mbination which performed the function of raking or unloading
terials by means of an endless-chain rake. It protects nothing
re than a novel combination of old mechanical elements by
ans of which the endless rake may be used to perform its cus-
nary function. In what, then, does the novelty of the invention
imed by Mallon consist? A comparison of his first claim with
prior patents and machines discloses the fact that the combina-
n of "cross-bars provided with rake-teeth and carried" by the

two endless chains with the other elements mentioned in that claim is not disclosed in the prior art. And a similar comparison of the fourth claim with the prior machines shows that the combination of "boxes pivotally supported on said shaft, stretcher-rods having a longitudinally-adjustable connection with said pivotal boxes," and "cross-bars carried by said chains and provided with rake-teeth," with the other elements of that claim, was apparently novel. But the machines of the defendants have neither cross-bars provided with rake-teeth upon its endless chain, nor stretcher-rods longitudinally adjustable in pivotal boxes. Since at least one element of each of the combinations secured by the claims upon which this suit is founded is wanting in the machines of the defendants, they cannot be held to infringe these claims, and the decree of dismissal is not subject to reversal. The absence from a device that is alleged to infringe a patented combination of a single mechanical element of that combination is fatal to the claim of infringement. Adams Electric Ry. Co. v. Lindell Ry. Co., 77 Fed. 452, 451, 23 C. C. A. 223, 242; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 718, 45 C. C. A. 544, 569.

The contention that the toothed-sprocket chain of Gregg is the mechanical equivalent of the toothed cross-bars of Mallon attached to his chains, and that Gregg's fork adjustable to the extension of one of the bars of his triangular frame is the equivalent of the stretcher-rods of Mallon longitudinally adjustable in his pivotal boxes, has not been overlooked. And if Mallon had been a pioneer in the art under consideration, if he had first invented a machine or combination by which the functions of raking materials of the nature of those which have been described had been performed by an endless chain, the suggestion might well prevail. But, as we have seen, he was not an inventor of this character. And if the toothed chain of Gregg is the equivalent of the toothed cross-bar of Mallon fastened upon two endless chains, by the same mark the toothed endless belt of Morey, the gatherer bearing belts of Best and Howard, the knife-carrying chain of Wilson, and the slat-bearing chain of Stillwell, are mechanical equivalents of the endless chains and toothed cross-bars of Mallon. If the fork of Gregg longitudinally adjustable on the extension of one of the bars of his triangle is the mechanical equivalent of the stretcher-rods of Mallon adjustable in his pivotal boxes, by the same interpretation the longitudinally adjustable arms of Wilson are the equivalents of Mallon's stretcher-rods and boxes, and Mallon's alleged invention is anticipated and his patent is avoided by the devices disclosed and patented before he devised his combination. The state of the art when he conceived his invention made the way he was compelled to travel to sustain it narrow, if it did not make it straight, and it is only by keeping sedulously within its limits that he may preserve it. The moment he crosses its boundaries he trespasses on prior rights which superseded his own. The case is one in which the art was not developed in a single leap by one great genius, but in which many men have contributed both the genius of inventors and the skill of mechanics

ts progress, and the advance in it has been gradually made, by step. It falls within the rule that where the advance ards the desideratum is gradual, and several inventors form rent combinations and make different improvements which erially aid to accomplish desired results, each is entitled to own combination or improvement, so long as it differs from se of his competitors and does not include theirs. National low Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 693, 712, 45 C. C. A. 544, 563; Railway Co. v. Sayles, 97 S. 554, 556, 24 L. Ed. 1053; McCormick v. Talcott, 20 How. 402, 15 L. Ed. 930; Stirrat v. Manufacturing Co., 61 Fed. 980, 981, C. C. A. 216, 217; Griswold v. Harker, 62 Fed. 389, 391, 10 C. A. 435, 438; Adams Electric Ry. Co. v. Lindell Ry. Co., 77 Fed. 440, 23 C. C. A. 223, 231.

he advance in the art which the machine of Mallon evidenced, le it disclosed no new principle, presented a novel combination reby old devices might be adapted to a new, but a near and logous use. It was a perceptible and commendable advance, to him the character of inventor ought not to be denied. the combination of the defendants differs from and does not ude his, and their machines fail to infringe his patent.

he decree below is accordingly affirmed.

HAYES-YOUNG TIE PLATE CO. v. ST. LOUIS TRANSIT CO.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1905.)

No. 2,108.

ATENT—ABANDONMENT OF APPLICATION AND OF INVENTION—PATENT ON SECOND APPLICATION.

An abandonment of an application for a patent is not necessarily an abandonment of the invention, and a patent may lawfully issue on a second application, although the first has been abandoned. In such a case the absence of prior use or sale of the invention for more than two years prior to the second application is indispensable to the validity of the patent.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 109.]

AME—SUBSEQUENT APPLICATIONS—CONTINUANCE OF ORIGINAL PROCEEDING.

In cases in which the original application has not been abandoned, subsequent applications and amendments constitute a continuance of the first proceeding, and the two years' public use or sale which may avoid the patent must be reckoned from the presentation of the first application, and not from the filing of subsequent applications or amendments.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 100.]

AME—WHEN ESTABLISHED SUBSEQUENT APPLICATION A NEW PROCEEDING —TIME RECKONED FROM ITS FILING.

The abandonment of an application destroys the continuity of the solicitation of the patent. A subsequent application institutes a new proceeding, and the two years' public use or sale which may invalidate the patent must be counted from the filing of the later application.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 100.]

AME—COMMISSIONER'S FINDING PRESUMPTIVELY CORRECT.

The legal presumption is that a decision of a question of fact by an executive officer to whom the law intrusted its determination is correct,

and the finding of the Commissioner of Patents under section 32 of the act of July 8, 1870 (16 Stat. 202, c. 230; U. S. Comp. St. 1901, § 4894, p. 3384), that the delay which caused the abandonment of an application was not unavoidable, is sustained by that presumption.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 163.]

5. SAME—PLEADING OF SPECIFIC FACTS REQUISITE TO OVERCOME THIS PRESUMPTION.

Averments of specific facts or circumstances from which it appears that, if they are true, the fact was probably otherwise than the finding, are essential in a pleading for the purpose of overcoming this presumption. Allegations that the fact differs from the finding, or that the decision is erroneous, without more, are futile.

6. PLEADING—SPECIFIC CONTROL GENERAL AVERMENTS.

A general allegation in a pleading is controlled and limited by specific averments on the same subject.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 68.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

For opinion below, see 130 Fed. 900.

The Hayes-Young Tie Plate Company, a corporation, exhibited its bill in the Circuit Court for the Eastern District of Missouri for relief from the infringement of letters patent No. 688,852, issued on December 17, 1901, to James N. Hayes and his assignees. A demurrer to this bill was sustained, and it was dismissed on the ground that it did not state facts sufficient to constitute a cause of action. The material facts stated in the bill were these: On July 23, 1894, Hayes, the inventor, filed an application for a patent, which was rejected on October 8, 1894. He was informed of this rejection, but, by reason of illness, infirmity, and lack of funds, the application became abandoned for want of prosecution, under the rules of the Patent Office. After his recovery from his illness he presented to the Commissioner of Patents a petition for the revival of his abandoned application, and accompanied it with good and sufficient reasons for the abandonment; but the commissioner held that these reasons were not sufficient to account for the delay in the prosecution of the application, and advised the inventor to file an entirely new application. On April 15, 1901, he filed a new application as a substitute for or continuation of the original application, and the patent issued on December 17, 1901. There was no averment in the bill that the invention was not in public use or on sale for more than two years prior to the second application, and the court below sustained the demurrer upon this ground.

John C. Higdon (Edward E. Longan and James L. Hopkins, on the brief), for appellant.

Sears Lehmann, for appellee.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The fact that an invention was not in public use or on sale in this country for more than two years prior to the application for the patent is an indispensable condition of its validity, and an averment of that fact is essential to the statement of a good cause of action for its infringement. U. S. Comp. St. 1901, § 4886, p. 3382; Walker on Patents (3d Ed.) § 425, p. 350; Krick v. Jansen (C. C.) 52 Fed. 823, 824; Nathan Mfg. Co. v. Craig (C. C.) 47

ed. 522, 524; Blessing v. Copper Works Co. (C. C.) 34 Fed. 753. he chancellor below ruled that the bill in this case contained no legation that the invention was not in public use or on sale in is country for more than two years prior to the filing of the ap- ication of April 15, 1901, although it presented an averment that e invention was not in public use or on sale for more than vo years prior to the filing of the application of July 23, 1894. hereupon he gave to the complainant permission to amend its ll by inserting an allegation therein to the effect that the invention as not in public use or on sale more than two years prior to the cond application. The tie company refused to accept this per- ission, and thus in effect conceded that the court's construction the pleading was right.

The first question, therefore, is whether or not the absence of blic use and sale for two years prior to the filing of the second plication was essential to the validity of the patent. Counsel r the appellant contend that it was not, because the second ap- cation was either a substitute for or a continuation of the original plication, so that the right of the patentees is conditioned by the blic use and sale prior to the filing of the first, and not prior the filing of the second, application. In support of this propo- ion, they cite many authorities, which have been carefully exam- ed, but they are not inconsistent with these rules, which seem to well established. There is a wide difference between the aban- nment of an invention and the abandonment of an application r it. An abandonment of an application is not necessarily an andonment of the invention, and, after the application has been andoned, a valid patent for the invention may nevertheless be cured upon a new application, provided the invention has not ne into public use or been upon sale for more than two years ior to the filing of the latter. In cases in which the first ap- cation has not been abandoned, subsequent applications and endments constitute a continuance of the original proceeding, d the two years' public use or sale which may avoid the patent ust be reckoned from the presentation of the first application, d not from the filing of subsequent applications or amendments. S. v. American Bell Telephone Co., 167 U. S. 224, 17 Sup. Ct. 9, 42 L. Ed. 144; Colgate v. Western Union Tel. Co., Fed. Cas. o. 2,995; Miehle v. Read, 96 O. G. 426; Thomson-Houston Elec- c Co. v. Winchester Avenue R. Co. (C. C.) 71 Fed. 192, 73 O. 2155; Godfrey v. Eames, 1 Wall. 317, 17 L. Ed. 684; Smith v. odyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952; Cain Park, 14 App. D. C. 42, 86 O. G. 797, 798; Ex parte Stewart, O. G. 665; Stirling Co. v. St. Louis Brewing Ass'n (C. C.) 79 d. 80; Dederick v. Fox (C. C.) 56 Fed. 714, 717; Ligowski ay-Pigeon Co. v. American Clay-Bird Co. (C. C.) 34 Fed. 328, 3.

But the abandonment of an application destroys the continuity the solicitation of the patent. After abandonment a subsequent plication institutes a new and independent proceeding, and the o years' public use or sale which may invalidate the patent

issued upon it must be counted from the filing of the later application. Bevin v. East Hamilton Bell Co., Fed. Cas. No. 1,379; Lindsay v. Stein (C. C.) 10 Fed. 907; Lay v. Indianapolis Brush & Broom Mfg. Co., 120 Fed. 831, 835, 57 C. C. A. 313, 317; Mowry v. Barber, Fed. Cas. No. 9,892; Marsh v. Sayles, Fed. Cas. No. 9,119; Ex parte Simpson, Fed. Cas. No. 12,878; Carty v. Kellogg, 73 O. G. 285; Cain v. Park, 86 O. G. 797, 798.

Hence the ultimate question in the case becomes, does the bill disclose the fact that the first application for the patent was abandoned? The act of July 8, 1870, c. 230, § 32, 16 Stat. 202 (U. S. Comp. St. 1901, § 4894, p. 3384), reads in this way:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

The complainant avers in its bill that the application of July 23, 1894, was rejected on October 8, 1894; that he was advised of that fact, "but by reason of a serious illness and continued infirmity which rendered the applicant almost helpless for a number of years, and also from lack of funds, the said application became, under the rules of the Patent Office, abandoned for want of prosecution"; that he presented to the Commissioner of Patents a petition for the revival of his abandoned application, and accompanied it with good and sufficient reasons for the abandonment, but the commissioner held that these reasons were insufficient to account for the delay in the prosecution of his claim, and advised him to file an entirely new application; that on April 15, 1901, he filed such an application "as a substitute for or continuation of the original application"; that he made an oath at this time with the intent and purpose of testifying that the invention had not been in public use for more than two years prior to the filing of the original application, but that he did not make his oath in that exact language, and that on December 17, 1901, the patent issued.

Counsel for the appellant cite Godfrey v. Eames, 1 Wall. 317, 17 L. Ed. 684; U. S. v. American Bell Tel. Co., 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952; Ex parte Stewart, 4 O. G. 665; Colgate v. Western Union Tel. Co., Fed. Cas. No. 2,995, and other authorities in which applications were under consideration which had been presented to the commissioner before the passage of the act of 1870, in support of the position that mere delay or inaction on the part of the applicant for long periods of time does not establish the abandonment of the application. But the proceedings under consideration in those cases were not governed by the express legislative declaration that, upon the failure of the applicant to prosecute his proceeding for more than two years after any action taken therein, his application shall be regarded as abandoned unless the commissioner is satisfied that the delay was unavoidable, which

as first enacted in 1870, and for this reason these decisions do not
le the issue of abandonment in the case at bar, which arose un-
r the act of 1870.

Counsel invoke the rule that the decision of an officer of the ex-
utive department of the government of a question which the acts
Congress impose upon him the duty to decide is presumptively
rrect, and then argue that by the issue of the patent the com-
issioner rendered a judgment which the courts ought not to dis-
rb, to the effect that the delay in the prosecution of the first
plication was unavoidable and was excused. The legal, but re-
ttable, presumption undoubtedly is, that the commissioner right-
decided the questions which it was necessary for him to deter-
ne in order to issue the patent. But it was not indispensable to
issue that he should decide that Hayes' delay in the prosecution
his first application was unavoidable. If it was avoidable, and
he had abandoned his first application, he was nevertheless
titled to a patent upon a new application, if he had not abandoned
s invention, and if it had not been in public use for more than two
ars before the filing of his second application. The commissioner
ay have held these to be the facts which warranted the issue of
e patent, and the averments of the bill sustain the proposition
at this must have been his ruling. They declare that he had
ard the evidence, and had deliberately adjudged that the delay of
e applicant was not unavoidable; that he had denied his petition
revive his first application; that he had advised him to file an
tirely new application; that the inventor had done so; that he
d made a new oath, in which he did not exactly state that his
vention had not been in public use for more than two years before
e filing of the first application, although he had the intent and
rpose to make such a statement; and that the patent was then
ued. The only conceivable purpose of his failure to make a
ain statement in his oath that the invention was not in public
e prior to the first application is that the ambiguity of the oath
ght lead the commissioner to believe it contained the statement
at the invention was not in public use or upon sale for that
ngth of time before the filing of the last application. This was
doubtedly the commissioner's interpretation of the oath, and
s decision must have been that the first application was aban-
ned, but that the invention was not renounced, and that the ap-
cant was entitled to his patent upon his new application. Any
ner conclusion is inconsistent with the deliberate adjudication
the commissioner, when that single issue was tried by him,
at the applicant's delay was avoidable, and that his application
uld not be revived, as well as with his advice to him to file an
tirely new application, and it is inadmissible. The result is that
e judgment of the commissioner that the first application was
andoned stands without modification or reversal, and that the
al presumption that it was right sustains it.

Nor does the bill contain averments sufficient to overcome this
esumption. Its allegations present nothing but bald statements
at by reason of the inventor's illness, infirmity, and lack of funds

his application became abandoned, and that he presented to the commissioner good and sufficient reasons for this abandonment, which the commissioner adjudged to be insufficient to account for his delay. These allegations disclose no facts from which the court can determine when, how long, or in what way the delay was unavoidable. Averments of specific facts or circumstances from which the court may see that, if they are true, the fact was probably otherwise than the finding, are essential in a pleading for the purpose of overcoming the legal presumption that the determination of a question of fact by an executive officer to whom its decision is intrusted by the law is correct. Allegations that the fact differs from the finding, or that the decision is wrong, without more, are futile.

Finally, it is said that the bill shows that there was no abandonment of the first application, because it contains the allegation that the second application was filed "as a substitute for or continuation of the original application." But the answer is that this is a general averment of a conclusion, which is inconsistent with and is overcome by the specific allegations in the pleading that the first application became abandoned, that the commissioner adjudged that the delay in prosecuting it was not unavoidable and that the application could not be revived, and that the bill disclosed no facts to overcome the presumption of the correctness of this conclusion. A general allegation in a pleading is controlled and limited by specific averments on the same subject. Boatmen's Bank v. Fritzlen et al. (C. C. A.) 135 Fed. 650; Mayer v. Fort Wayne, C. & L. R. Co. (Ind. Sup.) 31 N. E. 567, 568; Reynolds v. Copeland, 71 Ind. 422; Pinney v. Fridley, 9 Minn. 34 (Gil. 23).

The complainant averred that the first application was abandoned; that on a trial of the issue before the commissioner under section 32 of the act of July 8, 1870, he adjudged that the delay which caused this abandonment was not unavoidable, and the bill contained averments of no facts which show that this judgment was wrong. The unavoidable conclusion is that the first application of Hayes was abandoned; that the second application was not a continuation of the original solicitation, but the institution of a new and independent proceeding; that the patent is founded on the second application alone; and that the absence of any averment that the invention was not in public use or on sale in this country for more than two years before the latter application was presented to the commissioner is fatal to the cause of action for an infringement of the patent.

The decree below is affirmed.

AMERICAN CAN CO. v. HICKMOTT ASPARAGUS CANNING CO.

(Circuit Court, N. D. California. March 20, 1905.)

No. 13,345.

1. PATENTS—INFRINGEMENT—COMBINATION CLAIMS.

In a combination claim of a patent, every element specified by the patentee, either directly or by a reference to the specification, which carries such element into the claim, must be deemed material; and to constitute an infringement of such claim the infringing device must contain every one of its elements, or its equivalent.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 376, 387.]

2. SAME—EQUIVALENTS.

A device in one mechanism to be the equivalent of the device in another, must perform the same function and perform it in substantially the same manner.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 24.]

3. SAME—PIONEER INVENTIONS—IDENTITY OF MEANS.

To sustain a claim of infringement of a patented machine, three things must be found: First, identity of result; second, identity of means; third, identity of operation. The fact that an invention is of a primary character does not entitle the patentee to all means for accomplishing the same result.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 370–381.]

4. SAME—CAN MAKING AND SOLDERING MACHINES.

Neither the Jordan patent, No. 436,792, for a can body making machine, the Norton patent, No. 365,316, for a can cap soldering machine, nor the Holden and Brown patent, No. 598,567, for a can body machine, is infringed by the machine of the Eldridge patent, No. 712,998, for a can body forming machine.

In Equity. On petition for rehearing or a new trial.

John H. Miller, for complainant.
Wheaton & Kalloch, for defendant.

MORROW, Circuit Judge. This is a suit for the infringement of three letters patent, namely: No. 436,792, issued to Peter Jordan, September 23, 1890, for a can body making machine. This patent contains 91 claims. No. 365,316, issued to E. Norton, June 21, 1887, for a can cap soldering machine. This patent contains 31 claims. Patent No. 598,567, issued to Edward B. Holden and Charles M. Brown, February 28, 1898, for a can body machine. This patent contains 41 claims. The total number of claims in these patents is 163. These patents are owned by the complainant. The defendant owns, and at the commencement of this suit was threatening to use, the machine made under patent No. 712,998, issued to John Eldridge, November 4, 1902, for a can body forming machine. This patent contains 6 claims.

The question before the court upon the hearing of this case was whether a machine constructed under the Eldridge patent infringed the patents of the complainant with respect to certain specified claims. The claims of the Jordan patent alleged to have been infringed are claims 58, 59, 60, 61, 62, 63, 64, 65, 69, 78, 79,

80, 81, 87, and 88—fifteen in all. In the motion for rehearing complainant has referred to claims 64 and 69, contending that the action of the court in holding that these claims have not been infringed was sufficient to entitle complainant to a rehearing. The claim of the Norton patent alleged to have been infringed is claim 31. The action of the court in holding that this claim had not been infringed is relied upon in the motion for a rehearing. The claims of the Holden and Brown patent alleged to have been infringed are claims 28, 29, 30, 31, and 32—five in all. In the argument in support of the motion for rehearing, complainant refers to claim 29 of this patent as having been infringed.

In deciding the case in favor of the defendant, the court held that there was no infringement of any of these claims. In support of the petition for a rehearing elaborate briefs have been filed by counsel on both sides. The first claim to which the court's attention is now directed in this motion is claim 64 of the Jordan patent. The claim is as follows:

"The combination, with a rotatable horn furnished with means for clamping one edge of the sheet, of a stop blade or device for engaging the opposite end of the sheet, substantially as set forth."

The complainant contends that this claim consists of three elements, namely: (1) A rotatable horn, (2) furnished with means for clamping one edge of the sheet, and (3) a "stop blade or device for engaging the opposite end of the sheet." Another analysis would resolve this claim into two elements, as follows: (1) A rotatable horn, furnished with means for clamping one edge of the sheet, and (2) a stop blade or device for engaging the opposite end of the sheet. To understand these elements, the claim must be read with reference to the mechanism of a can body forming machine, and the sheet referred to in the claim is the blank sheet of tin out of which the can body is formed. The object of complainant's invention, as declared by him in his application for a patent, was to provide a machine which would automatically feed the blank sheet of tin, form it into a can body, and interlock and fold its edges into the usual lock seam, ready for soldering. Such a mechanism turns one of the edges of the blank into a hook, and then turns the opposite edge into a similar hook, and finally interlocks and folds the two hooked edges together into a locked seam. As before stated, claim 64 of complainant's patent appears to have two elements; but, whether the claim has two or three elements, it is what is known as a combination claim. A combination claim is thus described by the Supreme Court in Fay v. Cordesman, 109 U. S. 408, 420, 3 Sup. Ct. 236, 244, 27 L. Ed. 979:

"In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim, and privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality."

A claim must always be considered with reference to the specifica-ons and the mechanism to which it relates; otherwise, in some stances, the claim would be void for want of invention. The ircuit Court of Appeals of this circuit, referring to claims similar the one now under consideration, in Jensen Can-Filling Machine o. v. Norton, 67 Fed. 236, 242, 14 C. C. A. 383, 390, said:

"These are all combination claims, and each is broad enough to include ery imaginable style of mechanism for forming can bodies and soldering e side seams thereof. So regarded, they would all be void for failure to scribe any patentable invention. They must necessarily be limited to in-ude only the particular devices specified."

To which, of course, should be added the qualification: "or echanical equivalent or substitute."

In a patented combination, a device in one mechanism, to be e equivalent of a device in another, must perform the same func-on (Rowell v. Lindsay, 113 U. S. 97, 103, 104, 5 Sup. Ct. 507, 28 Ed. 906), and perform that function in substantially the same anner, as the thing of which it is alleged to be an equivalent. Walker on Patents, § 354.

Comparing the mechanism described in claim 64 of the Jordan tent with the mechanism described in the defendant's patent, in e light of these rules, what do we find? The first element of aim 64 is "a rotatable horn, furnished with means for clamping ne edge of the sheet." In complainant's patent this is the rotatable orn, G, with the former, F, and is described as follows:

"The edge folder, F, has a lip or blade, f, which operates to clamp the edge the sheet against the opposing die or jaw, F^1, which is or should be cor-spondingly recessed. The former, F, is pivoted at f^1 to the horn, G, and is operated by a sliding wedge or bar, g, which, like the former, F, is ounted in a suitable recess, g^1, in the horn, G."

This former, F, is used in putting a second hook upon the blank, nd the device works in connection with the horn, G.

Complainant contends that this element of complainant's patent found in defendant's machine, being the undercut edge, 10, and e spring-actuated bar, which presses the hook edge of the sheet to engagement with said undercut edge. But in defendant's achine this undercut edge and the spring-actuated bar are used putting the first hook on the blank, which in complainant's ma-ine is an operation performed elsewhere and at a distance from e rotating horn. Obviously, the defendant's machine for putting e first hook on the blank is a different means from that used by e complainant for putting the first hook on the blank, and is not substitute or an equivalent for that feature of complainant's echanism.

The second element of claim 64 is "a stop blade or device for en-ging the opposite end of the sheet." In complainant's patent this the stop blade, H, and is described as follows:

"H is a stop blade, which engages the first hook or edge fold, x^1, as the nk is being wrapped around the horn by the rotation thereof. This stop de is arranged near the periphery of the horn, so that it will surely en-ge the first hook or fold, x^1, and hold it in position for interlocking with e second hook or fold, x^2, of the blank, as shown in Fig. 12. The stop

blade, H, is preferably mounted movably, so that it may be moved toward or from the horn, as desired. I prefer to mount this stop blade on an arm or lever, H^1, pivoted at h to the frame of the machine, so that it may be swung to or from the horn."

This stop blade or device is intended to engage the first hook of the sheet, and stop this first hook in its proper position.

Complainant contends that it finds this element in the defendant's machine, in the plate, f. Now, what is the object of the plate, f, in defendant's machine? It is not to stop anything, but to hold against the horn the end of the sheet upon which the second hook is to be formed. In other words, we do not find in defendant's machine the stop blade or device, which is one of the elements of the sixty-fourth claim of the Jordan patent. But this is not all. In complainant's machine the stop blade is preferably mounted on the arm or lever, H^1. In the specifications this arm or lever, H^1, is required to perform a function described in the claim as a "means for clamping one edge of the sheet." The specifications are as follows:

"The arm, H^1, also preferably carries a curved shoe or presser device, H^2, which may be made integral with the stop blade, H, or the pivoted arm, H^1. The arc of this shoe should correspond with that of the horn. The purpose of this shoe is to press the inner end of the blank, x, which carries the first and now outwardly projecting hook, x^1, flat against the horn during the operation of interlocking the second and now inwardly projecting hook, x^2, with the first hook, x^1; said second hook, x^2, hooking over the first hook, x^1, as is clearly indicated in Fig. 12."

There are other devices described in the specifications for pressing the blank sheet against the horn, viz., the guides or shoes, K and L, and all three are described as follows:

"The guides or shoes, H^2, K, L, surrounding the horn, serve to hold and bend the blank around the horn as the horn is rotated; one edge of the blank being clamped between the dies."

The defendant has no mechanism of this character in his machine, and for this reason there is no infringement.

Claim 69 is as follows:

"The combination, with a rotatable horn furnished with means for clamping the edge or end of the sheet thereto, of a device for holding the opposite edge or end of the sheet against the horn, and means for interlocking the hooks on the blank, substantially as specified."

Counsel for complainant contends that this claim is the same as claim 64, with the addition of the element, "means for interlocking the hooks on the blank." The patent, in referring to this element, says:

"H is a stop blade, which engages the first hook or edge fold, x^1, as the blank is being wrapped around the horn by the rotation thereof. This stop blade is arranged near the periphery of the horn, so that it will surely engage the first hook or fold, x^1, and hold it in position for interlocking with the second hook or fold, x^2, of the blank, as shown in Fig. 12."

Now, what is the use of this stop blade? It engages with the first hook and holds it in position to assist it in interlocking with the second hook. If the stop blade is not in the Eldridge machine —and we have already explained that it is not—and for that reason

is not infringed, it necessarily follows that the blade is one of the ements in the combination of claim 69, and that that claim is not fringed. The result of this comparison is that there is that lack identity between the two machines which constitutes in law an fringement. To sustain a claim of infringement of a patented achine, three things must be found: First, identity of result; econd, identity of means; third, identity of operation. The re-ult of the work of complainant's machine, as set forth in these two aims, is to put a second hook on the blank sheet of tin (the first ook having been put on by other mechanism) and fold the edges to the usual lock seam. The result of the work of the defendant's achine is to put both hooks on the sheet of tin and fold the edges to a lock seam. It is therefore only with respect to the last hook nd the folding into a seam that there is an identity of result, and, as efore explained, there is a lack of identity in the means used to roduce the can body, and also a lack of identity in the operation f these two machines.

But complainant contends that this is a narrow construction of ese two claims; that the evidence shows that Jordan was the rst to devise and introduce into the art a rotary can body forming orn, and, this being so, these claims should receive a broad and beral construction; and that all subsequent machines which em-loy substantially the same mode of operation are infringements. his rule of law for which the complainant contends is well estab-shed, and is not in controversy. The complainant, however, cites e case of Morley Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. t. 299, 32 L. Ed. 715, as applying the doctrine in a case similar all respects to the present case. In that case the Supreme Court aid:

"Morley, having been the first person who succeeded in producing an auto-atic machine for sewing buttons of the kind in question upon fabrics, is ntitled to a liberal construction of the claims of his patent. He was not a ere improver upon a prior machine, which was capable of accomplishing e same general result, in which case his claims would properly receive a arrower interpretation. This principle is well settled in the patent law, oth in this country and in England. • Where an invention is one of a pri-ary character, and the mechanical functions performed by the machine are, a whole, entirely new, all subsequent machines which employ substantially e same means to accomplish the same result are infringements, although e subsequent machine may contain improvements in the separate mechan-m which go to make up the machine."

It will not be necessary to analyze that case and point out where-it differs from the present case. It will be sufficient to call at-ntion to the fact that the court found that in all three of the main echanisms used in the Lancaster machine the means employed in were substantially equivalents of those employed in the Morley achine, and that the mechanical devices used by the defendant ere known substitutes or equivalents for those employed in the Morley machine to effect the same result. In referring to Morley's aims, the court said:

"Those claims are not for a result or effect, irrespective of the means by hich the effect is accomplished. It is open to a subsequent inventor to ccomplish the same result, if he can, by substantially different means."

And that is what the court thinks was done in this case. The defendant has accomplished the same result with respect to the last hook upon the blank tin and the folding of the two hooks into the lock seam. But this has been accomplished by substantially different means, and the operation as a whole is not identical in the two machines. The pioneer character of complainant's machine does not entitle it to all the means for accomplishing the same result.

The charge that the defendant has infringed claim 31 of patent No. 365,316, for a can body soldering machine, is also without foundation. Claim 31 reads as follows:

"The molten solder containing vessel, furnished with a discharge valve and mechanism for operating said valve by contact with the can, substantially as specified."

The specifications describe this mechanism as follows:

"H, represents a vessel for containing molten solder. It is automatically movable up and down, and the lower end of this vessel serves as a soldering iron to distribute the solder over the seam. This molten solder vessel is moved up and down to bring the same into contact with the seam to be soldered when the can is presented under the same by the carrier. The solder vessel may be moved up and down by any suitable means or mechanism. It may, for example, be automatically operated by the same mechanism as that employed to operate the stirrer bars, G."

The device so described relates to mechanism for soldering caps on filled cans. Peter Kruse, a witness called for the defendant, testified, with respect to this device, that, while the caps are being soldered on the cans, the cans have a rotatable motion; that the seam that is soldered is circular, and that the mechanism could solder no other seam; that the side seam of the can body could not be soldered by this device. Referring to the defendant's mechanism, the witness testified that, while the cans were being soldered by that machine, they did not have a rotary motion; that the machine had never had a movable molten solder vessel provided with a valve of any kind. The witness then described in detail the mechanism of defendant's soldering apparatus, from which, and from an examination made by the court, it appears that, compared with complainant's machine, there is lacking that identity of means, identity of operation, and identity of result necessary to constitute an infringement.

Complainant contends that claim 29 of patent No. 598,567 has also been infringed. This claim is as follows:

"In a can body machine, the combination with a series of soldering irons, arranged in line above a soldering horn along which the can bodies are moved, of a soldering pot located in advance of the soldering irons, heating apparatus for heating the irons and pot, and solder feeding mechanism for feeding the solder into the pot, substantially as described."

The witness Kruse testified, with respect to this device, that it soldered the outside seam of the can only, while the defendant's machine solders both the inside and outside seam at the same time; that in complainant's machine wire solder was used; that the soldering boxes do not contain melted solder; that defendant's

apparatus does not contain any of these boxes or a solder pot; and that there is no place in the defendant's machine where either these boxes or the solder pot could be applied. The court examined these devices at the trial, and further consideration of the mechanisms convinces the court that there is no infringement of complainant's patent by any part of defendant's mechanism.

Complainant's motion for a new trial is denied.

HUTTER v. KOSCHERAK.

(Circuit Court, S. D. New York. February 14, 1905.)

1. PATENTS—SUIT FOR INFRINGEMENT—DEFENSE OF LACHES.

The owner of a patent is not subject to a plea of estoppel, laches, or implied license because of delay in bringing suit against an infringer during the pendency of a test suit in which the validity of the patent was involved.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 468.]

2. SAME—INFRINGEMENT—BOTTLE STOPPERS.

The Hutter patent, No. 491,113, for a bottle stopper, *held* valid and infringed on motion for a preliminary injunction.

In Equity. Suit for infringement of letters patent No. 491,113 for a bottle stopper, granted to Karl Hutter February 7, 1893. On motion for preliminary injunction renewed.

Arthur v. Briesen, for the motion.

Louis C. Raegener, opposed.

LACOMBE, Circuit Judge. The new patents Haas, Woodbury, etc., are not sufficiently persuasive to induce this court, on motion for preliminary injunction, to modify the construction given to the patent by the Circuit Court of Appeals. 128 Fed. 283, 62 C. C. A. 652. Upon that construction the slot of the stoppers which defendant has recently been selling infringes, and I do not think infringement is avoided on any theory that the porcelain shank is not a conical tapering plug. The stopper is a conical tapering plug when it is ready for use with the rubber on.

The evidence which was promised that complainant was himself interested as partner or similarly with the concern in Germany which manufactured the stoppers sold by defendant has not been produced, and the written license to such manufacturer expressly reserves the style of slot which is covered by the American patent.

Upon the question of implied license, estoppel, and laches the record has been most carefully examined. When the testimony is studied with the exhibits in hand, most of the difficulties suggested by the argument quickly disappear. Defendant's theory as to so-called misleading conduct of the complainant is based entirely upon the assumption that during the period in which defendant and his predecessor were selling stoppers there was no change whatever in the form of slot. Some of the witnesses testify that there was no such change, but the exhibits which defendant abun-

dantly proved show this to be a mistake. The exhibits "Made in Trenton" and "Wallace stopper" are manifestly infringements, and it appears that complainant or his counsel promptly objected to them in 1895, and that defendant knew of such objection. The exhibits of the later stoppers which defendant now sells are also clearly infringements. But between these two groups it appears that defendant or his predecessor sold stoppers with slots slightly, but substantially, different. The exhibits "1895 stopper made in Germany," and "Stopper made for defendant by Muller prior to August 1, 1895," lack the so-called "apex," which induces the centering of the bail-wire, the distinctive merit of the patented device. That is plain upon inspection, and the wax impressions of the "1895 stopper made in Germany" and of the stopper now made by defendant indicate the differences still more sharply. It is admitted by defendant's witnesses that within the past nine years there have been changes made in defendant's stoppers. The witnesses insist that such changes were only in the shank, but the exhibits they produce show that in that respect their recollection is at fault. The exact dates of the changes in the slot from "Trenton" and "Wallace" to "1895" and "Made by Muller," and back again to the present type, are not shown. For aught that appears, after Hutter had objected to the infringing type like "Trenton" and "Wallace," and after the other type was adopted, there may have been no reverter to the infringing type till within three years, which defendant testifies is the date of change to the type now in use. At that time complainant was pressing his test suit which the Court of Appeals decided last year, and under such circumstances estoppel, laches, or implied license are not made out.

Careful study of the exhibits indicates further that the assertion made on behalf of defendant that injunction will work irreparable injury, will destroy his business, and subject him to financial ruin, is a delusion. The two models "Exhibit 1895 stopper made in Germany" and "Exhibit stopper made for defendant by Muller prior to August 1st" differ substantially from the slot of the patent by having a flattened-out lower surface. Upon this record, certainly, they cannot be held to infringe, and complainant's counsel concedes that, for he says in his brief in both of these "the bottom of the slot is substantially a straight line; it has no cam action, and exercises no centering tendency on the bail-wire, as does the lower curved portion of the defendant's present stopper." Therefore the defendant, even if enjoined from selling his present stopper, would still be free to sell stoppers with slots like the "1895 made in Germany," and the "Made for defendant by Muller prior to August 1st," with whatever variety of shank he might prefer. Inasmuch as defendant and his witnesses insist that all the types of stopper which they have sold are practically the same so far as the slot is concerned, and therefore equally good except for defendant's alleged improvements in the shank, it is difficult to see how he can be seriously injured by being confined to one of the forms of slot which he has himself used, and, as his testimony shows, successfully.

Complainant may take injunction pendente lite, with a clause serving from its operation stoppers with a slot such as shown in e two exhibits above referred to.

STIRLING CO. v. STANDARD SNUFF CO.

(Circuit Court, M. D. Tennessee. April 26, 1902.)

TENTS—INFRINGEMENT—STEAM BOILERS.

The Stirling patent, No. 407,260, for a steam boiler of the vertical water tube type, is valid, and entitled to a liberal construction covering equivalents. As so construed, *held* infringed by the boiler of the Turner patent, No. 594,163, which differs from that of the Stirling patent chiefly in having two mud drums instead of one.

In Equity.

Ephraim Banning and Thomas A. Banning, for complainant.
Almon Hall and Brown & Akers, for defendants.

CLARK, District Judge. This bill charges defendants with fringement of letters patent of the United States No. 407,260, sued to the International Boiler Company, Limited, as assignee Allan Stirling, July 16, 1889, for an improvement in steam boilers. ne principal defense is noninfringement, which defense involves construction of the Stirling patent.

The boiler of the Stirling patent consists essentially of elevated oss drums, known technically as steam and water drums, a lower oss drum, known technically as a mud drum, connecting banks of bes extending from the elevated drums to the lower drum, pipes mmunicating between the steam spaces of the elevated drums, pes communicating between the water spaces of the elevated ums, and a furnace setting which causes the flame and gases to avel up and down along and among the tubes so as to completely velope the same. The patent has two claims, the first covering e combination of elevated and lower drums and their connecting bes and pipes; and the second, this combination with the addition the furnace setting. In each claim the mud drum feature is rred to as the "single mud drum A."

The defendant's boiler, manufactured by the Turner Engineer- g Company, is shown in the George E. Turner patent, No. 594,163, ovember 23, 1897. It is similar to the Stirling boiler in its ar- ngement of drums, tubes, and other features; but its rear bank tubes is somewhat modified in form and position, and an addi- onal mud drum and bank of tubes are employed. The question the case is whether these modifications take the Turner boiler ıt of the Stirling patent.

The patent was litigated in Stirling Company v. Pierpoint Boiler ompany (C. C.) 72 Fed. 780, in which Judge Buffington, Judge cheson concurring, held that it was not infringed by a vertical wa- r tube boiler having multiple mud drums. This case was taken the Court of Appeals for the Third Circuit, and after argument

in that tribunal compromised by the parties. In view of this compromise, no authoritative decision was rendered in the Court of Appeals, but the cause was remanded, with instructions to the Circuit Court to grant a rehearing and enter such decree as the parties might agree upon or the court consider proper; and following this the Circuit Court vacated its first decree, granted a rehearing, and finally ordered a perpetual injunction covering three forms of boilers each having multiple mud drums. As thus appears, the Circuit Court finally construed the Stirling patent as covering equivalents, Pierpoint's multiple mud drums being treated as the equivalent of Stirling's "single mud drum." Although the final decree was entered without argument, it had, in a practical and legal view, the effect of wiping out the stain put upon the patent by the court's first decision; and therefore, even disregarding it as an authority, the question of construction may be considered an open one.

In the Turner boiler three tubes, five inches in internal diameter, extend from the rear elevated drum backward and downward, one from near each end of the drum and one from its middle, the two end tubes communicating at their lower ends with the front mud drum, and the middle tube at its lower end with the rear mud drum, the vertical portion of each of these tubes being partially imbedded in the rear wall of the furnace setting. The two end tubes serve to connect the rear elevated steam and water drum with the front lower mud drum, this connection being, it is true, somewhat indirect or circuitous. Starting from the front mud drum, the course of circulation of the water is up through the front bank of tubes to the front elevated steam and water drum, thence across through the water connecting pipes to the rear elevated steam and water drum, thence down through the large end tubes just described to the front mud drum, and so on in circuit. In its first circulatory movements, that part of the water which is carried down from the rear drums through the middle connecting tube into the rear mud drum passes up again through the middle or additional bank of tubes into the rear elevated steam and water drum; but all the water eventually passes from the rear elevated steam and water drum, backward and downward through the end tubes into the front lower mud drum, thence up through the front bank of tubes into the front elevated steam and water drum, thence back through the water connecting pipes into the rear steam and water drum, and so on in circuit. The large end tubes, therefore, perform the function of conducting the water down from the rear elevated steam and water drum and passing it forward through the front lower mud drum into the hottest parts of the boiler; and all the water is required to pass through the front lower mud drum before reaching these hottest parts or being generated into steam. In practical effect, the function and operation of these parts is the same as in the Stirling boiler.

In the Turner boiler the rear mud drum and the bank of tubes connecting it with the rear elevated steam and water drum are claimed by defendant's experts to have the effect of an economizer; that is, of providing for the heating of feed water and precipitation

sediment therein before the water is conducted into the hottest rts of the boiler. Even if admitted to the fullest extent presented, s preliminary heating and purifying of the water do not material- affect the function or operation of the front lower mud drum. ıe statement in the Stirling patent that "the water is forced to ss through the mud drum and deposit its sediment therein" does t necessarily mean that all or any particular part of the sediment ıst be deposited in this drum. One of the characteristic features the Stirling patent is the provision which it makes for a strong, sitive circulation in the hottest parts of the boiler, where most the steam is generated, and whenever a "single mud drum" is ıployed in securing or producing this circulation the requirements the patent in this respect are complied with. The patent call- g for a "single mud drum," there must of course be one principal ıd drum, and this mud drum must be so connected with the ele- ted steam and water drums that substantially all the water will ve to pass through it before reaching the hottest parts of the iler; but the patent does not require all the sediment to be de- sited in this mud drum, or prevent the previous removal of any rt thereof by the use of additional mud drums or otherwise. fferently stated, the patent does not prevent the use of additional ıd drums, in connection with the principal mud drum or separate erefrom, for removing sediment or other purposes.

The defendants have introduced a large number of patents and blications to illustrate the prior state of the art; but there is thing in these prior exhibits materially limiting the scope of the irling patent. None of them shows a boiler having the same nstruction and possessing the same advantages in operation. s improved by Stirling himself, his boiler has practically super- ded all other vertical water tube boilers in the market. In view this and other circumstances, the court should be slow "to adopt narrow or astute construction fatal to the grant." Keystone anufacturing Company v. Adams, 151 U. S. 139, 145, 14 Sup. Ct. 5, 38 L. Ed. 103; Westinghouse Air Brake Co. v. New York Air ake Co., 63 Fed. 962, 969, 11 C. C. A. 528. Even if not strictly a oneer in the art, the Stirling patent stands in such meritorious po- ion as to be entitled to the liberal construction suggested in orley Machine Co. v. Lancaster, 129 U. S. 263, 273, 9 Sup. Ct. 9, 32 L. Ed. 715; McCormick Harvesting Machine Co. v. C. ıltman Co., 69 Fed. 371, 386, 387, 16 C. C. A. 259, and similar ses.

I therefore hold that, the Stirling patent covering equivalents, e changes which the Turner Engineering Company has made, as ove described, are immaterial, and insufficient to avoid the charge infringement.

McGILL v. WHITEHEAD & HOAG CO.

(Circuit Court, D. New Jersey. April 29, 1905.)

1. PATENTS—VALIDITY AND INFRINGEMENT—SCARF PIN.

The McGill patent, No. 285,641, for a scarf or tidy pin or stud, is void for lack of patentable novelty, in view of the prior art. Also construed, and, as narrowed by the amendment of the claim in the Patent Office to meet objections of the examiner, *held* not infringed, if conceded validity.

2. SAME—CONSTRUCTION OF CLAIMS—ESTOPPEL.

Where a patentee, with knowledge of a device made by defendant, made no claim of infringement for five years, he will be held estopped to thereafter place a different construction on his patent, just before its expiration, for the purpose of making out a case of infringement.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 468, 469.]

In Equity. On final hearing.

Ewing, Whitman & Ewing, for complainant.

Andrew Wilson, William A. Jones, and Howard P. Denison, for defendant.

CROSS, District Judge. The complainant, George W. McGill, filed his bill of complaint against the defendant, the Whitehead & Hoag Company, alleging infringement of certain letters patent of the United States, issued to him September 25, 1883, and known as No. 285,641, and asking that the defendant might be enjoined from making and selling the invention therein set forth and claimed, and also asking for an accounting of the gains and profits made by the defendant from the manufacture and sale of such patented article, and that he might be decreed to pay to the complainant the damages sustained by him by reason of such alleged infringement. The patent referred to claims to embrace certain "new and useful improvements in the construction of scarf and tidy pins, studs, and such like articles."

The complainant, in his application for said patent as originally filed, set out but one claim, as follows:

"A pin or stud, consisting of a single piece of wire pin-pointed at one end and fashioned to form the single shank, b, and loop, a, in combination with a metal cap, A, closed upon the loop in manner substantially as herein described, for the purposes specified."

This claim was rejected by the patent examiner, for the reason that the same lacked novelty, and was embraced in a previous patent issued to complainant January 3, 1882, numbered 251,912. Upon such rejection the complainant amended his claim to read as follows:

"A pin or stud consisting of a pin-pointed shank, b, having an angular neck, a', and a closed loop, a, of the form of the metallic cap, made of one continuous piece of wire, in combination with such cap, which is upset or closed over the looped head, substantially as set forth"—

And it is in the above form that the patent was ultimately issued.

It will be noticed that but two changes which can be called material appear between the original and the amended or final claim.

These are denominated as the "angular neck" and the "closed loop." The former consisted of a shoulder or angle in the pin-pointed wire to allow for the thickness of the cloth or other material in which the pin might be inserted, so that, when the pin was fully inserted in cloth or other material, it would permit the head of the pin to lie flat against it. It was to all intents and purposes like the angle or shoulder which appears in the ordinary scarf pin, and, although the expression did not in terms appear in the original claim, it cannot be said to be new, for it was substantially mentioned and described in the original specifications and drawings, and consequently could not have formed the basis upon which the patent was finally allowed, and, furthermore, it appeared distinctly in the earlier patent issued to the complainant, and which was referred to by the examiner as No. 251,912. It would seem, therefore, necessarily to follow, that the material change in the amended claim, and the one which influenced the issuance of the patent, was the term "closed loop," which appears twice in the amended claim, and concerning which the parties differ in their construction. On the part of the complainant, it is maintained that the phrase has the same meaning in both of the places in which it is used, and in support of their position they say that, in the place where first used, "closed" means, as applied to the loop, "closed in," or inclosed by, the folded-in edge of the cap. The defendant, however, claims that the word "closed" is used in two different senses in the amended claim, and that, as applied to the loop in the first instance, it means a closed or shut or fully formed loop, something equivalent to a circle, although not necessarily of that form. As to its use in the second place, both parties agree.

It seems to me that the defendant's contention is correct, and that the word "closed," as used, has two different meanings; that as used in the first instance it did not relate to the cap at all, but to the pin-pointed shank having a closed loop for its head, while in its second use it plainly refers to the cap which is to be crimped or closed over such "looped head." I regard any other construction as impossible. Such being the case, important results follow, for it appears that the defendant's alleged infringement consists in the use of a device similar to the complainant's, except in this one respect: that the loop forming the head of the pin-pointed shank is unclosed, and, instead of consisting of a fully formed loop, consists of but a segment or part of a loop. Upon a first glance this difference might seem unimportant, and under ordinary circumstances the adoption of the open loop by the defendant would probably have constituted an infringement of the complainant's patent. But in this connection it must be borne in mind that the complainant's original claim used simply the word "loop," without stating whether such loop was "closed" or "unclosed," and that in such form the claim was disallowed by the examiner, and thereupon the language was changed in the amended claim so as to read "closed loop," and that this modification was adopted to meet the objection of the examiner, or, at least, was adopted by the applicant with a view to manifest the novelty of his invention, which had

been disputed by the examiner. The use of the term "closed loop" undoubtedly narrowed the original claim, and by its use under the circumstances, the complainant has estopped himself from using an unclosed or open loop, and has himself established a difference in definition between "loop" and "closed loop." As just stated, the original claim was broader than the amended claim, and, whether rightly or wrongly, the original claim was objected to, and the complainant yielded to the objection, and cannot now be heard to object to a strict construction of the expression ultimately, and we must assume, carefully, chosen and adopted. In Brill v. Car Company, 90 Fed. 666, 33 C. C. A. 213, the Circuit Court of Appeals held:

"Where an applicant for a patent amends and limits his claims and specifications to meet the objection of the Patent Office, whether said objections were well founded or not, he is not entitled to the benefit of the original claim under the patent issued, nor to a construction making the amended claims as broad as those abandoned."

There is no closed loop found in the defendant's badges which are claimed to be an infringement of the complainant's patent. These badges are very familiar, and are constantly seen in the market, and are popularly known as "campaign" badges or pins. The defendant corporation, therefore, has clearly omitted one element of the complainant's patent, and, as a patent for a combination is not infringed by the use of any number of parts less than the whole, its act does not constitute an infringement of the complainant's patent.

In this connection it may be added that the complainant for a long time seems to have considered his patent as limited to a "closed loop." It appears from the testimony that for five years he knew that the defendant corporation was manufacturing and selling a similar device, except that it used an unclosed or partial loop; yet he neither brought suit to establish such infringement, until about a year before his patent expired, when this suit was instituted, nor did he in any other manner claim that the defendant was infringing his rights. It would seem, therefore, as if his conduct was susceptible of but one construction: that he did not consider defendant's device an infringement upon his. The principle adopted in Westinghouse Elec. & Mfg. Co. v. Wagner Elec. Mfg. Co. (C. C.) 129 Fed. 604, should therefore be adopted, and the complainant's claim of infringement be deemed an afterthought, and he himself estopped from asserting it.

Another matter appears in the record which, while perhaps not entitled to the weight of an admission, nevertheless does manifest a material lack of confidence on the part of the complainant in his ability to show that the manufacture by the defendant of its open loop badge is an infringement upon the complainant's patent in suit. The facts are these: After the institution of this suit, and after some testimony had been taken therein, the complainant purchased a junior patent, dated July 1, 1884, No. 301,083, and known as the "Bornstein Patent," and thereupon commenced a suit against the defendant in the Southern District of New York for an alleged infringement of that patent, and introduced in evidence therein, to show such infringement, the same exhibits introduced by him to

ıow infringement of his patent in suit herein. The Bornstein ıtent provides for a pin with an unclosed loop head sprung into cap, and there held by the elasticity of the head, a device very milar to that used by the defendant. The grant of the Bornstein ıtent raised a presumption of novelty over the McGill patent in uit herein, and the complainant by his conduct would seem to have early recognized that the open or unclosed loop is not an infringeent upon his patent.

What has already been said disposes of the case adversely to the mplainant, but another view of the case may well be taken which aches the same conclusion. I think the complainant's patent is valid for want of novelty. Mr. Cox, an expert witness for the mplainant, at one point in his testimony states that he finds in the aim upon which the complainant's patent was granted four eleents: (1) A pin-pointed shank; (2) an angular neck; (3) a osed loop of the form of the metallic cap, made of one continuous ece of wire; and (4) a cap which is upset or closed over the oped head. Later in his testimony, however, he virtually adits that all of the elements except the "angular neck" are found the alleged anticipations. His exact language is as follows:

"The specific element of the patent in suit which I do not find in the alleged ıticipations is the angular neck."

And in another place he says:

"It would be impossible to pick any one element [in complainant's patent] ıd say that in itself it was entirely new; in my opinion, the novelty reles in the method or manner in which the cap and its pin shank are conected."

This testimony as to novelty is denied by the defendant's exerts, and is overborne, in our judgment, by the other evidence in ıe case. The 1882 patent of the complainant, the Chess patent 1864), the Prentice patent (1882), the McCarthy patent (1873), ıe Robinson patent (1874), and the Duguen French patent (1880), ıd other patents offered in the evidence on the part of the defendıt, clearly show every material element in the complainant's ıtent in suit, while several of them show such elements in comnation so closely resembling the complainant's device as to negave any idea of novelty therein. As to the particular point referred in the testimony of the complainant's expert above quoted, it ay be added that the complainant's 1882 patent shows clearly, and hers show but little less clearly, substantially the "angular neck" ıd method of uniting the cap and pin shank adopted by the comainant. Without going more into detail, it may be said that the nguage of Mr. Barkley, an expert witness for the defendant, fairly ows the state of the prior art at the time when the complainant ed his application. He says:

"To sum up: The foregoing examination of the state of the art shows at at the date of the application for the patent in suit, and, indeed, long ior thereto, it was a known thing to cover the heads of screws and nails ith metallic caps whose edges or flanges were folded in or crimped against e metal of the head of the screw or nail to form a unitary structure; also at in some cases the nails or tacks were pin-pointed, or at least pointed.

Also said examination shows that long prior to the said date of application it was a known thing to form screws, button fasteners, buttons, rosettes, and pin-pointed button fasteners by bending a single wire into the desired shape, and especially to form a head thereon by means of a ring or loop at one end thereof, and to conduct the said ring or loop with the shank or stem or the like by means of an offset identical in function with the angular neck of the patent in suit; and also in many cases these rings or loops were covered with a cap secured in place in the same manner as the cap specified in the patent in suit. In at least one case the wire skeleton is held in place beneath an inturned edge or flange by its own elasticity (Robinson patent and Robinson fastener)." And, when asked, "In your opinion, does the patent in suit show any invention or improvement over the prior state of art?" answered, "The patent in suit shows nothing that is not shown in the prior art in substantially the same relations or combination."

In such opinion I concur. The bill of complaint will be dismissed.

CHICAGO GRAIN DOOR CO. v. CHICAGO, B. & Q. R. CO. et al.

(Circuit Court, N. D. Illinois, E. D. April 27, 1905.)

No. 26,317.

PATENTS—SUIT FOR INFRINGEMENT—SUPPLEMENTAL BILL COVERING NEW INFRINGEMENTS.

Where the defendant, pending a suit for infringement of a patent, begins the use of another alleged infringing device, separate and distinct from that complained of in the bill, although such fact does not render the suit defective, within the meaning of equity rule 57, but constitutes ground for an independent suit, the court may nevertheless, in the interest of saving delay and expense by the needless duplication of proofs, permit the question of the second infringement to be brought into the case by a supplemental bill.

In Equity. On demurrer to supplemental bill.

Raymond & Barnett, for complainant.
George S. Payson, for defendants.

SANBORN, District Judge. Demurrer to supplemental bill. The original bill was filed May 24, 1902, alleging infringement of patent No. 527,792, issued to E. A. Hill October 23, 1894, for a car-door bracket, and praying for discovery, accounting, payment of profits, and injunction. Proofs were closed in July, 1904. On November 5, 1904, by leave of court and consent of parties, a supplemental bill was filed, alleging infringement by a separate device, begun at some time after the original bill was filed, and that complainant did not know of the use or threatened use of such independent device until about 15 days before filing the supplemental bill. The usual order to demur, plead, or answer being entered, a demurrer was filed, setting up that the supplemental bill makes a new case, the suit has not become defective, the bill is unnecessary, the new matter is not material to the relief under the original bill, and that the alleged additional infringement, if any, can only be raised by a new original bill.

The Hill bracket, of which infringement is claimed, is a bracket with two vertical and one horizontal faces. The principal claim

s that a screw which holds the bracket to the door of a freight car nas its head so protected by a housing or raised portion of the oracket as to prevent its being withdrawn by a thief attempting to enter the car by prying out the lower corner of the door without oreaking the lock or seal. The door, resting on the horizontal portion of the bracket, prevents the bracket from being so rotated as to draw out the screw. The bracket used by defendant company at the time of filing the original bill is in two parts. It does not make use of the housing to prevent withdrawal or rotation, but protects and conceals the screw or bolt by sliding the outer part of the oracket, secured by flanges, down over the inner part; thus concealing and protecting from removal the screw or bolt which fastens the inner, and incidentally the outer, part of the bracket to the car door. The bracket complained of in the supplemental bill, called the "McGuire bracket," is also in two parts, but the bolt or screw s not entirely concealed. It is, however, protected by a hood, and the vertical wall of one of the parts being slid down partly over and close to the screw head; thus tending to prevent both withdrawal and rotation of the screw or bolt.

The supplemental bill charges that the McGuire bracket has been ntroduced into extensive use, in lots of 500 or more at a time, on defendant's cars, since suit commenced. The question is thus presented whether a new and independent infringement (assuming it o be such only for the purposes of the demurrer), not by a change or modification of an existing infringing or noninfringing device, but by an entirely separate one, can be introduced into the case by supplemental bill, or whether a new suit is not necessary.

It is assumed, merely for the purpose of deciding the demurrer, that the original bill is good on its face, that complainant then had a case, and that the proofs show infringement by defendants' first device. Has the suit become defective, or, if not, is there any other good reason why a supplemental bill is necessary, under equity rule 57? The rule follows:

"Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties) or, for any other reason, a supplemental bill or a bill in the nature of a supplemental bill may be necessary to be filed in the cause, leave to file same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party."

Fair verbal interpretation of the rule, and judicial construction as well, permit a supplemental bill where the original suit has not become defective. Undoubtedly the usual case is that of some defect, either existing when suit brought, or due to a change of interest or parties, producing complete or partial abatement. Where the defect exists in the original bill, either as to facts charged or relief prayed, this is proper for amendment, yet there is a class of supplemental bills which merely supply such defects, as in the prayer for relief, or bringing in a new party who should have been joined originally. 3 Dan. Ch. Pr. 1532; Story, Eq. Pl. § 343; Chase v. Searles, 45 N. H. 511, 521; Sheffield, etc., Co. v. Newman, 77 Fed. 787, 23 C. C. A. 459. As to lunacy, insolvency, transfer of

interest or liability, newly discovered evidence, etc., see Kennedy v. Bank, 8 How. 586, 12 L. Ed. 1209; Butler v. Cunningham, 1 Barb. 85; Jenkins v. Eldridge, 3 Story, 299, Fed. Cas. No. 7,267; Gillette v. Bate Refrig. Co. (C. C.) 12 Fed. 108; Metcalf v. Arnold, 132 Ala. 75, 32 South. 763; Western Tel. Mfg. Co. v. American El. Tel. Co. (U. S. Cir. Ct., Northern District of Illinois, March, 1905) 137 Fed. 603. Instances of supplemental bills sustained when the suit was not defective, but it was sought to reinforce or sustain the suit, are Jenkins v. International Bank, 127 U. S. 484, 8 Sup. Ct. 1196, 32 L. Ed. 189, where a judgment rendered after original bill was allowed to be brought forward by supplemental bill as an estoppel; Jaques v. Hall, 3 Gray, 194, and Hasbrouck v. Shuster, 4 Barb. 285, where the supplemental bill enlarged or changed the kind of relief; Mellor v. Smither, 114 Fed. 116, 52 C. C. A. 64, where complainant, having a valid cause of action, filed a defective bill, to which a demurrer was sustained, but who was allowed to file an amended and supplemental bill curing the allegations of the original bill, and setting up matters occurring after it was filed, fortifying his rights; Sheffield, etc., Co. v. Newman, 77 Fed. 787, 23 C. C. A. 459, where it was held that other and more extensive relief might be secured by supplemental bill; Parkhurst v. Kinsman, Fed. Cas. No. 10,758, where a new party, through whom defendant was covertly acting, was brought in by supplemental bill. In none of these cases had the bill become defective, but the action was in some way supported or re-enforced by the supplemental bill.

The rule that there can be no supplemental bill when the complainant has in fact no cause of action when suit commenced, and neither states a case, nor can do so, is too well settled to require extended citation. Mellor v. Smither, supra; New York, etc., Co. v. Lincoln, etc., Co. (C. C.) 74 Fed. 67; Bernard v. Toplitz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465; Putney v. Whitmire (C. C.) 66 Fed. 387; Pinch v. Anthony, 10 Allen, 477; Hughes v. Crane, 135 Ill. 519, 26 N. E. 517. It is equally well settled in patent cases that complainant must have a cause of action when the bill is filed. Judson Mfg. Co. v. Burge-Donaho Co. (C. C.) 47 Fed. 463; Slessinger v. Buckingham (C. C.) 17 Fed. 454. In Humane Bit Co. v. Barnet (C. C.) 117 Fed. 316, this rule was carried so far as to dismiss the bill where the proof showed infringement after the filing of the bill, but before service of subpœna, following Farmers' L. & T. Co. v. Lake St. El. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, deciding that suit is begun when the bill is filed.

The limited purpose of a supplemental bill is to repair or add to a good original case, shown by an original bill, good or bad, either to supply defects sometimes existing when suit brought, but usually afterwards occurring, or to support, fortify, or re-enforce.

There are many decisions, of which Milner v. Milner, 2 Edw. Ch. 114, and Prouty v. L. S. & M. S. R. Co., 85 N. Y. 272, are types, to the effect that matters occurring after bill filed, and which can be made the basis of an independent suit and decree, cannot be brought forward by supplemental bill, but must be made the basis of a new

it. In the Milner Case a bill for divorce was filed. Afterwards fendant committed a separate but similar offense, and it was held at this could not be brought into the original suit by supplemental bill. This rule has not, however, been fully adopted in tent cases. By the practice in such cases, if an infringer so anges the use as to still infringe, although the new infringement ight be made the subject of an independent suit, the damages or ofits arising therefrom may be included and reported by the aster, and such changed use is within the injunction. In Higby Columbian Rubber Co. (C. C.) 18 Fed. 601, there was a peranent injunction against continuing the manufacture and sale of bustle. Defendants had made bustles like the one patented, but fferent from the one enjoined. They had ceased making those ke the patent and like those enjoined, but continued to make a ustle somewhat different from the patent, and not having elastics described in its claims. Plaintiff claimed that the defendants' ustle was "substantially" the same as the one enjoined. Judge owell says:

"Sometimes it is a great convenience to the parties to bring supposed ingements to the notice of the court by motion; and if a patent has been lly discussed and understood in the trial of the case, and if, in the light of at discussion, it is clear to the court that the change which has been made a machine or a manufacture is merely colorable, there is no objection to s course. When a case has not been closed, but an account is being taken, arrangement may sometimes be made to instruct the master to include e profits received from the alleged violation in his account, together with ch evidence as may be given of its construction and mode of operation; d, if the issues are reformed so far as need be to meet this new case, there a great saving of expense. The case upon the patent was closed months nce, and upon the present motion for an attachment no regular issues are ade up, and the evidence is taken ex parte."

In Westinghouse Air Brake Co. v. Christenson Engineering Co. C. C.) 121 Fed. 558; Id. (C. C.) 126 Fed. 764—it had been held at defendant's valve did not infringe, but was a device similar to e Boyden valve, held not an infringement in 170 U. S. 537, 18 p. Ct. 707, 42 L. Ed. 1136. Afterwards defendant so modified valve as to eliminate the feature which differentiated it, and it as thought that it then infringed plaintiff's valve, as construed by e Supreme Court. A supplemental bill showing such later ingement was filed. It will be seen that the plaintiff had no case der its original bill, but sought to bring a subsequent infringeent before the court by supplemental bill. Before the supplental bill was filed, complainant moved for a temporary injuncn on a showing of the modified valve. Judge Lacombe denied e motion for injunction on the ground that no cause of action isted under the original bill, but inadvertently, it would seem, ve leave to renew the motion after defendant should have aped for and obtained leave to file a supplemental bill. Such a l was filed, and a demurrer heard by Judge Wallace (126 Fed. 1), who properly held that, when there is no cause of action in the iginal suit, there can be no supplemental bill. He said:

"The supplemental bill is, however, objectionable upon other grounds asned by the demurrer. It is an attempt to put in issue facts occurring sub-

sequently to the filing of the original bill, which can be proved without the aid of the supplemental bill, and which, when proved, will not entitle the complainant to any relief which he cannot obtain under the original bill. According to the averments of the supplemental bill, the original bill charges the defendant with infringement of the complainant's patent by making, selling, and using certain air-brake mechanism containing the inventions of the patent. The supplemental bill alleges that since the original bill was filed, and while proofs were being taken in the suit, the defendant modified or changed its mechanism in such a manner that it 'clearly' contains the invention of the patent. If the defendant had not infringed when the original bill was filed, complainant is not entitled by a supplemental bill to establish a right to relief by proof of subsequent acts. On the other hand, if the defendant had infringed, the new acts of infringement can be proved upon the accounting, and full relief obtained under the averments of the original bill, and a supplemental bill is neither necessary nor proper. 'Not every relevant event happening posterior to a bill renders a supplemental bill admissible, and therefore, when only a fact has occurred which may be proved on taking the account prayed for by the original bill, a supplemental bill is improper and demurrable.' 3 Daniell, Ch. Pr. 1663. But if the original bill entitles the complainant to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out new matter by a supplemental bill. Candler v. Pettit, 1 Paige, 169, 19 Am. Dec. 399."

In California Pav. Co. v. Molitor, 113 U. S. 617, 5 Sup. Ct. 618, 28 L. Ed. 1106, complainant secured an injunction against the use of a concrete pavement. Defendant then varied the mode of laying his pavement by ceasing to make it in separate and detached blocks, and only making a mark or crease on the surface while in a plastic state, thus giving the pavement the appearance of being made in detached blocks, and in fact answering all the purposes of detached blocks; the crease being sufficient to produce the results obtained by plaintiff's patent. Plaintiff moved for process of contempt, but it was held that this was not an appropriate remedy, since the question whether the new pavement was an infringement or not was a mixed question of law and fact, as was the question whether the original pavement constituted an infringement. The same rule was applied to the use by defendant of a card-playing tray constituting a different device. U. S. Playing Card Co. v. Spalding (C. C.) 93 Fed. 822. In Mack v. Levy (C. C.) 49 Fed. 857, after injunction defendant changed the device by using a different detachable handle for an opera glass; and it was held that it was doubtful whether this was an infringement, and the question would not be determined in contempt proceedings. Many other like cases are cited in Walker on Patents, § 708. A broader rule, however, applies to the taking of the account. The master may be directed to report on the use of various machines used by defendant, or may do so of his own motion. Cawood Patent, 94 U. S. 695, 708, 24 L. Ed. 238; Adams v. Keystone Mfg. Co. (C. C.) 41 Fed. 595. But the better practice seems to be for the court itself to decide all questions of infringement before the interlocutory decree is entered. Walker on Patents, § 742. See, also, Hoe v. Scott (C. C.) 87 Fed. 220; Cary Mfg. Co. v. Acme Flexible Clasp Co., 108 Fed. 873, 48 C. C. A. 118.

The question remains whether the use of the McGuire bracket should be brought in by supplemental bill, or left for a second suit.

he bracket is so different from defendants' first bracket that the uestion of infringement could not be decided in contempt proedings, and ought not to be on an accounting, if any. I think e ends of justice, by the saving of delay, vexation, and expense, ill be the better secured by the allowance of the supplemental ll.

Counsel for complainant, appealing to the discretion of the court, ge that the filing of a second bill would uselessly involve an iginal bill, an answer, a replication, and service of a subpœna, volving a delay of at least a quarter of a year, the proof of the tent, the proof of title, evidence as to the device used, expert stimony in chief, in reply, and in rebuttal by both parties as to e meaning of the patent, and as to each of the patents, etc., conituting the prior art in this case, depositions pro and con as to alleged prior invention and prior use, the making of physical hibits, and a lot of photolithographs, notarial or examiner's fees, pewriters' fees, attorneys' time and fees, the court costs, the cost printing a record of 250 large pages, the cost of obtaining copies patents therefor, and the time and expenses of separate briefs, all no other purpose whatever but to duplicate the record now in int, because a new phase of the question of infringement is prented by the supplemental bill.

On the other hand, defendants' counsel urges the following:

"Let us suppose, however, that the original bill does not set forth a good case, d that complainant, fully aware of this, is striving to bolster it up by the inoduction of another device, which it admits was not used until after the ng of the original bill, and which it may think more nearly resembles the vice of the patent. (It may be fair to say, in passing [says defendants' coun], that I have no doubt that this is the precise state of facts here.)"

If complainant has in reality no case in the original suit, the supemental bill must fail. It seems to me that this question can be irly considered and justly decided on final hearing, and that dendants' case will not be prejudiced by overruling the demurrer. further seems that the ends of justice will be promoted by allowg the supplemental bill to stand. If so able a jurist as Judge allace had clearly decided the question, I should hesitate to de de differently. But I think the Westinghouse Case is distinishable, for the reasons stated.

Demurrer overruled, with leave to plead or answer in 20 days.

RUDOLF v. BROWN et al.

(District Court, S. D. New York. April 14, 1905.)

IPPING—LIABILITY OF OWNER FOR SUPPLIES—CONSTRUCTION OF STATUTES. Act June 26, 1884, c. 121, § 18, 23 Stat. 57 [U. S. Comp. St. 1901, p. 2945], which provides that "the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole," is to be construed in connection with the limited liability act of 1851 (Rev. St. § 4283 [U. S.

Comp. St. 1901, p. 2943]), and does not apply to personal contracts, so as to exempt a part owner from full liability for supplies purchased by his authority, or with his knowledge and consent.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 637, 643.]

In Admiralty. Suit against vessel owners to recover for supplies.

Hyland & Zabriskie, for libellant.

Hunt, Hill & Betts, for respondent Brown.

ADAMS, District Judge. This action was brought by Maria J. Rudolf, engaged in the business of furnishing coal and other supplies to vessels in New York, against Charles R. Brown and George D. Barney, as owners of the yacht Impatient, to recover $176.32 for coal, water and wood supplied to her in July and August, 1904.

There is no dispute about the supplies having been furnished. The respondent Barney could not be found for the service of process in this district and has not appeared in the action. The respondent Brown, who was served, claims immunity for more than one-half which he has paid into court.

It appears that the respondents were equal half owners of the yacht. Barney, living in Brooklyn, was the registered master, and apparently managed her financial matters. He collected from Brown his half thereof, but failed to pay the bills, hence this action against Brown, who lived in Yonkers. The testimony shows that both parties occasionally used the boat, but in August it was principally used by Brown.

When the yacht went into commission Barney ordered the sailing master to obtain the supplies of coal, wood and water from the libellant. The question of the liability for more than one-half is now to be determined, under the United States Statutes, and the authorities construing them.

It is provided (Act June 26, 1884, c. 121, § 18, 23 Stat. 57, [U. S. Comp. St. 1901, p. 2945]):

"Sec. 18. That the individual liability of a shipowner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending."

The foregoing provisions were extended in 1886 "to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters." 24 Stat. 80, c. 421.

It is urged that these acts are in pari materia with the limited liability act of 1851, and that they should be considered together. That act provides (section 4283, Rev. St. [U. S. Comp. St. 1901, p. 2943]):

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, lost, damage, or forfeiture,

lone, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Without these acts, seemingly there can be no doubt of the liability of all the part owners, personally or in solido, for the ordinary debts of vessels. The Pilot, 9 Fed. Cas. 1100, 1102; Parsons on Ship. & Admty. 100. In the latter it was said (pages 100–102):

"In general, all the part-owners are liable in solido for the repairs of a ship, or for necessaries actually supplied. * * *

If one who has a claim for repairs or supplies receives a part of his claim from one or more of those liable in solido, those who thus pay a part, even if it be their share, or more than their share, are still liable for the residue. And they are thus liable, although the supplier expressly promised to discharge them in consideration of their paying as they did; for their payment alone would not be consideration enough in law to sustain the promise, even if they paid more than their shares, because they were legally bound to pay the whole."

It is claimed by the libellant that Gokey v. Fort (D. C.) 44 Fed. 364, is decisive of this case. That was a question of liability for a bill of repairs upon the schooner J. J. Pharo, in her home port, arising from collision by her own fault. The repairs were ordered by her master, who acted as ship's husband and managing agent, and ran the vessel upon shares. Recovery was allowed against the owners, notwithstanding a decree limiting their liability, under the provisions of the foregoing acts of congress. The ground of the decision, was the personal liability of the respondents because of their ownership in the vessel and the repairs having been ordered with the knowledge of some of them.

It was there said by Judge Brown in this connection:

"2. But the respondents were individually liable for the contracts of their managing agent, made in the home port, in the ordinary repair of the vessel, these repairs being known and approved by some of the owners. The Two Marys (D. C.) 10 Fed. 923; Scull v. Raymond (D. C.) 18 Fed. 549. It has been held that the limitation provided by the act of 1884 upon the liabilities of the owners 'on account of the ship' does not extend to their personal contracts, but only to the debts and liabilities that arise out of the navigation or business of the ship, or from the contracts of the master, under his general powers in the course of the voyage. The Amos D. Carver [(D. C.) 35 Fed. 665]; McPhail v. Williams (D. C.) 41 Fed. 61. Such has long been the construction of the broad provisions of the ordinance of Louis XIV., as well as of the similar provisions of section 216 of the Code of Commerce, (1 Valin, Comm. 568;) Emerigon, Cont. à la Grosse, c. 4, § 11; 2 Desjardin, Droit, Com. Mar. §§ 283–286; 2 Valroger, Com. du Code de Com. § 256. And, in general, repairs made in the home port by the owners, or by their authorized agent, are treated as the personal debts of the owners, and cannot be discharged by a surrender of the vessel."

* * * * * * * * * * * * *

"Construing the acts of 1884 and 1851 in the light of these decisions, and of the general maritime law which it was their purpose to introduce into our jurisprudence, I must hold that the decree set up in the answer, limiting the liability of the respondents, as a decree based on claims growing out of a subsequent voyage, does not affect the libelant's prior demand, and that this prior demand was from the first a personal liability of the respondents, and not subject to limitation at all;"

In The Republic, 61 Fed. 109, 9 C. C. A. 386, in which limitation of liability was sought, it was refused because the corporation

owning the barge, concerning which the limitation was sought, failed to make a sufficient examination to discover the weakness and rottenness of certain parts. It was there said by Wallace, J., speaking for the Circuit Court of Appeals (page 113, of 61 Fed., page 390, of 9 C. C. A.):

"We do not understand it to be seriously argued that section 18 of the act of congress of June 26, 1884, displaces the liability of shipowners for losses occasioned by their own negligent acts. The section does not purport to repeal any pre-existing law, but is legislation in pari materia with the act of 1851. The scope and object of the section are pointed out in Force v. Insurance Co. (D. C.) 35 Fed. 778; The Amos D. Carver, Id. 669; and Gokey v. Fort (D. C.) 44 Fed. 364. It has no application to the present questions."

The statutes have been considered in other districts and a somewhat different construction given to them, viz.: Whitcomb v. Emerson (D. C.) 50 Fed. 129, and Warner v. Boyer (D. C.) 74 Fed. 873, but even assuming that those cases are opposed to the decision of Gokey v. Fort, the latter must be followed in this district.

The conclusion in the latter case that the act of 1884, does not cover contracts entered into personally by a shipowner was reached by Judge Nelson in McPhail v. Williams, mentioned in Gokey v. Fort, supra, and by Judge Webb in The Giles Loring (D. C.) 48 Fed. 463, 471. See, also, Hughes on Admiralty 308, 311.

Under Gokey v. Fort, it would seem that the libellant was entitled to recover, but in any aspect of the case, a personal participation by a part owner in the contraction of debts, for a vessel, would doubtless make him responsible therefor, notwithstanding the statute, and there was sufficient in this case to impose such a liability upon the respondent Brown, in that the facts here show that he was aware of the incurring of this debt. It appeared that he used the yacht several times in July and almost exclusively in August. He must have had presumptive knowledge therefore of the use of supplies of this nature, and even if he did not know from whom they were obtained, he was personally bound therefor, because it was obvious that the vessel could not be used by the owners without them. He had actual knowledge that some of the supplies were being obtained, because it appeared that he paid his co-owner in August some $700 for his share of them, which included the libellant's coal bill in July. This was, at least, a ratification of the purchase, which is equivalent to a prior command to make it—Broom's Legal Maxims, 866—and would seemingly have authorized the contraction of debts for the vessel on account of all the owners by one of them.

Decree for the libellant, with interest.

THE DREDGE NO. 1.

(District Court, S. D. New York. April 25, 1905.)

MIRALTY—DISTRIBUTION OF PROCEEDS OF VESSEL—PRIORITY BETWEEN CLAIMS.

On distribution of the proceeds of a vessel sold in admiralty, one who advanced money to pay off a lien for salvage on said vessel, under an agreement that he should be subrogated to such lien, *held* entitled to priority of payment over claims based on prior personal judgments against the owners.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, § 105.]

In Admiralty. On motion for distribution of fund.

Alexander & Ash, for petitioners Bleakley and the Rodermonds.
James A. Deering, for petitioner Benjamin L. Odell.

ADAMS, District Judge. These are motions for orders of distribution of the proceeds of the sale of Reed Brothers' Dredge o. 1 on the part of Clarence L. Bleakley, Charles B. Rodermond d Clarence T. Rodermond, and Benjamin L. Odell, the various aimants of the fund, amounting to $451.99, now in the registry the court. The claims are $455, $329.88 and $309.53, aggregating ,094.41, or $642.42 in excess of the fund. The question to be dermined is, what disposition shall be made of the fund in view of e deficiency?

The claim of Bleakley arose out of an assignment of a claim on e part of Merritt & Chapman Derrick & Wrecking Company for lvage services rendered to the dredge. The commissioner deribes the transaction as follows:

"I find that on the 21st day of June, 1904, a libel was filed in this court ainst the Dredge No. 1 by the Merritt & Chapman Derrick & Wrecking Comny on a claim of $550 for salvage; that thereafter and on the 21st day of vember, 1904, said dredge was attached by the Marshal of this District der and by virtue of a monition issued in accordance with the prayer of d libel; that at said time Ferdinand C. Reed and Edward B. Reed were e owners of said dredge and that Edward B. Reed and the representatives his brother who has since died, continued to be the owners thereof until e attachment and sale herein; that on November 26th, 1904, the said Reed others applied to petitioner for an advance of $455 to be used in paying said salvage claim and securing a release of the dredge from the custody the Marshal, and agreed that if petitioner would advance the same, he uld have an assignment of said lien and a lien upon the dredge as security the money so advanced; that petitioner thereupon advanced the Reed others the sum of $455 and that the same was used to pay the Merritt & apman Derrick & Wrecking Company and the expense of attachment, and e dredge was thereupon released from custody; that no part of said $455 s been paid; that an inspection of the records of this court shows that ere is now in the Registry thereof the sum of $451.91, the balance of the oceeds of the sale of said dredge."

The claim of the Rodermonds is described by the commissioner as llows:

"I find that the petitioners herein carried on the business of shipbuilding d repairing vessels in the year 1903 at Tompkins Cove, New York, and that the months of September and October of said year they made repairs to the redge No. 1 of the value of $327.73; that subsequently they brought pro-

ceedings in the United States District Court for the Eastern District of New York for the recovery of said amount, and on the 7th day of July, 1904, a final decree was entered therein against Ferdinand C. Reed, Edward B. Reed and George Marsdorf for the sum of $379.88; that the sum of $50 has been paid on account therein and that the balance of $329.88 still remains due and unpaid; that an inspection of the records of this court shows that there is now in the Registry thereof the sum of $451.91, the balance of the proceeds of sale of said dredge."

The claim of Odell is described by the commissioner as follows:

"I find that in the latter part of March 1904, two proceedings in admiralty were pending in the United States District Court for the District of New Jersey against Ferdinand C. Reed and Edward B. Reed, owners of the Dredge No. 1, and that Benjamin L. Odell became surety therein in each of said proceedings; that in one of said proceedings brought by William Gaskell, et al., a final decree was entered in favor of libellants on September 19th, 1904, for $111.40 and that in the other brought by Samuel Isaksen a judgment for libellant was entered on the same day for $167.60; that subsequently on demand of the United States Marshal for the District of New Jersey, the petitioner paid said Marshal the sum of $309.53, in satisfaction of the execution in his hands issued under said judgment; that on the 9th day of January, 1905, petitioner entered judgment in the New York Supreme Court, County of New York, for the amount so paid, viz., $309.53 against Edward B. Reed and that no part of said judgment has been paid; that at the time of the attachment and sale of the said dredge in this court, the said Edward B. Reed and the estate of his deceased brother Ferdinand C. Reed, were the owners of said dredge; that an inspection of the records of this court shows that there is now in the Registry thereof the sum of $451.91, the balance of the proceeds of sale of said dredge."

These reports have not been excepted to and must be regarded as correct.

It appears that the claim of Bleakley should have precedence over the others. The circumstances under which the money was advanced, subrogate him to all the rights of the assignor, and the fact of such rights being based on salvage entitles the assignee to maritime priority, notwithstanding the existence of the earlier judgments in personam against the owners of the dredge—Collins v. The Ft. Wayne, 6 Fed. Cas. 119. As this claim will absorb the whole fund, it is not necessary to consider the other questions presented.

Decree accordingly.

CLEVELAND ELECTRIC RY. CO. v. CITY OF CLEVELAND et al.

(Circuit Court, N. D. Ohio, E. D. April 24, 1905.)

No. 6,851.

1. STREET RAILROADS—FRANCHISES—LIMITATIONS—MUNICIPAL CORPORATION—POWERS.

A municipal corporation entitled to grant a street railway franchise had power to limit the grant as to time, prior to the passage of Act Ohio May 14, 1878 (75 Ohio Laws, p. 360), providing that no grant or renewal of a grant shall be valid for a greater period than twenty-five years, though prior to the passage of such act there was no statute authorizing the municipal corporation to limit such grants.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1469; vol. 44, Cent. Dig. Street Railroads, § 42.]

SAME—CONTRACT RIGHTS—SURRENDER—UNLIMITED FRANCHISE.

Where a street railway company, having an alleged unlimited franchise to operate a line on a certain street, granted prior to the adoption of 75 Ohio Laws, p. 360, limiting such grants to 25 years, accepted the terms of a subsequent ordinance authorizing it to extend its line on such street, and to equip and operate such extension and all of its tracks on such street for a period of 25 years, the acceptance of such ordinance operated as a surrender of its alleged unlimited franchise as to such street.

SAME—JUDGMENTS—ESTOPPEL—RES ADJUDICATA.

Where a street railway company was compelled by action of the public to defend itself in court against a present claim of misuser of its franchise, mere reasons presented by it in argument in such action, though inconsistent with its subsequent claim as to the continuance of its franchise, did not amount either to an estoppel or establish a claim of res judicata.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Evidence, §§ 165–168.]

SAME—CONSOLIDATION OF LINES—EFFECT.

Neither the consolidation of street railway lines into one company and one system, nor transfer obligations imposed by an ordinance authorizing the laying of an additional line on another street, operated to prolong the life of any prior franchise.

SAME—EXTENSION OF FRANCHISE BY IMPLICATION—ORDINANCE—TITLE.

Where none of the titles of several city ordinances granting street railway extensions contained any intimation of a purpose to deal with the subject of the life of the original grant, though the "subject" of the ordinance was required to be "clearly expressed in its title," an extension of the main franchise could not be implied therefrom.

SAME—PERMISSION TO EXTEND TRACKS—EFFECT.

Ordinance granting a street railway company permission to extend tracks and operate them "in connection with the main line" for a period which endures longer than the right to operate the main line did not operate as extending the main-line franchise, regardless of whether such extensions were capable of independent operation.

SAME—DETERMINATION OF FRANCHISE.

Where a street railway company operating lines on various streets, under franchises which expired at different times, accepted an ordinance authorizing the substitution of electricity for horse power on its G. Street branch, and providing that the right to operate such branch should continue during the term of the company's then present grant for the operation of the tracks on such branch, the ordinance fixed a uniform period for termination of the franchise of the G. street line over its entire length, as extended under a prior ordinance, and therefore abrogated any prior contract for the operation of an extension of the G. street branch for a period longer than the expiration of the G. street franchise.

STATUTES—CONSTRUCTION—EXTENSIONS—AUTHORITY OF MUNICIPALITY.

Rev. St. Ohio, §§ 2501, 2502, provide for the granting of original street railway franchises, after advertisement on public bids, to the corporation which will agree to carry passengers at the lowest possible rates of fare, and shall have previously obtained the written consent of a majority of the property holders on the several streets along the proposed route, provided that no street railway grant, or renewal of a grant, shall be valid for a longer period than 25 years. Section 2505 authorizes the city council to grant any street railway corporation power "to extend its track," subject to the provisions of sections 3437–3443, none of which, however, relates to the establishment of a route or a renewal of a grant, and did not require such extensions to be on competitive bidding, etc. *Held*, that an extension granted under such sections is not a "new route,"

having an independent life, but depends for its existence on the original line, and expires with the franchise thereof.

9. SAME—DOUBLE-TRACKING LINE—VALIDITY.

Where a city council established a street railway route, and granted a franchise for the operation of the road, as provided by Rev. St. Ohio, §§ 2501, 2502, the city council had no power, by merely giving the corporation the right to double-track its lines, to confer power on the railroad company to operate the second track for a period beyond the term of the franchise of the line double-tracked.

In Equity.

The complainant files its bill against the city of Cleveland and the Forest City Railway Company, alleging that the enforcement of a certain ordinance of the city of Cleveland will violate the complainant's rights under the Constitution of the United States, especially by impairing the obligation of its contracts with the city; asking that the ordinance be decreed to be null and void; and, alleging that irreparable injury will be done to it by enforcing the ordinance, and that it has no adequate remedy at law, prays that the defendant the city of Cleveland, its officers, agents, attorneys, etc., be now temporarily, and hereafter perpetually, enjoined from putting the ordinance alleged to be illegal into effect. The bill sets out the corporate history of the complainant, and the several ordinances of the city upon which its right to operate a street railroad is based, and especially in relation to its right to operate a street railroad on what is called its Garden street (now Central avenue) line, which is the immediate subject of this controversy. An amendment to the bill was filed before the hearing, but this will be treated and spoken of in this opinion as part of the bill itself. Upon the filing of the bill a temporary restraining order was allowed ex parte, and the case is now before the court upon the application for a temporary injunction. The defendants have fully answered, all of the ordinances and other facts affecting the question before the court have been presented, the case has been most ably and elaborately argued, and this hearing, so far as this court is concerned, is practically a hearing on the merits.

The complainant, by consolidation with other companies and by purchase of other lines, is now the owner of about 236 miles of street railway track in the city of Cleveland, comprising practically all of the street railway mileage within the city. The East Cleveland Railroad Company is the constituent company to which, prior to the consolidation, all of the rights involved in this proceeding were granted. This corporation—that is, the East Cleveland Railroad Company—was incorporated in the year 1859, and in the course of the following three years received grants, by ordinance of the city of Cleveland, for the operation of a line beginning at what was then the easterly city limit, at Willson avenue; thence by way of various streets to and through the Public Square to Water street. These grants were made to expire September 20, 1879, and under them a street railroad was constructed. In 1862, the East Cleveland Railroad Company was granted by the township trustees of East Cleveland township the right to construct a single street passenger railway track from the Willson avenue terminus of its line, in the city of Cleveland, eastwardly along Euclid street (now Euclid avenue), a distance of about two miles, to Doan's Corners. There was no time limitation to this grant, and under it a street railroad was constructed and put in operation. Prior to January 14, 1868, the East Cleveland Railroad Company applied to the city council of the city of Cleveland for leave to construct a street railroad from the intersection of Prospect and Brownell streets, to connect with the main line of its railroad; thence along the center of Brownell street to its intersection with Garden street; thence easterly along the center of Garden street to and across Willson avenue to the easterly boundary of the city. The requisite consents of the property owners were filed, bond in the sum of $20,000 was given, bids were filed as required by the statute, and the council declared by resolution that the bid of the East Cleveland Railroad Company "provided for the lowest rates of fare for carrying passengers on the proposed line," made by any company or individual. There-

upon, on January 14, 1868, the council passed a resolution giving to the East Cleveland Railroad Company permission to lay down a track on the streets named in the application, and to use and occupy the tracks, switches, and turn-outs during the period of 20 years, and also the right to continue to use and occupy the streets, avenues, and public grounds over which its main line was then constructed and operated, westerly from the junction of the Garden street branch with the main line to its western terminus (that is to say, Water street), for the same length of time. Thus originated the line which is the subject of this litigation. On January 16, 1868, the railroad company filed its acceptance of "the grants and permits to construct and operate a street railroad from their main track in Prospect Street, through Brownell to Garden, and through Garden Street to the easterly line of the City, in accordance with their petition and bid, and the ordinance and resolution of the Council."

In March, 1868, the village of East Cleveland, which bounded the city of Cleveland on the east at the point where the Garden street branch, as granted by the ordinance of the city of Cleveland, ended, granted to the East Cleveland Railroad Company the right to construct a street railroad, "as a branch of its said railroad," through and along certain streets in the village, beginning at the termination of its branch road at the easterly line of the city of Cleveland, in Willson avenue, for a period of 20 years. This ordinance was accepted by the street railroad company, and the Garden street branch was built, as contemplated by the two ordinances just referred to, extending from Prospect street, at Brownell, to the southerly line of Wade street, at Baden street. The length of this Garden street branch, as thus originally established by the ordinances of the city of Cleveland and the village of East Cleveland, was about two miles. On March 25, 1873, the city council passed a resolution granting to the East Cleveland Railroad Company the right to lay a second or double track in Garden street, between Brownell street and Willson avenue. There are no words in this ordinance limiting the time during which the right should exist.

On May 23, 1876, a portion of the village of East Cleveland having been annexed to the city of Cleveland, the council of the city passed an ordinance entitled "An ordinance to permit the East Cleveland Railroad Company to extend the Garden street branch of its road," which ordinance authorized the railroad company "to extend the Garden street branch of its road to the easterly end thereof, along Garden street to Baden avenue, and along Baden avenue to Quincy street, and along Quincy street to New street, and along New street to Garden street, there to connect with the Garden street track; and to equip and operate said extension for twenty years in connection with said branch and its main line."

On September 15, 1879, the city council passed an ordinance granting a renewal, for the period of 25 years from and after September 20, 1879, of the right to operate a street railroad in and along Superior street, Euclid avenue, Erie street, Prospect street, Case avenue, and Euclid avenue. This is what is sometimes in the ordinances referred to as the "main line" of the East Cleveland Railroad Company.

On March 20, 1880, the city council passed an ordinance entitled "An ordinance to permit the East Cleveland Railroad Company to extend the Garden street branch of its railway," which, omitting the formal parts, is, in full, as follows:

"Section 1. Be it ordained by the city council of the city of Cleveland, that the East Cleveland Railroad Company be and is hereby authorized and empowered to extend the Garden street branch of its railway from the present track, at the intersection of Baden avenue and Quincy street, in an easterly direction on and along said Quincy street, to the intersection of Lincoln avenue, and to equip and operate the said extension and its Garden street branch for the period of twenty-five years from and after the passage of this ordinance; but with the express condition that no increase of fare shall be charged by said company on any part of its said branch, or of its main line, or of said extension by reason of said extension. This grant is made subject to all ordinances of said city council now in force, or which may hereafter be duly passed regulating street railroads.

This is the ordinance which the city claims is the only ordinance under authority of which the Garden street branch is now operated. It expired on the 22d day of March of the present year.

On February 9, 1885, the city council passed an ordinance entitled "An ordinance to permit the East Cleveland Railroad Company to extend the Garden street branch of its railway," by which it authorized the railroad company "to extend the Garden street branch of its railway from the termination of its present track at the intersection of Quincy street and Lincoln avenue in an easterly direction on and along said Quincy street to Woodland Hills avenue and equip and operate said extension as a single-track railroad, with all necessary switches, * * * in connection with said branch and its main line, and terminating with the grant for the main line," etc.

At this time the Garden street franchise ran to March 22, 1905, and the "main line" franchise to September 15, 1904.

On June 18, 1887, an ordinance was passed entitled "An ordinance to permit the East Cleveland Railroad Company to extend the Garden street branch of its railway," by which the railroad company was authorized "to extend the Garden street branch of its railway from the intersection of its present track with Baden avenue, upon Garden street, in an easterly direction along and upon said Garden street to the easterly line of Lincoln avenue, and equip and operate said extension. * * * in connection with said branch and its main line, and terminating with the grant for the Garden street main line."

July 13, 1888, an ordinance was passed extending the franchise of the Euclid avenue line (sometimes called "main line") to July 13, 1913.

On March 16, 1890, an ordinance was passed, entitled "an ordinance granting the East Cleveland R. R. Co. the right to substitute electric motive power for horse power upon its Garden street branch." Section 1 of this ordinance is as follows:

"Section 1. Be it ordained by the city council of the city of Cleveland, that the East Cleveland R. R. Co., its successors or assigns, is hereby authorized and granted the right to operate its Garden street branch by electricity, i. e. from the intersection of Prospect and Erie streets, along Erie street to Ohio street, along Ohio street to Brownell street, along Brownell street to Garden street, and along Garden street to Lincoln avenue; also along New street from Garden street to Quincy street, and along Quincy street to Woodland Hills avenue, and authority is hereby granted said company to erect and maintain on said streets all necessary poles and wires, and the necessary appliances and fixtures for the conducting of electric currents to operate by electric motive power the said Garden street branch during the term of its present grant for said Garden street branch. All poles erected under this ordinance to be of iron unless otherwise ordered by the board of improvements."

On April 4, 1890, the East Cleveland Railroad Company accepted the above ordinance, and agreed "to abide by the provisions, conditions, limitations and restrictions contained in said ordinance."

On March 20, 1891, an ordinance was passed authorizing the East Cleveland Railroad Company to lay and operate a second track on Central avenue (formerly Garden street) from the east line of Willson avenue to the Cleveland & Pittsburgh Railroad tracks; and it was provided by section 4 of the ordinance that "the right herein granted shall be valid until the expiration of the grants for the company's main line."

On April 20, 1891, the council passed an ordinance granting to the East Cleveland Railroad Company permission to lay an additional track in Quincy street, from New street to Woodland Hills avenue, authorizing the company to connect the additional track with the tracks then laid upon New street, and providing that the right therein granted should be valid "until the expiration of the grants for said company's tracks in Quincy street east of Lincoln avenue, to wit, July 13, 1913."

On March 25, 1893, the Cleveland Electric Railway Company was organized, by the consolidation of the East Cleveland Railroad Company and the Broadway & Newburg Street Railway Company, and subsequently it was further enlarged by consolidation with two other street railroad companies.

On February 19, 1894, an ordinance was passed granting permission to the eveland Electric Railway Company and the Cleveland City Railway Compa- to extend their tracks in Willson avenue. Willson avenue is a cross-town reet, and crosses the various tracks of the Cleveland Electric Railway Com- ny and the Cleveland City Railway Company at many points, including the acks of the Central avenue (formerly Garden street) line. Section 6 of this dinance provides as follows: "A passenger on any car operated on any part said Willson avenue, on payment of one fare, either in cash or by ticket, shall entitled, without additional or extra charge, to be transferred to any her line of either of said companies intersecting or coming to said Will- n avenue, including the lines on Broadway, and to have a continuous le thereon, with the right, without additional or extra charge, to be trans- rred from such second line to a car on any other line of the company erating the same which crosses the Cuyahoga river, and passengers on y line of either of said companies intersecting or coming to said Willson enue, including the lines on Broadway, shall be entitled, without additional extra charge, to be transferred to said Willson avenue line and to have continuous ride thereon. The council shall at all times have the right prescribe rules and regulations in respect to the transferring of passengers provided for in this action."

On July 2, 1894, the council passed an ordinance granting to the Cleveland lectric Railway Company the right to extend and operate its street railroad Quincy street, from New street to Willson avenue. The distance between ese two points is very short, the purpose being to permit a connection be- een the two tracks. Section 6 of this ordinance provides as follows: "This ant shall terminate with the grant for said company's present line in uincy street."

On August 8, 1901, the council passed an ordinance granting to the Cleve- nd Electric Railway Company the right to lay a track along the easterly le of the Public Square, and the right to use the tracks of the Cleveland ity Railway Company on Superior street from the westerly side of the ublic Square to Erie street. Section 4 provides: "This grant shall expire March 22, 1905, unless it be sooner terminated by the city, and the city eserves to itself the right to terminate it at any time," etc. The purpose this ordinance was to facilitate the transportation of passengers in the ngested part of the city.

The result of the various consolidations of companies and acquisition of roperties has been to establish one system throughout the city, over which ly one fare is charged for a continuous ride, with certain privileges of ansfer.

On January 11, 1904, the city granted to the Forest City Railway Company he renewal right to maintain and operate the existing street railroads," mely, the Garden street line. No question is made, and it is stated by ounsel on both sides that no question can be made in this court, as to the alidity of this ordinance, except on the ground that, as to the complainant, is in violation of the Constitution of the United States.

Squire, Sanders & Dempsey, for complainant.
Newton D. Baker, City Sol., for defendant city.
Garfield, Howe & Westenhaver, for defendant Forest City Ry. Co.

TAYLER, District Judge (after stating the facts). The com- lainant bases its claim to relief on several grounds, which are, I hink, fairly stated as follows:

First. (1) That since, prior to the act of 1878, the Legislature ad not delegated to the municipality the right to limit the term f a street railroad franchise, and as the Legislature has not since hat time withdrawn from any street railroad company enfranchised rior to 1878 the rights it had thus acquired, the act of the city ouncil and of the council of the village of East Cleveland in limit-

ing the term of the complainant's predecessor's rights to 20 years was invalid, and that the franchise of the company's "main line" is unlimited. (2) That, for the same reason, since the trustees of East Cleveland township gave an unlimited and original franchise to the East Cleveland Railroad Company, that franchise still endures. (3) That since, as claimed, the right to operate the Garden street (Central avenue) line, or at least a part of it, is made to expire with the expiration of the franchise on the "main line," such right is now held in perpetuity or for an unlimited period.

Second. That by reason of the consolidation of the companies, and the creation of a "system" over which there is a right to ride for one fare for a continuous passage, however long, with certain transfer rights, the system must be considered as a unit, with a period of expiration fixed at the date of the last expiring franchise.

Third. That, because of the obligations imposed by the Willson avenue ordinance—especially by section 6, requiring transfers at the intersection of the Central avenue and the Willson avenue lines—a right arises corresponding to the duty imposed; and since the Willson avenue franchise will last until 1914, and the duty to transfer at Central avenue continues until that time, the right to operate the Central avenue line is extended, by implication, to that date.

Fourth. (1) That the original Garden street (Central avenue) grant was for an "extension," and not a new route, and that the granting of the right to operate the several "extensions" thereto "in connection with the main line," or "in connection with the Central avenue branch," to a time beyond the expiration of the right previously given to the "main line" or to the Central avenue branch, operated to extend the time of expiration of the franchise of the main line and of the branch, and that this is true whether by "main line" is meant either the Euclid avenue line, or what is called the "Garden street branch." (2) That some of the Garden street ordinances—some for "extensions" and some for laying additional tracks—provide for an expiration the same as for the "main line," and that, as to the ordinance for double-tracking on Quincy street east of Lincoln avenue, it is explicitly provided that the grant should be valid until "the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue, to wit, July 13, 1913," and that, by the clear implication of the language, we must conclude that not only does the right to operate the line east of Lincoln avenue run until 1913, at least, but that the whole Garden street line must have the same life.

I think I have stated the substance of the claims made by the complainant, and they will be discussed in the order in which they have been given.

1. As to the claim of perpetual or unlimited franchise: Prior to the act of May 14, 1878, the Legislature had given to municipal councils the general power to consent to the use of their streets by street railroads, and to prescribe the terms and conditions of such use. By the act of May 14, 1878 (75 Ohio Laws, p. 360), it is provided that no grant, or renewal of a grant, shall be valid for

greater period than 25 years. It thus appears that prior to the v of 1878 the Legislature had not undertaken to use the authority ich it possessed to put any limit upon the time which might be anted by a municipal corporation to the right of a street railroad mpany to occupy streets. After that the Legislature withdrew om the municipality all power which it may have had prior to at time to grant such franchises for a period in excess of 25 years. l of the ordinances passed by the city of Cleveland and by the lage of East Cleveland, as well those passed prior to 1878 as ose passed since that time, fixed a time limitation on the grants d renewals given to street railroad companies. The only unlim-d grant is that given by the township of East Cleveland.

The conclusion to which I have come is that prior to the act of 78 the council of the city of Cleveland had full power to limit e term of a street railroad's franchise to occupy the streets, and at even if it did not have such power, and such limitation was in-lid, nevertheless any rights which may have accrued to the edecessors of the complainant, as well as the right to an unlimited anchise which it had from the township of East Cleveland, have en, for valid considerations, yielded up to the city. If we assume at on March 22, 1880, the complainant, or its predecessor in title, d an unlimited grant over some part of its Garden street line, it is ear that, as a property right, it could contract with the city con-rning it; for some accruing advantage it could contract to give ck to the city such portion of the term of the franchise as might agreed upon. What was done by the ordinance of March 22, 80, passed when the council had the power to grant a franchise r a limited term? It was agreed by that ordinance that the com-ny might extend its Garden street line to Lincoln avenue, and quip and operate its said extension and all of the Garden street acks" for the period of 25 years. This ordinance was accepted the complainant, and constituted a contract. If at the time of e passage of this ordinance the complainant had the right to op-ate any part of the Garden street line after March 22, 1905, that ght was yielded up by force of the contract made through the dinance of March 22, 1880.

Counsel for the complainant cite on this point the case of Citi-ns' Railway Company v. City Railway Company (C. C.) 64 Fed. 7, and the same case on appeal, 166 U. S. 557, 17 Sup. Ct. 653, 41 Ed. 1114. In the Circuit Court, Judge Woods, sitting with Dis-ict Judge Baker, held that the term of the franchise was unlim-ed, and also that an additional and unexpired term of seven years ad been granted. Judge Baker dissented from the holding that e term was unlimited, but agreed that it had seven years more to n, so that both were of opinion that an injunction should be al-wed. The case went to the Supreme Court. There it was held at it was unnecessary to pass on the question of an unlimited ant, because the unexpired term of seven years furnished ground r ample relief. The decree of the lower court was therefore mod-ed by striking out such parts of it as recognized an unlimited

grant. The modified decree was exactly what would have been entered by Judge Baker, and exactly what the Supreme Court would have entered if it had found that there was no unlimited grant. Surely, if the city had the right to grant the use for an unlimited period, it had the right to grant it for a limited period. The greater power would include the less. But apart from that, there was no question in the Indianapolis case arising out of the making of a new contract with the city after the state had delegated to it the power to grant franchises for a limited term. That is the situation here, and that would control the determination of the question before us, even if the Supreme Court had sustained the validity of Judge Woods' decree.

Counsel for the complainant, in support of his contention for perpetual franchise, cites the case of State ex rel. Taylor v. Columbus Railway Company, 24 Ohio Cir. Ct. R. 609. A careful examination of this case shows that, so far from sustaining the contention of the complainant, it is authority against it. This case does not hold that prior to the act of 1878 the council of a municipal corporation was without power to impose a limitation of time on a street railroad franchise. It did hold and does hold that, until the statute imposed the 25-year limitation on the power of the council, a franchise granted without limitation was perpetual, in so far as the power of the council existed to terminate it; the court holding that it could only be dealt with under the reserved power of the Legislature, as granted by the Constitution.

The second proposition of the syllabus is as follows:

"Such consent given prior to said act [that is, the consent of the city to operate a street railway prior to the act of May 14, 1878], without any limitation of time, or to a corporation with succession during the term of its charter, is revocable only by legislative authority."

The third proposition is as follows:

"A franchise or privilege to construct and operate a street railway, granted and consented to prior to said act, without limitation of time, is perpetual, but subject to be determined by the General Assembly under section 2, art. 1, or under sections 1, 2, art. 13, of the Constitution."

In the opinion, on page 621, it is apparent that counsel for the street railroad company recognized that the council might limit the grant. I quote from the opinion:

"The contention of counsel for the defendant [that is, for the street railway company] is that these statutes expressly confer upon municipalities power to grant the right to use the street, and that, the power being unlimited as to the duration of the grant, it is in the discretion of the municipality to grant without limitation, and, if it does, the grant is irrevocable and perpetual."

And again, on page 637, the court says:

"But the right or franchise conferred by the state [prior to the act of 1878] being unlimited as to its duration, and the city, under its power to agree upon the terms and conditions under which the right might be exercised, not having imposed any such limitation, the right continues, subject to be determined only in virtue of the power reserved either by legislation or by the courts by forfeiture."

It therefore appears to have been recognized and held in this se that if, prior to the act of 1878, the council had seen fit to im- se a time limitation on a franchise, such limitation would have en valid. That case also passes upon the question of the effect succeeding ordinances upon the unlimited grants theretofore ven. An examination of these ordinances shows that not one them undertook to fix a time limitation, or indicated in any way, contract or by implication, that the railway company was yield- g up any unexpired term of any previous franchise. For instance, stated on page 639, the court says:

'It is contended also that in some of the ordinances consenting to double cks it is provided 'that nothing in this ordinance shall in any wise work extension of the charter of said railway company,' and that this is an mission by the company that its franchise is not perpetual; that the sev- l ordinances passed subsequently to 1878 repealed former ordinances and de new agreements, and that by acceptance of the latter ordinances the mpany gave up all rights under the former ordinances; and that, as the ter ordinances were passed subsequently to 1878, the limitation of twenty- e years contained in the act of that year applies; and that contention is de also in respect to ordinances making new or additional agreements, t not expressly repealing former ordinances. These contentions have given much trouble, because counsel refer to ordinances we are unable to find, her attached as exhibits to the pleadings, or in the agreed statement of ts. However, the alleged admission by the company is immaterial, for is neither averred nor shown that the action of the city was in any instance ocured or influenced by the alleged admission; and, as to the other con- tions, if they are good, then they concede that, by the new agreements or linances, consent was given for twenty-five years, and a present right to upy the streets, and, when a right presently to occupy the streets is con- ded, we do not consider or determine the moot question of its possible dura- n."

It is thus apparent that the court did not have before it any dinance which explicitly put a limitation on the franchise, and, en if it did, it did not pass upon the question, but held that, there was still time to run, upon the theory of the plaintiff, no actical question arose as to the right to operate its tracks.

The effect of the passage of an ordinance providing for the sub- itution of electricity as a motive power in place of horse power referred to on page 640 as follows:

'As to the ordinance authorizing the substitution of electrical power, we y say, in the words of Mr. Justice Brown in City Ry. Co. v. Street Ry. Co., 5 U. S. 557, 569, 17 Sup. Ct. 653, 657, 41 L. Ed. 1114, 'There is nothing in the called electrical ordinance which affects this question.'"

Now, an examination of the case referred to, in which Mr. Justice rown delivered the opinion, discloses that there was nothing uching upon the term during which the right should exist, except e words:

'Nothing herein contained shall be construed so as to lengthen the term of e franchise, enlarge, or in any way change or affect, the rights of the tizens' Street Railway Company," etc.

The manifest purpose of the insertion of that provision was to ave in statu quo the pre-existing right, so far as duration of fran- ise was concerned.

Counsel for the city contend that the action of the court in the case of State ex rel. Hadden v. East Cleveland Railroad Company, 6 Ohio Cir. Ct. R. 318, in which this ordinance of March 22, 1880, was under consideration, estops the complainant from now making any claim of the right to a perpetual franchise. There is some force in this contention, but it is not convincing. The main question in that case was whether a renewal could be granted before the expiration of the grant to be renewed. The railway company did not seek the forum, but was compelled by action of the public authorities to go into court and defend itself from a present claim of misuser; and mere reasons presented in argument could not, even if inconsistent with the present claim, amount to estoppel, or make that case res adjudicata as to this question.

The conclusion, therefore, to which I have come in respect to this claim of perpetual or unlimited franchise, is that prior to the act of 1878 the council had the right to limit the term of a franchise, and that, as to any franchise granted for an unlimited period, the rights of the complainant have been wiped out by its subsequent contracts entered into with the city.

2. As to the effect of the consolidation and the creation of a system: I am not at all impressed with the force of this claim. Of course, there are many and obvious advantages in the development of a system. Unity of management and of fares, as well as unity of responsibility, is a thing much to be desired; and the proposition that, on that account, renewals of franchises might come by implication, would be more plausible if it were not for the consequences which would manifestly follow. It is true that with a system, in so far as it is essential that all of its constituent parts should be unified, the right to operate it and all of its parts ought to be co-determinate; but two observations conclusively answer the contention of the complainant: First, that, if there is any control over the life of the system and of its parts, it is the life of the system which must control the life of the parts, not the part the system; second, it is far from the truth that, physically or practically or legally, any one part of the system is essential to the operation and life of the system.

3. The Willson avenue ordinance: The claim that the imposition of certain contract duties by section 6 of the Willson avenue ordinance creates, by necessary implication, a franchise right enduring as long as the Willson avenue franchise, is made. But an examination of that ordinance does not support the contention. It is true that, under the provisions of section 6, it is made the duty of the complainant to transfer passengers to its Garden street line. But the council could not have intended, by so requiring, that such transfers be made by the complainant when the complainant had no Garden street line; and, if it had so intended and had so declared, it would have been invalid. To assume that the city could terminate the right to operate the Garden street line, and make it impossible for the complainant to transfer passengers at the intersection, and then hold the complainant responsible for not transferring them, is to assume an impossibility.

4. (1) We now come to the last and most important of the considerations urged by counsel for the complainant, namely, that the effect of the several ordinances relating to the Garden street (Central avenue) line is to extend the franchise along that line, for its entire distance, until July 13, 1913. This involves an inquiry into the nature of these ordinances and the history of the Garden street line, as well as a discussion of the power of municipal corporations, and the method by which, if at all, a franchise can arise by implication.

The public cannot be held to have parted with its fundamental rights, except by clear and explicit language, or by implication equally clear. This rule of law is thoroughly established, and must not be relaxed. It is essential to the preservation of the rights of the people, for whose benefit Legislatures and municipal councils are created, and public service corporations permitted to exist.

Let us examine into the grounds of these salutary definitions and declarations.

In the state Legislature, under the sanction given and limits set by the Constitution, is reposed the sovereign power of the state. Some of that power it has delegated to the municipal council. A fragment of its authority, which it may at any moment recall, it has turned over to the council of the city of Cleveland. Among other things, it has so turned over to the city is the power of limiting to 25 years the time during which a street railway company, under its perpetual charter to be a corporation, may operate its cars on the streets of the city. I say "perpetual charter," because, while the state could repeal or annul the charter, it does not in fact do so, except for misuser or nonuser. We have therefore the patent fact that a corporation may have perpetual life given it by the state, but may be lawfully denied by the municipal corporation the right to have anything more than a nominal life, unless in some lawful manner it succeeds to rights which the municipal corporation has granted. Now, this delegated sovereignty reposed in the municipality by the state is to be exercised by the agent with no less care than if exercised by the sovereign itself. It is true, as urged by counsel, that the city council has plenary power, subject only to certain well-defined limitations; but it is not to be therefore said that, having plenary power, that power may be exercised in any other than the method provided by law, or that it may be assumed to have exercised it when the fact does not clearly appear. The council is not merely representative of the people who elect it. It is also the representative of the sovereign. Restrictions are vain if the checks put upon the methods of municipal legislation are not to be respected when they deal with fundamental rights. The rule that obligations arise or rights are granted by mere implication depends upon the nature of the parties, and the character of the obligations and rights. It is a very easy thing for a man competent to contract to have his rights determined by the just implications from his acts. He may find himself parting possession with his property even when he did

not intend to do so. But this is all but impossible with a municipal corporation. Indeed, a municipal corporation, through its council or officers, may sometimes make strenuous effort to part with its property or with public rights, and fail in the effort. Instances of this kind could be indefinitely multiplied. But to say that a municipal corporation, the delegate of sovereignty, has parted with one of the powers of sovereignty by implication, is to assume that which, while not impossible, can only be supported by the strongest proof, and by an implication so cogent as to be quite as impressive and conclusive as if the grant had been made in express terms.

The rule of grant by implication is correctly stated in Booth on Street Railways, § 43, as follows:

"As repeals by implication are not favored, and the rule of strict construction against the grantee is strictly applied to charters of private corporations, a corporation will not be permitted to enlarge a franchise beyond the expiration of its original charter unless that intention has been clearly expressed by the granting power. Amendatory and supplemental acts or ordinances will not have that effect unless the intention to renew the franchise be expressed in apt terms, and any ambiguity in the language used will be resolved in favor of the state."

Judge Cooley, in his work on Constitutional Limitations, at page 394, quotes with approval the language of the Supreme Court of Pennsylvania in the case of Railroad Company v. Canal Commissioners, 21 Pa. 22:

"When a state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so that we will never believe it to be meant when it is not said. In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation."

The Supreme Court of the United States has expressed the same thing in no less emphatic terms in Fertilizing Company v. Hyde Park, 97 U. S. 66, 24 L. Ed. 1036:

"Every reasonable doubt is to be resolved adversely to the corporation. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

The general doctrine is laid down by Chief Justice Taney in Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. Ed. 773, 938, in which the proposition is forcibly stated that, as against the sovereign, no grant can arise by implication, but that the full vigor and powers of the sovereign will be presumed to exist in every case where a claim is made in derogation of them, unless by clear, positive, and explicit language a grant has been made.

An interesting case is that of New Orleans & Carrollton Railroad Company v. City of New Orleans, 34 La. Ann. 429. In that case a company was chartered by the Legislature of Louisiana in 1833, the duration of its franchise being 50 years. The company was to build and operate a railroad from New Orleans to Carrollton, and all of its property was for a definite period exempted from taxation. In 1835 another act was passed by the Legislature, providing for

the enlargement and mode of subscription and payment of shares of the capital stock of the original company, conferring upon it certain banking privileges, and authorizing it to construct a continuation of the railroad authorized under the previous law, from Carrollton to the town of Bayou Sara. It was provided in express terms that this second grant, and all privileges conferred by it, were to remain in force for 75 years from the date of the passage of the act, and further provided that all of the property of the company in the nature of railroad and equipment should at the end of said period of 75 years revert to the state. Upon the basis of these two and certain other acts of the Legislature of Louisiana pertaining to said company, and affecting various of its rights, it was contended that the limitation of time contained in the second grant extended the life of the first grant, and that the exemption from taxation provided in the first grant was annulled by the second, but that all of the property covered by the first grant, with that covered by the second, reverted to the state at the end of the period of 75 years. The company was thus contending for a sacrifice of rights very important to it on the one hand, while it contended for an extension of its life 25 years on the other. The court says:

"A fact which impresses one as remarkable at the outset is that the Carrollton Railroad Company, which has initiated this litigation, should be contending with such zeal to enlarge the construction of the twenty-second section of the act of 1835, which purports to do nothing except to impose upon the company a burden, and to exact a penalty as a compensation for privileges, part of which it never exercised, none of which ever inured to its advantage, and all of which have long since been abandoned. This anomaly is explained when we see that the company deduces from this burden implied privileges in its own favor largely exceeding in value the burden itself, and thus seeks to convert the penalty into a reward."

The court says on page 440, referring to a phrase in the act of 1835 which provided that the railroad to be constructed under the second grant was to "constitute a continuation" of the road constructed under the first grant, from which the results above outlined were attempted to be deduced:

"Surely so slender a thread was never required to support so ponderous a weight. * * * They extend by implication the existence of the corporation twenty-five years beyond the term to which its duration was expressly limited by its charter."

As to implication of renewal or expansion of duration, see the case of City of Cincinnati v. Cincinnati Inclined Plane Railway Company (Superior Court of Cincinnati) 30 Wkly. Law Bul. 321, affirmed by the Supreme Court without report. Among other things held in that case was that:

"The fact that, in 1885 and 1888, at which times the grant for route No. 8 had expired, the board of public works granted to the defendant company permission to substitute electricity as a motive power in place of animals, did not impliedly renew the grant of that route."

Although in that case it was held that the board of public works had no right alone to grant a renewal, the court says that the language of the grants gives no warrant whatever to any claim that even the board of public works or the board of public affairs in-

tended to renew any grant then in existence, or to vitalize any grants whose existence was doubtful. And the court goes on to say that the expenditures made by the railway company in substituting electricity as a motive power do not operate to bring about a renewal by estoppel. And this is true, not only for the reasons already asserted, but because of the nature of the situation which exists when such legislation is under consideration. The municipal legislative body does not always consider the possible legal deductions which may be made from its language, and it could not do so. When the matter is susceptible of such easy expression in the English language, it might well suppose that if, by an ordinance, it was intended to fix a period for a franchise, it could be done in unmistakable terms. There is no need of concealment in such cases, and no need for implication.

If it be true that to grant the right to build an extension, and permit its operation as such, in connection with the system of which it forms a part, for a period beyond the duration of the system's franchise, is to extend to that date the franchise of the system, then we must conclude that the council may give away the public's property and the rights of the community, without knowing that it is doing so, and while striving not to do so.

It is most ingeniously and plausibly argued that to give the right to operate, in connection with the main stem, the extension of an existing line, to a time beyond the time allotted to the existing main stem, is, by implication, to extend the period of the right to operate the main stem, because, if it were otherwise, it would lead to an absurdity, and leave the fragmental extension alone and incapable of operation when the franchise of the main stem expired.

Yet, apart from the fundamental objection which I shall hereafter discuss, a little reflection suggests many answers to the claim. The extension may or may not be incapable of independent operation. Is the determination of the right to depend upon the particular conditions of independence or of isolation in each case? The price is too high, and the implication too severe and far-reaching, if, as claimed by counsel, a slight prolongation of a line, made under the statute allowing extensions, shall suffice to extend the franchise of 236 miles of line, if, perchance, a careless or generous or complaisant council, dealing with the triviality of a few hundred feet of extension, should give the right to operate it, in connection with the main line, for a period beyond the date of expiration of the main line's franchise. Certainly no obligation is incurred to so operate in connection with the main line after the company's franchise to the main line has expired. No doubt the vigilant representatives of the railway company will always endeavor to procure the longest possible term for the most trivial extension. The council may think the right of such slight importance as to grant it without thought of any additional and important rights arising by implication. When the right is possessed, if it can be possessed, and the corporation is in possession even of only a few hundred yards under such a franchise, it has a position of some importance, and sometimes of controlling importance.

An examination and comparison of the several ordinances relating to this subject leaves upon the mind the indelible conclusion that after the ordinance of March 22, 1880, all of the extensions of the Garden street line were intended to expire with the Garden street main line franchise, viz., March 22, 1905. I am of opinion that it was the purpose of the council all the time to make the life of the right to operate the Garden street line all the same throughout its length, and over all the extensions and additional tracks. This view is supported by the inherent reasonableness of the purpose and by the language of most of the extension ordinances. It is to some extent discredited by the language of the ordinance dated April 20, 1891, in which it is provided that the right to operate the extension therein referred to shall terminate with "the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue, to wit, July 13, 1913." But if this shows that the council assumed and believed that the franchise east of Lincoln avenue did not terminate with the termination of the main Garden street ordinance, it shows, also, beyond the possibility of successful answer, that the right to operate the Garden street main line did not automatically expand and lengthen every time an extension ordinance was passed, with an extended date of expiration.

But after all, the conclusively satisfactory answer is that it is intolerable to think that instead of using direct, explicit, and easily framed language to grant a great right which only the sovereign can grant, it may be conveyed by an implication to be raised by a process of reasoning which the lay mind has difficulty in comprehending, and which it could hardly discern at all if not pointed out, and that this implication may be so derived from apparently innocuous and insignificant words lost in the mazes of an ordinance of relatively small consequence. Fundamental powers of the sovereign to be used by a delegated body, naturally untrained in the law's learning, and rigidly restricted in its use, are not to be so exercised.

Nor are we denied the possession of other cogent reasons reaching the same conclusion. In view of the contention here made by the complainant, it is most significant and astonishing that in no single instance of an extension ordinance does the title of the ordinance state that any such object was in view, or that any extension of time for expiration of either the main line or the Garden street branch was involved in the permission thereby given for the construction of an extension. But the law explicitly requires that the "subject" of an ordinance "shall be clearly expressed in its title." What could more surely do violence to the letter and spirit and purpose of that legal requirement than to say that an ordinance entitled an ordinance to permit some petty and relatively unimportant extension should be found to contain within its sophistical implications a grant renewing for a term of years an important and far-reaching franchise? Can such an implication from such an ordinance, so entitled, be justified either on the ground of reason or of propriety?

Respecting the ordinance of April 20, 1891, granting to the East Cleveland Railroad Company permission to lay an additional or second track in Quincy street from New street to Woodland Hills avenue, and wherein it is provided that the right therein granted shall be "valid until the expiration of the grant for said company's tracks in Quincy street east of Lincoln avenue, to wit, July 13, 1913," and the claim that this establishes complainant's contention, the conclusive answer is that the grant for the company's tracks in Quincy street east of Lincoln avenue did not and would not expire July 13, 1913. The ordinance did not state the fact. It is true that the original right in Quincy street east of Lincoln avenue was, by the terms of the ordinance granting it, to expire with the main line franchise. If by "main line" was meant the Euclid avenue line, then it would expire in 1904. Subsequently that main line franchise was extended to July 13, 1913, and doubtless the person who drafted this ordinance assumed that as the main line franchise had been extended to July, 1913, the effect of that extension was to extend the time of the rights in Quincy street east of Lincoln avenue to that date. But the fatal defect in that process of reasoning, and the fatal objection to the date inserted in the ordinance of April 20, 1891, is that after the passage of the ordinance for the Quincy street extension east of Lincoln avenue, and before the passage of the ordinance extending the main line to 1913, to wit, on March 10, 1890, the council passed an ordinance authorizing the East Cleveland Railroad Company to substitute electrical motive power for horse power over its Garden street line to Woodland Hills avenue, and provided that the right to operate the Garden street branch should continue during the term of the company's then present grant for the operation of the tracks upon the Garden street branch. Now, the Garden Street franchise, at the time of the passage of the ordinance of March 10, 1890, was to expire on the 22d day of March, 1905, and the period of expiration of the right to operate an extension east of Lincoln avenue on Quincy street, if it could be different from the life of the main stem, if it could be made to coexist with the franchise on the Euclid avenue line, was wholly wiped out by this new ordinance authorizing the use of electricity, and changed the termination of its franchise to accord with the franchise for the Garden street line, viz., March 22, 1905. It therefore follows, from the language of the several ordinances, properly interpreted, that the franchise for the entire Garden street line expired March 22, 1905.

(2) While the foregoing considerations lead to the conclusion that the relief sought by the complainant must be denied, still I am constrained to rest my determination of this question on a much broader and more satisfactory ground. I have reached the conviction that it is beyond the power of the council to endow an "extension" with a duration of life extending beyond the life of the line which is extended. This, it seems to me, must be true, considering the nature of an extension, as well as the statutory provisions relating thereto. Before we can arrive at a definition of an exten-

sion, as the term is used in Ohio, it is necessary to examine the statutory provisions which throw light upon the subject.

Under the law of Ohio, three different things may occur respecting the construction and operation of a street car line: First, the establishment of a route, which must be done in a certain formal way, in which there is an opportunity for competitive bidding; second, the renewal of a franchise, but neither the grant of the right to construct a railroad, nor the renewal of that grant, is valid for more than 25 years; and the third thing that may be acquired is the right to extend the track of a street railroad. The Garden street line, which, with its extensions, is the subject of this controversy, as originally established, was not an extension of the East Cleveland Railroad Company's line, but was a branch, possessing all of the characteristics of an original route, and was established in strict conformity with the requirements of sections 2501, 2502, Rev. St. The fact is that, when authority was given to construct the Garden street branch, no authority existed for the extension of the track of a street railroad, and it was necessary, in order to obtain the right, to proceed under the authority of what are now sections 2501 and 2502. Section 2501 provides as follows:

"Sec. 2501. No corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the counsel by ordinance shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered to the public interest."

Section 2502 provides as follows:

"Nothing mentioned in section 2501 of the Revised Statutes of Ohio shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed, and no action inviting proposals to construct and operate such railroad shall be taken by the council; and no ordinance for the purpose specified in section 2501 of the Revised Statutes of Ohio shall be passed until public notice of the application therefor has been given by the clerk of the corporation once a week, for the period of at least three consecutive weeks in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation; and no such grant as mentioned in section 2501 of the Revised Statutes of Ohio shall be made, except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed: provided, that no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period then twenty-five years from the date of such grant or renewal; and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipal corporation shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of grant."

Neither section 2501 nor section 2502 refers to or has anything to do with extensions, and it follows that, if an extension has any

different life from that with which the thing extended is endowed, it is because the state has not limited the power of the municipal council in respect to the right to limit the life of such extension. The state has delegated this authority to limit the life of an original franchise or a renewal to 25 years, and does not, in terms, put any limitation on the life of any other grant relating to street railroads. If an extension may have any other life than the life of the thing to which it forms an extension, it may be given an unlimited term of life by the council. The general law gives authority to the council to consent to the use of the city's streets by street railroads, and, as we have seen, it was not until 1878 that a proviso was added to the effect that no grant or renewal (that is to say, no grant or renewal under sections 2501 and 2502) should be valid for more than 25 years. This proviso is a limitation upon the plenary power theretofore given by the state to the council, and no more is to be subtracted, in consequence of that proviso, from that plenary power thus delegated, than its express terms permit. There is no specific limitation, nor can such be derived by implication, upon the power of the council to give as large a consent for as full a time to an extension as prior to 1878 it could give to an original grant or renewal, unless the position is sound that an extension, in the very nature of things being a part of the thing extended, must have the same life as, and no more than, the line or branch or route of which it is an extension. The grants and renewals referred to in the last clause of section 2502 must mean the original grant or its renewal, and cannot apply to an extension, because the first requirement of section 2502 is that nothing mentioned in section 2501—that is to say, no work performed in the construction of a street railroad—shall be done until suitable advertisement has been made, and the right given to the corporation or individuals that will carry passengers at the lowest rate of fare.

Section 2505, which, so far as this question is concerned, is in the same form now as it always has been, provides as follows:

"Sec. 2505. The council of any city or village may grant permission, by ordinance, to any corporation, individual, or company owning, or having the right to construct, any street railroad, to extend their track, subject to the provisions of sections 3437, 3438, 3439, 3440, 3441, 3442 and 3443, on any street or streets where council may deem such extension beneficial to the public; and when any such extension is made, the charge for carrying passengers on any street railroad so extended, and its connections made with any other road or roads, by consolidation under existing laws, shall not be increased by reason of such extension or consolidation."

This section, it will be noticed, authorizes the extension of a "track," and implies a mere physical act made necessary or useful by reason of the existence of certain conditions.

In its original form, this section was passed May 7, 1869 (66 Ohio Laws, p. 140), and was supplementary to an act passed March 27, 1866 (63 Ohio Laws, p. 55); and the provisions to which it was then subject were provisions of the act of March 27, 1866,

determining how the street railroad company might proceed when it was unable to obtain the consent of a majority of the property owners along the street, and gave them the right of appropriation. It will be noted that this right of extension is granted under certain conditions named in the section, and also subject to the provisions of sections 3437 to 3443, inclusive. These sections fix the terms and conditions upon which the extension may be made, and are not, therefore, the terms and conditions described in section 2501, relating to the establishment of a route or the renewal of a grant. An extension of the track of a street railroad may be permitted to the corporation owning the line sought to be extended, without any competitive bidding, on such terms and conditions as the council and the company may agree, and, of course, subject to the consent of a majority, by feet front, of the property owners along the line of the extension. The right of extension is, as it must be, based upon the fact that there is already a line in existence, and that the permission to extend is a mere development of the right already granted. It extends the track only. The language of section 3439 is significant in this respect, namely, that:

"The provisions of sections 2501 and of 2503 to 2505, inclusive, so far as they are applicable, shall be observed in all respects, whether the railway proposed is an extension of an old, or the granting of a new, route."

Now, the extension of an old route is not the granting of a new route, as the juxtaposition of the terms contained in section 3439 manifestly discloses. The extension of an old route, as the term is used in section 3439, means, if we can understand the ordinary meaning of language, that it is a mere physical addition to the route or right already established, and that it becomes incorporated in, and actually a physical and legal part of, that which was originally established. Otherwise we would have the spectacle of a new route or new line established without the usual formality of a petition, with an opportunity to all persons to bid for the same. If this reasoning is sound, it is quite apparent that an extension of an existing route can have no other term of life than the term of life of the line to which it is an extension. If it were not so, we would not only be confronted with the condition where two parts of one line have a different duration of life, but we would have a vested right in the corporation which owned the route to occupy a part of it far beyond the period of life of the original stem, and practically nullify the statutory requirement when new routes are established. But more than that would be true. Under the law of Ohio, an extension may be granted for an unlimited term, or it must have its life determined by the life of the thing extended. Nowhere can authority be found for limiting the life of an extension, if an extension is considered as a thing to which the council can give any period of time it pleases up to 25 years. Strictly speaking, the granting by the council of the right to extend a street railway line is not the giving of a franchise, but the expansion or

enlargement of a franchise already given. It is, at most, nothing more than a subsidiary franchise. It is not original. It can have no life and no power which do not inhere in and belong to the original line of which it is an extension. As stated in the text of Booth on Street Railways, § 63, "The extension is a necessary incident to the principal subject of a previous valid grant." Now, if an extension is a necessary incident to the principal subject of a previous valid grant, how can anything more occur, than that the extension is absorbed by the previous valid grant, and has precisely the same life which that grant possesses? The same principle, of necessity, applies to, and indeed is most aptly illustrated by, the ordinances granting the right to lay an additional track over a part of an established route or its extension. How can the period during which the right exists to operate the additional track extend beyond the life of the line to which the track is added? The second track is neither an extension nor a renewal. It is not the establishment of an original route. It is not governed by the requirements of section 2502. There is no competitive bidding. It is a mere incident of the contract between the city and the street railroad company. It is, like the extension, a mere integral part, but only a part, of the main body of the property. The life of the right to operate it must, in the very nature of things, terminate with the life of the main body of which it is a part. The effort of the council to give it life beyond the life of the main stem is not effective, either to give the right to operate the additional track beyond the period fixed by the ordinances for the main stem franchise, or, by reason of the grant of the additional track, to extend the life of the line of which it forms a part. The council had no power, having established a route under certain conditions which the law requires, and having the right to renew it as a renewal, to undertake, by the mere giving of the right to double-track, to give the right to operate the second track for a period beyond the term of the franchise of the line which is double-tracked. One might as well say that the human foot could survive after the vital organs had ceased to exist; that, where there is one life-giving center, the things which grow out of it and are subsidiary to it may live after the life-giving center has ceased to have life; that the tree, having sent forth a branch, might die, but leave the life of the branch unaffected. The whole theory of the claim that an extension can live longer than the thing extended is at war with reason and with the nature of things. It is true that in this respect the extension statute has not been considered by the courts. The word "extension" has not been defined. It has not been judicially declared that an extension cannot live longer than the thing extended. Probably this is so because no contrary contention has ever before been made. The only reference which has come to the attention of the court, at all touching the subject, appears in the opinion in the case of Cincinnati v. Cincinnati Street Railway Company (in the Superior Court of Cincinnati) 31 Wkly. Law Bul. 308. In this case the court says, after holding that it was competent for

e council to impose terms and conditions upon which an extension ould be made:

"Among the conditions which I have excepted from the application of is principle [that is, among the conditions which may not be changed by uncilmanic action, or imposed upon a company at the time of making an tension] are those which provide that no increased rate of fare shall be arged beyond that authorized to be charged on said route No. 13, and that e term of the extension shall terminate with the term of the original grant. nese are really not conditions imposed by the board of administration, but the law itself, and may therefore be dismissed from the discussion."

The opinion in this case very elaborately discusses the subject extensions. If the claim had been made or if the thought ad occurred that an extension might have a life enduring beyond at of the line extended, it would undoubtedly have been raised this case, and would have been discussed by the court; but the ourt, in view of the subject, which had evidently been elaborately rgued and fully considered, makes the remark, in passing, which ridences a conviction on its part, that the law itself imposes the ondition that the term of the extension shall terminate with the rm of the original grant.

These conclusions may be summarized as follows:

(1) Prior to the act of May 14, 1878, it was competent for the ouncil to make grants for street railway purposes, either with or ithout limitation as to time.

(2) Whatever be the duration of a grant, whether limited or unnited, it may be changed by contract between the city and the rantee of the right, subject only to the proviso now in force—that o grant shall be valid for more than 25 years.

(3) Neither the consolidation of the street railway lines into one ompany and one system, nor the transfer obligations imposed by he Willson avenue ordinance, operates to prolong the life of any rior grant.

(4) An extension of the life of a grant by implication is not avored, and will not be declared, except when clearly manifest nd obviously necessary; and this rule is invoked with especial ropriety where the implication is sought to be made in ordinances, ot one of which, in its title, gives the slightest intimation of a urpose to deal with the subject of the life of a grant.

(5) Permission to extend tracks and operate them "in connecon with the main line" for a period which endures longer than he right to operate the main line will not have the effect of exending the life of the main line grant.

(6) The ordinance of March 10, 1890, authorizing the substituon of electricity for horse power on the Garden street (Central venue) branch, fixed a uniform period for the termination of the anchise of the Garden street line over its entire length to Woodnd Hills avenue, and abrogated, by consent of both parties, any rior contract for a different date, if any such there was.

(7) An "extension" is not a new route; it has no independent fe; it depends upon and is a part of the line to which it is added; nd, as it could have had no legal existence without the original

line, so it can have no tenure of life beyond that of the original line.

(8) The Garden street branch was established as a "route," and is an original line. The franchise to operate it, including all of its extensions and additional tracks expired March 22, 1905.

The temporary injunction asked for will therefore be denied. A decree may be taken in accordance with this opinion, and it ought to be framed as if upon final hearing.

THE SUE.

(District Court, E. D. North Carolina. March 29, 1905.)

1. JUDICIAL SALE—GROUNDS FOR SETTING ASIDE—OFFER OF INCREASED BID.
A sale of a libeled vessel in admiralty, made by consent, but which has not been finally confirmed, will be set aside, and a new sale ordered, on an offer of a materially increased bid; and it is no ground of objection to such action that the first bidder has deposited the amount of his bid, or incurred expense on account of his supposed purchase, since he could acquire no rights or standing in the case until confirmation.

2. MARITIME LIENS—REPAIRS AND SUPPLIES FURNISHED IN HOME PORT.
There is no lien for repairs or supplies furnished to a vessel in her home port on the order of the owners, unless given by the local law; and in such case the provisions of such law must be followed, or no lien is acquired.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, §§ 7–9.]

Maritime liens for supplies and services, presumption as to credit to vessel, see note to The George Dumois, 15 C. C. A. 679.]

In Admiralty.

W. W. Clark, for libelants Williams & Cosby.
S. M. Brinson and W. D. McIver, for M. B. Smith.

PURNELL, District Judge. On the 24th day of December, 1904, a libel was filed for services upon and material furnished to the steam tug Sue at the special instance and request of the owners thereof, amounting to $303.99, upon the filing of which, with proper stipulations, an attachment and monition were issued December 26th, and were duly returned December 28th. After seizure, Richard Barclift filed a petition as owner of the steam tug, asking to be admitted to defend accordingly. On this petition no order was ever asked or entered, and no defense set up. By consent, an order of sale was duly entered on the 19th day of January, 1905, and the tug regularly sold on January 30th, when M. B. Smith became the purchaser at the price of $275, which sale was reported and order made February 1st confirming the same, which order was entered February 2d, with the following memorandum: "The clerk will hold this decree for five days subject to objection, if no objection is filed within five days the decree will be entered as of record." On February 7th, at 3:20 p. m., Williams & Cosby filed objections to the confirmation of the sale; alleging that the price paid therefor

was not a fair price, and offering to increase the same 33⅓ per cent. Thereupon the decree entered February 2d was rescinded, and a re-sale of the tug ordered. Upon a report of this sale the cause was set down for hearing on Thursday, the 23d day of March, and all parties notified thereof.

The motion now is to confirm the sale, to which M. B. Smith, through his attorney, objects; the form of objection being a letter of February 22d addressed to the District Judge, and ordered to be filed as a petition in the cause, and a more formal petition filed March 19th, after the second sale, asking that the sale be set aside, and the marshal ordered to execute a deed to him for the said steam tug. The ground of objection is that M. B. Smith had paid the price bid by him at the first sale into court, had gone to some expense in ordering material for the repair of the tug, and that the objections to the sale were not filed in apt time. The objections are without force. The clerk was ordered to hold the decree confirming the first sale for five days, and within the five days, under the rule excluding the first day and including the last, and taking no note of parts of a day, the objections were filed, and were such that commend themselves to the court as reasonable ground for setting aside the sale. The libelants have shown their good faith by depositing the amount of the increased bid, and no court governed by the rules in equity or the rules in admiralty, which are based on natural justice, will sacrifice property by confirming a sale for 33⅓ per cent. less than is bid. The plea that the bidder has gone to expense in the purchase of material for the repair of the boat which he thought he had bought is not sufficient ground for confirming a sale for 33⅓ per cent. less than the court sees can be obtained. Courts of admiralty act upon enlarged principles of equity, rather than the strict rules of the common law. O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469. The bid of a purchaser at a judicial sale under a decree of the court is in legal effect only an offer to take the property at that price, and the acceptance or rejection of that offer is within the sound discretion of the court, to be exercised with due regard to the special circumstances of the case and to the stability of judicial sales. Milwaukee R. Co. v. Soutter, 5 Wall. 662, 18 L. Ed. 678; Camden v. Mayhew, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608. Until finally confirmed, the decree rests in the breast of the court. He was not a party to the proceedings, had no connection with it except as purchaser, and is really an intervener who has not complied with admiralty rule 34 as to interveners. The prayer of the petitioner is refused, and the petition dismissed.

There being no other objection to the sale to Williams & Cosby, it is ordered and decreed that the same be, and is hereby, in all respects confirmed, and the marshal directed to execute a bill of sale accordingly.

The only question remaining, then, is to pass upon the several claims filed by interveners. First intervening petition is by W. J. Smith, claiming as assignee of a note and mortgage executed by Richard Barclift, owner of the steam tug Sue, to J. W. Glover, and

duly recorded in the office of the collector of customs, upon which it is claimed there is a balance of $435, with interest from June 18, 1904, praying that after the payment of maritime liens the balance be applied to the discharge of the note secured by the mortgage. The note is not filed, but it is alleged in the petition that the following indorsement appears thereon in addition to the credit: "Pay to W. J. Smith, $435.00 without recourse on me. Jno. W. Glover." No question is raised as to this balance, or the validity of the mortgage or the assignment thereof.

It may be well to refer to some of the general principles governing liens on domestic vessels, principles controlling in this case. First, by common law, materialmen furnishing repairs to a domestic ship have no maritime lien upon the ship itself for their demand. As to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the local law, and no lien is implied, unless by that law. The General Smith, 4 Wheat. 438, 4 L. Ed. 609; The Planter, 7 Pet. 341, 8 L. Ed. 700; Ex parte McNiel, 13 Wall. 236, 20 L. Ed. 624; The Lottawanna, 20 Wall. 217, 22 L. Ed. 259; The Lottawanna, 21 Wall. 579, 22 L. Ed. 654; The J. E. Rumbell, 148 U. S. 12, 13 Sup. Ct. 498, 37 L. Ed. 345; Spedden v. Koenig, 78 Fed. 506, 24 C. C. A. 189; The Iris, 101 Fed. 1006, 41 C. C. A. 679. By the common law, materialmen furnishing repairs to a domestic ship have no particular lien upon the ship itself for their demand. The General Smith, 4 Wheat. 438, 4 L. Ed. 609; Ramsay v. Allegre, 12 Wheat. 614–636, 6 L. Ed. 746; Waring v. Clarke, 5 How. 491, 12 L. Ed. 226; Maguire v. Card, 21 How. 248, 16 L. Ed. 118; The Lottawanna, 20 Wall. 217, 22 L. Ed. 259; Davidson v. Baldwin, 79 Fed. 97, 24 C. C. A. 453. A shipwright who has taken a ship into possession to repair it is not bound to part with the possession until he is paid for the repairs; but if he parts with the possession of a domestic ship, or has worked upon it without taking possession, he has no claim upon the ship itself. The General Smith, 4 Wheat. 438, 4 L. Ed. 609.

The several claims filed herein by interveners, in which the state law has not been complied with, are therefore dismissed and ignored. The only two claimants who appear by the records to have filed liens in accordance with the state law are the libelants Williams & Cosby, $303.99, and J. A. Meadows, $115.88. A decree will therefore be entered allowing these claims to be paid pro rata, after the payment of the costs of this libel to be taxed by the clerk; and, if a balance shall remain, it shall be applied to the payment of the note and mortgage held by W. J. Smith.

ALLEN v. GILMAN, McNEIL & CO. (ÆTNA LIFE INS. CO., Garnishee).

(Circuit Court, E. D. Pennsylvania. April 26, 1905.)

No. 65.

1. GARNISHMENT—RIGHTS OF PLAINTIFF.
Where a judgment creditor of the holder of an employer's liability policy garnished the insurer, such creditor was only entitled to enforce the rights of his debtor, if any, against the garnishee.

2. SAME—EMPLOYER'S LIABILITY POLICY—CONSTRUCTION.
An employer's liability policy provided that if a suit was brought against insured he should immediately forward process to the insurer, which would defend against or settle the claim; that the purpose of the policy was to indemnify the insured "against loss from liability for damages;" and that no action should lie against the insurer to recover any loss under the policy unless brought by the insured himself to reimburse him for payment by him in satisfaction of a judgment. *Held*, that the policy was an agreement to indemnify insured "against loss," and not against "liability," so that no recovery could be had against the insurer by insured's attaching creditor until after complete payment by insured of the claim for which the insurer was liable under the policy.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 59; vol. 28, Cent. Dig. Insurance, § 1298.]

See 127 Fed. 609.

Francis Fisher Kane, for plaintiff.
R. W. Archbald, Jr., and Simpson & Brown, for garnishee.

J. B. McPHERSON, District Judge. The facts upon which this controversy arises have been agreed upon by the parties in the following case stated:

"On the 13th day of December, 1902, the Ætna Life Insurance Co. entered into a certain contract or policy of insurance with the defendant, Gilman, McNeil & Co. (a true copy of which, marked 'Exhibit A,' is hereto attached). The said Gilman, McNeil & Co. is a corporation duly organized under the laws of the state of West Virginia.

"On May 5, 1903, the circuit court of Kanawha county, in the state of West Virginia, having jurisdiction in the premises, in a suit in equity brought by George C. McNeil against the said Gilman, McNeil & Co. and others, appointed Walter F. Trotter receiver of all the property of the said Gilman, McNeil Company, Incorporated, and security was on the same day duly entered by the said receiver, as ordered by the court, he entering upon his duties as such. A true copy of the decree of the court, marked 'Exhibit B,' is attached hereto and made part hereof. The said decree has been in all respects duly complied with.

"On May 8, 1903, court of common pleas No. 4, Philadelphia county, having jurisdiction in the premises, in a suit in equity brought by George S. McNeil against Gilman, McNeil Co. et al., of March Term, 1903, No. 3,827, appointed Walter F. Trotter ancillary receiver of all assets of the said Gilman, McNeil Co., and security was on June 5, 1903, duly entered by the said receiver, as ordered by the court, and he entered upon his duties as such. A true copy of the decree of the court, marked 'Exhibit C,' is attached hereto and made part hereof.

"On the 25th day of June, 1903, suit was brought by Charles Allen v. Gilman, McNeil & Co. as of April term, 1903, No. 65, United States Circuit Court, for damages on account of bodily injuries accidentally suffered by him on February 27, 1903, within the period of the policy marked 'Exhibit A,' while an employé of the assured, and while on duty at one of the places and in one

of the occupations mentioned in the aforesaid policy of insurance marked 'Exhibit A,' and in and during the continuance of the work described in the policy. The above-described accident was such as were included in the terms of said policy of insurance, and said Gilman, McNeil & Co., Incorporated, has fully complied with all the conditions of the said policy of insurance and has completely fulfilled all the covenants therein contained. On the 26th day of January, 1904, judgment was entered in the above suit last above mentioned in favor of the plaintiff, Charles Allen, against the defendant, the said Gilman, McNeil & Co., in the sum of $5,000. No part of the said judgment has been paid.

"On the 6th day of February, 1904, an attachment execution was issued by the plaintiff in the case last mentioned directed against Gilman, McNeil & Co., defendant, and the Ætna Life Insurance Co., garnishee, return whereof was made nihil habet as to the defendant and served as to the garnishee. On the 8th day of February, 1904, the plaintiff filed interrogatories and rule to answer directed to the said Ætna Life Insurance Co., garnishee, and on the 14th day of March, 1904, said Ætna Life Insurance Co. filed answers thereto, admitting the facts.

"The following question is submitted for the determination of your honorable court: Whether the said Ætna Life Insurance Co. is or is not indebted to Gilman, McNeil & Co. under the aforesaid policy of insurance marked 'Exhibit A,' by reason of the entry of the aforesaid judgment against Gilman, McNeil & Co. in favor of the said Charles Allen in such manner as that the said indebtedness should be attachable by virtue of the above-recited attachment execution. If the court shall be of the opinion that the Ætna Life Insurance Co. is indebted to Gilman, McNeil & Co. in the manner aforesaid under the aforesaid policy and by reason of the judgment entered against Gilman, McNeil & Co. in favor of the said Charles Allen, then the court is requested to enter judgment in favor of the said plaintiff, Charles Allen, in the sum of $5,000. If the court shall be of the opinion that the Ætna Life Insurance Co. is not indebted to Gilman, McNeil & Co. in the manner aforesaid under the aforesaid policy of insurance by reason of the entry of judgment against Gilman, McNeil & Co. in favor of the said Charles Allen, then the court is respectfully requested to enter judgment in favor of the Ætna Life Insurance Co., garnishee.

"Each party reserves the right to appeal."

The policy of insurance need not be quoted in full. The relevant parts of that instrument are these: The insurance company agrees thereby—

"To indemnify Gilman & McNeil, of Chicago, county of Cook, state of Illinois, hereinafter called 'the assured,' for the period of twelve months, beginning on the 13th day of December, 1903, at noon, standard time, at the place where this policy has been countersigned, subject to the following special and general agreements which are to be construed as co-ordinate, as conditions:

"Against loss from common law or statutory liability for damages on account of bodily injuries, fatal or non-fatal, accidentally suffered within the period of this policy by any employee or employees of the assured while on duty at the places and in the occupations mentioned in the schedule hereinafter given, in and during the continuance of the work described in the said schedule."

The special agreements contain nothing now of importance, but paragraphs 1, 2, 3, and 7 of the general agreements are relied upon by both parties as decisive of one branch of the dispute, and require, therefore, to be carefully considered. They are as follows:

"1. The assured upon the occurrence of an accident shall give immediate written notice thereof, with the fullest information obtainable at the time, to the home office of the company at Hartford, Conn., or to its duly authorized local agent. He shall give like notice with full particulars of any claim that

may be made on account of such accident, and shall at all times render to the company all co-operation and assistance in his power.

"2. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy the assured shall immediately forward to the company every summons or other process as soon as the same shall have been served on him, and the company will at its own cost defend against such proceedings in the name and on behalf of the assured, or settle the same, unless it shall elect to pay to the assured the indemnity provided for in clause A of special agreements as limited therein.

"3. The assured shall not settle any claim except at his or its own cost, nor incur any expense, nor interfere in any negotiation for settlement or in any legal proceeding, without the consent of the company, previously given in writing; but he may provide at the time of the accident such immediate surgical relief as is imperative. The assured when requested by the company shall aid in securing information, evidence, and the attendance of witnesses and in effecting settlements and in prosecuting appeals.

* * * * * * * * * * * *

"7. No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment and after trial of the issue. No such action shall lie unless brought within the period within which a claimant might sue the assured for damages unless at the expiry of such period there is such an action pending against the assured, in which case an action may be brought against the company by the assured within sixty days after final judgment has been rendered and satisfied as above. The company does not prejudice by this clause any defences to such action which it may be entitled to make under this policy."

It is first to be noted that the plaintiff, being an attaching creditor, stands precisely in the shoes of his debtor, and must recover, if at all, upon such right as the debtor may possess against the garnishee. If the insured, therefore, upon the true construction of the policy, has a right to recover from the insurance company the amount of the judgment for $5,000 that was entered against the insured by the plaintiff in January, 1904, the insurance company may be compelled to pay that sum directly to the plaintiff; while, upon the other hand, if the insured has no right of action against the insurance company because the plaintiff's judgment has not yet been paid, the present suit must fail. Or the question may be stated more concisely in another form: Is the policy an agreement to indemnify against liability or to indemnify against loss? If the indemnity is against liability, the insured corporation had a right of action not later than the date when its liability was determined by the entry of the plaintiff's judgment, and the plaintiff may recover against the insurance company; if the indemnity is against loss, the insured has no right of recovery upon the policy, since no loss has yet been sustained.

The construction of this class of contracts has engaged the attention of several state courts, and an examination of the principal decisions will be useful. One of the earliest cases is Anoka Lumber Co. v. Fidelity, etc., Co., 63 Minn. 286, 65 N. W. 354, 30 L. R. A. 689, where the policy was construed to be an agreement to indemnify the insured against liability, and not an agreement to indemnify against loss. But the contract then under consideration differed from the policy in suit, for it is stated in the opinion to have been a contract insuring the plaintiff against "liability for damage."

and not against "loss," and the report shows that the provision contained in the first sentence of paragraph 7 heretofore quoted was not found in the policy then being construed.

In Hoven v. Employers', etc., Corporation, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388, the policy was essentially like the instrument that was before the Supreme Court of Minnesota. It recited that the insured had applied "for indemnity against claims for compensation for personal injuries to employé," and went on to agree that the insurance corporation "will pay to the employer * * * all such sums for which the employer shall become liable to his employé by virtue of the common law or of any statute." It was of such a contract that the Supreme Court of Wisconsin said:

"It not only clearly contemplates that such an action may be brought before actual payment of the claim for damages by the assured, but by plain and unmistakable language it contracts to indemnify the insured against liability, not against damages. The case is not one requiring a resort to rules for judicial construction in order to determine what the parties intended by the language of the contract. Substantially the same kind of policy was under consideration in the recent case of Anoka L. Co. v. Fidelity, etc., Co. (Minn.) 65 N. W. 353, 30 L. R. A. 689, cited in the brief of counsel for respondent, where the court held it to be a contract of indemnity against liability, and said: 'The intention of the parties appears to be so plainly expressed that any other construction than the one here given to the contract would do violence to the language they saw fit to use.'"

In American, etc., Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305, the policy was declared by the court to be a contract to pay liabilities, as appears by the following extract from the opinion:

"The contract speaks for itself. It is couched in unequivocal language. The insurer binds himself to pay 'all damages with which the insured might be legally charged, or required to pay, or for which it might become legally liable.' This is plainly a contract to pay liabilities. * * * The difference between a contract of indemnity and one to pay legal liabilities is that upon the former an action cannot be brought and a recovery had until the liability is discharged, whereas upon the latter the cause of action is complete when the liability attaches [citing cases]. The measure of damages is the amount of the accrued liability."

See, also, the decision upon similar facts in Fidelity & Casualty Co. v. Fordyce, 64 Ark. 174, 41 S. W. 420.

The policy under discussion in Fenton v. Fidelity, etc., Co., 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770, contained provisions like those in the preceding cases, and the court followed these decisions, and held the contract to be an agreement to indemnify; saying:

"By the express terms of the contract it agrees to indemnify the mill company not only against actual damage, but against liability for such damage."

So, also, in Ross v. American, etc., Ins. Co., 56 N. J. Eq. 41, 38 Atl. 22, where the agreement was "that said company will pay to the insured all damages with which the insured may be legally charged under the common law or any statute, not exceeding the amounts hereinafter limited, for or by reason of any accidental injuries, fatal or otherwise, happening to any employé or employés of the insured," etc., the vice chancellor held that the liability of

the insurance company arose when the injury happened, and not at the time when judgment for the injury was recovered against the insured. And, finally, the policy under consideration in Fritchie v. Miller's Extract Co., 197 Pa. 401, 47 Atl. 351, insured against "all liability for damages on account of fatal or nonfatal injuries," etc., and therefore fell within the same class as the contracts heretofore referred to. In none of these cases had the insurance company restricted its liability to indemnity against loss, or provided that no action should lie against it as respects any loss under the policy, unless the suit be brought by the insured himself to reimburse him for loss actually paid by him in satisfaction of a judgment.

In other courts, policies almost or altogether identical with the one in suit have been construed to be contracts to indemnify against loss, and not to indemnify against liability. In Travelers' Ins. Co. v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663, the policy agreed to indemnify a lumber company against loss from liability for damages, etc., and contained also the following clause, which is practically the same as the first sentence of paragraph 7 in the policy now before the court:

"No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after a trial of the issue."

In view of this paragraph of the contract, the Court of Errors and Appeals held, as set out in the syllabus:

"(1) That not the amount of the employé's judgment, but the amount paid by the employer thereon, was the sum for which the insurer was responsible; (2) that the transfer of the employer's property to a trustee in bankruptcy, by operation of the United States bankrupt act, was payment within the requirement of this clause, and perfected the liability of the insurer for so much as the employé was entitled to receive out of the bankrupt's estate; (3) that this liability of the insurer passed, by force of the bankrupt act, to the trustee in bankruptcy as assets of the estate; and (4) that the amount for which the insurer is liable will be determined by ascertaining what percentage of the assets of the bankrupt, outside of this policy, will pay on all the debts proved against the estate, outside of the employé's judgment. The insurer is answerable for the same percentage of that judgment."

The Supreme Judicial Court of Maine in Frye v. Gas & Electric Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500, had the same language before it, and construed the contract to be a contract of indemnity only. With regard to the provision expressly indemnifying the insured "against loss from common-law or statutory liability for damages," the court said:

"The contract of the insurer was with the gas company to indemnify that company 'against loss' from liability for damages on account of bodily injuries accidentally suffered by an employé and caused by the negligence of the assured. The use of the word 'indemnify' shows the object and nature of the contract. It was to reimburse and make whole the assured against loss on account of such liability. There can be no reimbursement when there has been no loss. The contract of insurance contains nothing to show that it was the object or intention of the contracting parties that the insurer should guaranty the gas company's liability for negligence to its employés. It was not a contract of insurance against liability, but of indemnity against loss by reason of liability."

After distinguishing the cases in Minnesota, Wisconsin, and Arkansas, the opinion goes on to say:

"In this case, as we have seen, the contract was one of indemnity only. It was not obtained by the gas company for the benefit of its employés, but for its own benefit exclusively, to reimburse it for any sum that the company might be obliged to pay and had paid on account of injuries sustained by an employé through its negligence. Independently of the condition in the contract of insurance above quoted, we should be compelled to construe this contract as one of indemnity only.

"But this provision puts an end to all questions or doubt, if any there could be. The parties have expressly provided in the contract which they chose to make that 'no action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.' By reason of the unequivocal language of this provision the undertaking of the insurer was expressly limited to liability in an action brought by the insured 'to reimburse him for loss actually sustained and paid by him.' There can be no doubt about the meaning of this language, and no question about the right of the contracting parties to insert such a provision in their contract for the purpose of making clear the nature and limit of the liability of the parties, or of either of them."

In a recent case in Iowa—Cushman v. Fuel Co., 122 Iowa, 656, 98 N. W. 509—a similar provision of the policy was that no action should lie against the insurance company unless brought "by the insured himself to reimburse him for loss actually sustained and paid in satisfaction of a judgment, after trial of the issue"; and the court decided that an unpaid judgment for a personal injury against the employer could not be enforced in an equitable action by the employé against the guaranty company; saying:

"The plaintiff was not a party to the contract, and had no legal rights thereunder. While the policy provided that the guaranty company might appear and defend for the fuel company in any action brought against it for personal injuries, such provision was for the protection of the guaranty company alone; and imposed no liability upon it beyond the terms of the contract. A court of equity can no more disregard the express provisions of the contract than could a court of law, and neither can make a new contract for the parties which would impose a liability not originally contracted for. Hence whatever relief a court of chancery might grant the plaintiff in any event must of necessity be based upon and be determined by the contract which the parties themselves have made. The only obligation of the guaranty company was to indemnify the fuel company against 'a loss actually sustained and paid in satisfaction of a judgment after trial of the issue.' This covenant is as explicit and certain as language could well make it, and, as between the parties to the contract, no recovery could be had against the guaranty company because the judgment against the fuel company was not paid, and consequently the covenant was not broken."

The last decision of which I have any knowledge is Finley v. United States Casualty Co., 83 S. W. 2, decided by the Supreme Court of Tennessee in November, 1904, in which the cases are reviewed and discussed, and a policy like the one in suit is construed to be a contract of indemnity against loss only, and to furnish no ground for a suit until the insured has himself paid the loss.

Against the rulings thus referred to is a single case—Sanders v. Frankfort, etc., Ins. Co., 57 Atl. 655—in which an opposite conclusion is reached by the Supreme Court of New Hampshire in construing a policy like the one now under consideration. The opinion

is careful, and deserves much respect; but it is certainly opposed to the weight of authority, and I am not satisfied with the construction of the policy that the court found it necessary to adopt in order to avoid the force of the provision forbidding suit by the insured until after he has paid the employé's judgment. The reasoning of the court is based for the most part upon the insurer's agreement under clauses 2 and 3 to defend or settle claims or pay the insured the full amount of the policy. This is regarded as equivalent to assuming the full liability for such a claim whenever the defense of the employé's suit is undertaken, and there is then no serious difficulty in taking the further step, and holding that the injured employé may enforce this liability by proceeding in equity directly against the insurance company. Clause 7 (it is numbered 8 in the New Hampshire policy) is limited to cases which the insurer does not defend, because it denies all liability therefor under the policy. To use the language of the court:

"The purpose of clause 8 was, therefore, to provide for the cases, if any should arise, where the company contended the claim arose from an accident not covered by the policy. It was intended to limit the liability of the company to damages ascertained by due course of judicial procedure in cases where they could not conduct the defense without waiving their claim that they were not liable, and as to which, if not liable, they were under no obligation to incur any expense. Its purpose was to prevent collusion between the plaintiff and the assured."

The objection to this construction, as it seems to me, is that it defeats a plain and unambiguous provision by what appears to be the pure assumption that the parties did not mean what they clearly said. The suits which they had in mind and provided for were suits by the insured for losses "under this policy," and for such losses the insurance company was liable whether it had defended the employés' suits or not. If it had defended these, it would probably be estopped to deny its liability afterwards. If it had refused to defend, taking the ground that the policy did not cover the particular injury, it could raise that question afterwards when a suit should be brought by the insured against it after the employé had obtained a judgment and had been paid. But after the insurer's liability has been established either by estoppel or in a suit brought against it by the insured such liability must of necessity be for a loss under the policy, and by the plain terms of the contract no action can be brought for "any loss under this policy," unless the insured has first paid it himself. So the parties have said, instead of confining the action to cases where the insurer has denied liability, and for that reason has refused to defend; and I do not see sufficient reason for endeavoring to explain away the unqualified language of the agreement contained in clause 7. It is broader than is supposed by the New Hampshire court, for it not only covers cases not defended by the insurer, but the case also where the insured has made payment under the compulsion of an execution, whether the insurer made defense or not. If the employer has available property, he must pay the writ in full. But if he is not in prosperous circumstances, and if, therefore, full

satisfaction can scarcely be hoped for, the employé may be willing to accept part of his claim as complete payment, while the insured may be unscrupulous enough to seek to recover the face of the judgment from the company. Evidently an execution may issue against the insured whether the company has defended the suit or not, and a full or partial payment that has been made on such a writ is beyond controversy, as it seems to me, included in the language of the policy now under consideration.

If the conclusion to which I have come on this branch of the case is correct, it is not necessary to consider how, if at all, the plaintiff's right to recover on his attachment execution may have been affected by the appointment of a receiver in May, 1903, and the transfer to him of "all the property, assets, claims, choses in action and in possession, debts, demands, notes, and other evidences of indebtedness, and of other personal property of said Gilman, McNeil & Co., wherever it may be found."

In accordance with the case stated, judgment may be entered in favor of the Ætna Life Insurance Company, garnishee.

In re PETTINGILL & CO. Ex parte PETERS. Ex parte CHICAGO NEWSPAPER UNION. Ex parte PEIRSON. Ex parte BURLINGTON HAWKEYE. Ex parte KELLOGG NEWSPAPER CO.

(District Court, D. Massachusetts. April 18, 1905.)

No. 8,742.

1. STATUTE OF FRAUDS—MEMORANDUM OF CONTRACT—WRITTEN OFFER ACCEPTED ORALLY.

A written and signed offer, which is accepted, either in writing or orally, constitutes a sufficient memorandum of contract under the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 195, 244.]

Sufficiency of expression of consideration in memorandum within statute of frauds, see note to Schoate v. Hoogstraat, 46 C. C. A. 183.]

2. BANKRUPTCY—PROVABLE DEBTS.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], the provability of a claim depends upon its status at the time of the filing of the petition in bankruptcy. If not then a provable debt, as defined in the act, it cannot be proved, although it may thereafter come within such definition.

3. SAME—TEST OF PROVABILITY—ANTICIPATORY BREACH OF CONTRACT.

If a bankrupt, at the time of bankruptcy, by disenabling himself from performing a particular contract, and by repudiating its obligation, could give the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such party may prove as a creditor in bankruptcy, on the ground that bankruptcy is the equivalent of disenablement and repudiation.

4. SAME—CONTINGENT LIABILITY.

The liability of a bankrupt on a guaranty executed by him of the payment by a corporation of dividends at a certain rate on its stock, owned by another, with respect to dividends not due or payable at the time of the filing of the petition in bankruptcy, is so far contingent that a claim based thereon is not a provable debt, within the provisions of Bankr.

Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447] at least where, at the time of the bankruptcy, the corporation was a going concern.

5. SAME—CONTRACT FOR FUTURE PURCHASE OF PROPERTY.

Bankruptcy is such a breach of a contract to purchase stock at a stated price and time, which time was subsequent to bankruptcy, that a claim for damages for the breach is a provable debt.

In Bankruptcy. On review of decision of referee with respect to certain claims.

See 135 Fed. 218.

Joseph W. Lund, for trustee.

John Abbott and Henry C. Stetson, for creditors.

LOWELL, Circuit Judge. Pettingill, styled Pettingill & Co., an advertising agent, was indebted for advertising Greene's Nervura to the creditor, publisher of a newspaper. This indebtedness Pettingill had agreed to pay in four equal parts, in October, 1901, April and October, 1902, and April, 1903. On August 31, 1901, Pettingill sent a signed circular to the creditor, in which, after eulogizing the prospects of Nervura, he proceeded:

"Instead of deferring final settlement of the Dr. Greene business for the year past, until April, 1903, as arranged for in our contract with you, we propose to turn over to you, on or before October 1st of this year, the six per cent. preferred stock of the Dr. Greene Nervura Company, issued as described, dividends guaranteed by Pettingill & Co. until stock is retired, in full settlement of the Dr. Greene Nervura business to date.

"We enclose herewith a blank acceptance, on the return of which, duly signed, a new contract will be forwarded."

It was agreed at the argument that the "new contract" referred to in the sentence last quoted concerned only future business, and not the existing debt, or its payment by the issuance of stock or otherwise.

The creditor signed and returned the "blank acceptance" above mentioned, dated September 25, 1901. It read as follows:

"Instead of the settlement in four installments, as provided in our contract with Pettingill & Company, we agree to accept six per cent. preferred stock of the Dr. Greene Nervura Co., total issue not to exceed $400,000, 6%, callable at any time after three years at 105, and any unpaid dividends, in settlement of our account for Dr. Greene's Nervura Advertising for the year beginning October 1st, 1900. Dividends on said stock guaranteed by Pettingill & Co., until stock is retired. It is understood that stock for the full amount of such account is to be issued to us October 1st, 1901, dividends payable semiannually, to accrue from that date."

This was sent to and received by Pettingill. A stock certificate for 263 shares of the preferred stock of Dr. Greene Nervura Company, a corporation, dated March 1, 1902, was sent to the creditor. Thereafter Pettingill & Co., the firm, disposed of its assets to Pettingill & Co., the bankrupt corporation, and the corporation assumed the business debts of Pettingill. An involuntary petition against the corporation was filed March 29, 1904, upon which adjudication followed April 18, 1904. Against the Dr. Greene Nervura Company an involuntary petition was filed April 7th, and adjudication followed on April 26th. Under the guaranty of the Pet-

tingill corporation the creditor seeks to prove against it for the amount of the dividends coming due on the Nervura stock, both before and after bankruptcy, and for the value of the Nervura stock. The referee allowed the proof for dividends accruing before the date of the petition against the Pettingill corporation, and disallowed the rest of the claim. There is no support for the claim for the value of the stock. No contract was made by the bankrupt concerning it.

The proof for dividends to accrue after the date of the petition was resisted. First, because the contract was outside the statute of frauds. But the circular was signed by Pettingill, and the offer which it contained was accepted by the creditor. An offer written and signed, though accepted but orally, is a sufficient memorandum under the statute. Browne on the Statute of Frauds, § 345a. The referee was of the opinion that the circular and acceptance did not constitute a contract to guaranty the dividends, but only a contract to make a future contract of guaranty. This does not seem to me the natural meaning of the transaction. Second, the referee was further of opinion that the liability of the firm, as shown by the offer and acceptance, was not a business debt of the firm, so as to be assumed by the corporation. But, considering that the debt which the guaranty replaced was undoubtedly a business debt, and looking at the nature of the whole transaction, it seems to me that the corporation assumed the liability. If these conclusions be correct, it is not disputed that the claim is provable unless it fails by reason of its contingency. The question presented is this: If, by a valid contract, A. guaranties to B. the payment of 10 per cent. dividends upon corporate stock held by the latter, and then becomes bankrupt, can B. prove against A.'s estate in bankruptcy for damages arising from corporate failure to pay 10 per cent. dividends after the filing of the petition in bankruptcy? Is such a claim so far contingent that it may not be proved under Bankr. Act July 1, 1898, c. 54b, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]?

Under that act the provability of a claim depends upon its status at the time the petition is filed. If, at that time, the claim is provable, within the definition of section 63, it may be proved. 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]. If, at that time, it does not fall within that definition, but does so at some later time, it cannot be proved. Swarts v. Fourth Bank, 117 Fed. 1, 54 C. C. A. 387; Moulton v. Coburn (C. C. A.) 131 Fed. 201. This is not an invariable rule in bankruptcy. Under some bankrupt acts provability is related to another time. See Williams on Bankruptcy, p. 114; Rev. Laws Mass. c. 163, § 31. If section 63a (2) and (5) and section 57i (30 Stat. 562, 560 [U. S. Comp. St. 1901, pp. 3447, 3443]) establish exceptions to the rule above stated, the exceptions are of most minute scope, and do not concern the case at bar. Section 63b "adds nothing to the class of debts which might be proved under paragraph 'a.'" Dunbar v. Dunbar, 190 U. S. 340, 350, 23 Sup. Ct. 757, 47 L. Ed. 1084. The court has, therefore, to consider if

the claim of Peters against Pettingill at the time the petition was filed was a provable claim within section 63a of the bankrupt act. It cannot be brought within clauses (1), (2), (3), or (5). If provable, it must be so because it is a claim founded upon a contract within the definition of clause (4); but not every liability founded upon a contract can be proved in bankruptcy. This was decided of a covenant to pay an annuity to a woman dum sola (Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084); and it has often been decided of covenants to pay rent, in so far as the rent accrues after bankruptcy. These claims are disallowed, not because they are not founded upon contract, but because at the filing of the petition, the time when the status of the claim is fixed, the damages arising from the breach of contract are so far contingent that they cannot be computed by any process known to law. As was said by the court in Riggin v. Magwire, 15 Wall. 549, 552, 21 L. Ed. 232, where a claim for breach of a covenant of seisin was denied proof under the act of 1841:

"If an action at law had been brought on a covenant at that time [bankruptcy], nominal damages at most, if any damages at all, could have been recovered."

That the act of 1841 went as far as the act of 1898 in admitting to proof claims subject to a contingency cannot be disputed.

Some statutes of bankruptcy, indeed, by express language admit to proof some claims which could not be liquidated in any action at law or in equity brought at the time of bankruptcy. In some sense these statutes empower a court of bankruptcy, in the language of the Supreme Court in Dunbar v. Dunbar, to guess at the creditors' damage. And this course has some advantages, for the bankrupt is thus relieved from liabilities which otherwise would hamper him after his discharge. The act of 1898, however, authorizes none of these guesses, and admits to proof only those claims which can be liquidated by legal proceedings instituted at the time of bankruptcy. Other liabilities of the bankrupt are deemed so far contingent that they cannot be proved in bankruptcy, nor are they released by the bankrupt's discharge.

For admission to proof, however, the claim need not arise before bankruptcy, nor need the contract be broken theretofore. It is sufficient for proof if the breach of contract and bankruptcy are coincident. To some extent bankruptcy operates as a breach of the bankrupt's contracts. This has been deemed true of the bankrupt's commercial paper, even though that paper is made payable after bankruptcy. It is true that the trustee in bankruptcy in some cases may elect to keep the bankrupt's contracts alive and to carry them out. In other cases, the creditor may be able to ignore the breach arising from bankruptcy and to keep a contract alive against the bankrupt. With these limitations upon the rule we need not deal here. If the trustee desires to keep the contract alive, he must manifest his election within a reasonable time. Where he does not do this, and where the creditor, by seeking to prove, manifests his election to treat the contract as broken, the court of bankruptcy

may permit proof of claims arising from a breach of contract, which breach did not occur before bankruptcy, but was caused constructively by the adjudication of bankruptcy itself. See Ex parte Swift, 112 Fed. 315, 50 C. C. A. 264; Ex parte Pollard, 2 Lowell, 411, Fed. Cas. No. 11,252. Bankruptcy itself may be treated as a breach of the bankrupt's contracts, analogous to that complete repudiation of the contract before the time of performance which was shown in Hochster v. Delatour, 2 E. & B. 678, and in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, or to a complete disenablement of performance of the contract, as in Frost v. Knight, 7 Exch. 111.

It seems, therefore, that the test of provability under the act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under section 63b (30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]).

What is the result of applying this test to the case at bar? Could Peters have sued at once in the circumstances supposed? No decided case exactly in point has been found by counsel or by the court. Reference has already been made to Dunbar v. Dunbar and to cases involving a breach of the contract to pay rent. In Moch v. Market St. Bank, 107 Fed. 897, 47 C. C. A. 49, the liability of a bankrupt indorser of commercial paper not due at the filing of the petition was held a provable debt. See In re Semmer Glass Co. (C. C. A.) 135 Fed. 77. In Re Stern, 116 Fed. 604, 54 C. C. A. 60, a creditor was allowed to prove for breach of a contract to deliver ice for a long period extending beyond the date of bankruptcy. To allow damages to be assessed in this case of anticipatory breach of the contract is clearly within the rule of Hochster v. Delatour and Roehm v. Horst. In Cobb v. Overman, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, the Court of Appeals for the Fourth Circuit held that an annuity was provable under section 63a (1) as a "fixed liability * * * absolutely owing." It is hard to see what sum was evidenced by the bond as absolutely owing, except the penalty itself. See Lowell on Bankruptcy, § 166; Eden on Bankruptcy (2d Ed.) 122. The claim would seem provable more easily under clause (4). In Hibberd v. Bailey, 129 Fed. 575, 64 C. C. A. 143, the Court of Appeals for the Third Circuit held that a claim against the bankrupt surety on an administrator's bond was provable where the administrator's liability had been fixed before bankruptcy. The decision seems to depend upon the probate laws of Pennsylvania, for it is said by the court that the decree against the administrator "is all that is necessary as a prerequisite to the proceedings against the surety." 129 Fed. 579, 64 C. C. A. 579. Demand on the administrator is thus dispensed with, and the surety's liability is made primary and uncontingent. On the other

hand, in Goding v. Roscenthal, 180 Mass. 43, 61 N. E. 222, it was held that a surety on a bankrupt's bond for dissolving an attachment could not prove, where he had not been called upon to pay until after bankruptcy. See, also, Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33. In Dunbar v. Dunbar the Supreme Court cited all the cases above mentioned which had then been decided, without unfavorable comment.

Upon the whole, it seems that, where A. guaranties to B. the payment of dividends by a corporation at a certain rate, and then repudiates the contract and disenables himself from performing it, B. cannot recover as to future dividends, as for a breach of an anticipatory contract, even under the broad rule laid down in Roehm v. Horst. The case is nearer to Dunbar v. Dunbar, and a computation of damages is deemed too difficult by reason of the doubt of the corporation's action.

In the case at bar the Nervura corporation became bankrupt but a few days after the bankruptcy of Pettingill, and was undoubtedly insolvent at the time of the Pettingill bankruptcy. Had the Nervura bankruptcy occurred first, it might, perhaps, have so determined the inability of the Nervura corporation to pay the dividends guarantied that recovery could be had at once upon Pettingill's guaranty. But the subsequent bankruptcy of the Nervura corporation, however closely impending, cannot enlarge the creditors' rights.

Ex parte Chicago Newspaper Union The facts were the same as in the Peters case, except that the "blank acceptance" signed and returned by the creditor had written upon it:

"Pettingill & Co., guarantee dividends and redemption of stock three years after date of issue."

From the referee's report I gather that these words were written by the authority of Pettingill before the "blank acceptance" was sent to the creditor. If so, the acceptance by the creditor established a contract binding under the statute of frauds. As was stated in the Peters case, the creditor's claim under the guaranty of dividends cannot be proved in bankruptcy. The contract to redeem the stock three years after the date of issue may fairly be construed as a contract to purchase the stock at par at the time specified. As to the provability of the claim arising from the last-mentioned contract, the question presented is this: Can a claim for breach of the bankrupt's contract to buy goods at a fixed date after bankruptcy be proved in the bankruptcy proceedings? If the creditor so elects, and if the trustee does not elect to keep the contract alive, I am of opinion that proof is possible, by the analogy of In re Swift, 112 Fed. 315, 50 C. C. A. 264, Hochster v. Delatour, and Rochm v. Horst. What should be the measure of damages need not now be discussed. The claim of the Evening News Association is similar.

Ex parte Peirson. In this case the acceptance contained the words:

"Redemption of stock guaranteed by Pettingill & Co. at price paid."

These words import a contract to redeem at any time at the option of the creditor, but other statements in the acceptance and accompanying circular make this construction somewhat doubtful. In any construction the claim is provable.

Ex parte Burlington Hawkeye. Here there was an express written agreement, signed by Pettingill, to redeem at the end of five years at par. The claim is provable.

Ex parte Kellogg Newspaper Company. The "blank acceptance" here contained a statement that Pettingill would purchase in five years for the price paid. The claim is provable.

The judgment of the referee is affirmed in the Peters case. In all the others it is reversed, with directions to proceed in accordance with this opinion.

FORD v. TAYLOR et al.

(Circuit Court, D. Nevada. March 30, 1905.)

No. 799.

1. RECEIVERS—PRACTICE ON EX PARTE APPLICATION.

When an ex parte application is made for the appointment of a receiver, the proper practice is to make an order requiring the defendant to show cause why the application should not be granted, and, if a proper showing of emergency is made, to appoint a temporary receiver until the day for hearing on the rule to show cause.

2. SAME—EVIDENCE TO WARRANT APPOINTMENT—ANSWER UNDER OATH.

Under the amendment to equity rule 41, an answer under oath may be used as an affidavit on a motion for the appointment of a receiver, or on a motion to discharge a receiver appointed ex parte; and where the bill does not waive answer under oath, such answer, which distinctly denies the material allegations of the bill, not only makes an issue, but proves it to the extent that to overthrow it will require the evidence of two witnesses, or of one witness and circumstances equivalent to a second.

In Equity. On motion to vacate order appointing a receiver.

Key Pittman and J. K. Chambers, for complainant.

Campbell, Metson, Jackson & Brown (James H. Budd, of counsel), for defendants.

HAWLEY, District Judge (orally). This suit was brought in the state court upon what may be designated a grubstake contract, which it is claimed in the bill of complaint constituted a copartnership between plaintiff and defendants in the location of certain designated mining claims in Goldfield Mining District, Nev. An injunction was issued and a receiver appointed. Subsequently the cause was removed to this court, and motions made to vacate said orders, especially the order appointing a receiver, upon several grounds: (1) Because the said receiver was improperly appointed; (2) that said receiver was appointed ex parte and without notice; (3) that the bill of complaint which is made the basis of said appointment fails to state facts sufficient to authorize the appointment by a court of equity; (4) that all of the equities alleged in the bill

of complaint have been fully denied. "Said motion will be made upon the records and papers on file in this suit, as well as upon the verified answer of defendants, which for the purpose of this motion will be used as an affidavit, without waiving any objections to the sufficiency of the complaint." Upon the hearing of this motion the complainant obtained leave to file an amended bill of complaint, which materially changes some of the terms of the contract as alleged in the original bill. The answer of defendants contains a specific denial of all the allegations in the original complaint, and it was agreed should, for the purposes of this hearing, be treated as an answer to the amended complaint.

In disposing of the motion to vacate the appointment of the receiver, it is only deemed necessary to refer to a few points. In Maynard v. Railey, 2 Nev. 313, 320, the court announced certain rules applicable to the appointment of receivers, viz., that while the court has the power to appoint a receiver on an ex parte application, when a proper showing is made, the appointment of a receiver ought not to be made without notice, except in cases of emergency. This court is of opinion that, when an ex parte application for the appointment of a receiver is made, the proper practice is to make an order requiring the defendant to appear and show cause why the application should not be granted, and, if a proper showing is made as to the necessity or emergency of such an appointment, to appoint a temporary receiver, until the day for hearing on the rule to show cause, in order to afford the plaintiff the protection to which he may fairly be entitled under the averments in his complaint. In Edwards on Receivers, 77, the author said:

"A motion for a receiver is generally made on the answer of the defendant; but it may be made on affidavits before answer, where the complainant can clearly satisfy the court that he has an equitable claim to the property in controversy and that a receiver is necessary to preserve the same from loss."

The appointment of a receiver is a matter within the sound discretion of the court, and each case must be determined upon its own conditions and circumstances, and in exercising this right the courts should ever keep in mind that a receiver is, like an injunction, an extraordinary remedy, and ought never to be made except in cases of necessity, and upon a clear and satisfactory showing that the emergency exists, in order to protect the interests of the plaintiff in the property involved. The power of appointing receivers is one which courts have said should be sparingly exercised, and with great caution and circumspection. Pullan v. Railroad Co., 4 Biss. 35, 47, Fed. Cas. No. 11,461; Latham v. Chafee (C. C.) 7 Fed. 526, and authorities there cited.

Without questioning the regularity of the proceedings in the state court, or the sufficiency of the complaint to authorize such action, we pass to other questions raised upon the hearing of the motion to vacate before this court. There is no controversy as to the right of the defendants to move, after answer, to vacate the order appointing the receiver. The bill of complaint was verified, and it did not waive an answer under oath. The defendants filed an answer under oath, denying all the material allegations of the

complaint. In such cases the rule is well settled that the answer, under the amendment to equity rule 41, can be used at the hearing with the probative force of an affidavit. United States v. Workingmen's Amalgamated Council (C. C.) 54 Fed. 994, 996, 26 L. R. A. 158; United States v. Parrott, 1 McAllister, 271, Fed. Cas. No. 15,998; Dravo v. Fabel, 132 U. S. 487, 489, 10 Sup. Ct. 170, 33 L. Ed. 421.

In Slessinger v. Buckingham (C. C.) 8 Saw. 469, 17 Fed. 454, it was held that, where the complainant does not waive an answer to the bill under oath, an answer under oath, which distinctly denies the material allegations of the complaint, not only makes an issue, but proves it to the extent that it will require the evidence of two witnesses, or of one witness and other circumstances equivalent to a second, to overthrow the answer. To the same effect see: Vigel v. Hopp, 104 U. S. 441, 26 L. Ed. 765; Morrison v. Durr, 122 U. S. 518, 7 Sup. Ct. 1215, 30 L. Ed. 1225; Monroe Cattle Co. v. Becker, 147 U. S. 47, 54, 13 Sup. Ct. 217, 37 L. Ed. 72; Latta v. Kilbourn, 150 U. S. 524, 541, 14 Sup. Ct. 201, 37 L. Ed. 1169; Childs v. Carlstein (C. C.) 76 Fed. 86, 91. Applying this rule to the present case, it is clear to my mind that the showing made by the plaintiff is not of such a character as to overthrow the evidence of the answer. Upon this ground alone the appointment of the receiver should be vacated.

There is another ground, equally strong, upon which the order might be made. The injunction issued by the state court, which will remain until the further order of this court, is ample to protect the plaintiff in his rights, if any he has, in the property in controversy.

The appointment of the receiver is hereby vacated.

CORBIN v. TAUSSIG et al.

(Circuit Court, E. D. Pennsylvania. April 1, 1905.)

No. 8.

1. EQUITY—DAMAGES FOR TORTIOUS ACTS—BENEFITS DERIVED BY WRONGDOER.
   A court of equity has no inherent power to ascertain the damages sustained by reason of tortious acts, unattended with profits to the wrongdoer. It required an act of Parliament (Acts 22 & 23 Vict. c. 27) to change this in England; and the only modification to be found in the federal law is with respect to the infringement of patents, which has been effected by direct act of Congress. Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395].

2. EXCLUSIVE AGENCY—SALE OF MANUFACTURED ARTICLES—RELIEF IN EQUITY—BENEFITS DERIVED—DAMAGES.
   Where, therefore, a party has the exclusive agency for the sale of articles manufactured by another, within certain territory, while a third party who invades such territory may be made by injunction to respect the contract, and at law might be subjected to an action for damages, to be measured by the profits derived from sales made in such exclusive territory in disregard of the agent's rights, yet a recovery in equity is limited to the damages or benefits derived by the offending party from sales so made.

3. Same—Expenses of Making Sales—Apportionment of, in Mixed Business.

In such a case, in order to determine the profits derived from sales made, the offending party is entitled to offset the legitimate expenses incurred in making them; and, the articles sold having formed a part of the general business in which he is engaged and no separate account having been kept by which to determine just what is chargeable thereto, the only thing left to do is to apportion the expenses among the different commodities dealt in, according to the gross sales of each. If this does not produce a just result, it is incumbent upon the party complaining to show it.

4. Contract—Construction—Exclusive Agency for Disinfecting Appliances—What Governed by.

Semble, where an agency was created for the sale of so-called disinfectors and a certain named disinfecting fluid, of which the other contracting party was the patentee and manufacturer, and the plaintiff was not only to have the exclusive right to make sales thereof, but of all appliances connected with the same, patented and manufactured by such patentee, this was broad enough to include a disinfectant, substituted for the first one, which did not work, coming from the same source and designed to accomplish the same end, although given a different name and not of the same composition, nor altogether the same in effect or manner of use, particularly where the parties, in their transactions with each other, had treated the one as taking the place of the other.

In Equity. On exceptions to master's report.

E. O. Michener, for complainant.

J. W. Bayard, for defendants.

ARCHBALD, District Judge.[1] It was established by the former opinion in this case (C. C. 132 Fed. 662) that the complainant had the right under his contract to the exclusive agency in Philadelphia for the sale of West disinfectants, and that the defendants had unlawfully intruded thereon. If, therefore, this were an action at law for the recovery of damages, he would be undoubtedly entitled to the loss sustained by him thereby. And the business being an established one, this loss would be measured by the profits which he would have derived from the sales made by the defendants in his exclusive territory in disregard of his rights, these profits being ascertained by the difference between the cost of the disinfectants to him and the price at which he retailed them again, subject to deductions for the expense of doing so as determined by the experience of the business. Lazier Gas Engine Co. v. Du Bois (C. C. A.) 130 Fed. 834; Russell v. Horn, 41 Neb. 567, 59 N. W. 901; Hall v. Stewart, 58 Iowa, 681, 12 N. W. 741; Ramsey v. Holmes Elect. Protec. Co., 85 Wis. 174, 55 N. W. 391; Mueller v. Bethseda Spring Co., 88 Mich. 390, 50 N. W. 319; Oliver v. Hanford, 92 Mich. 304, 52 N. W. 609; Peltz v. Eichele, 62 Mo. 171; Kenney v. Knight (C. C.) 127 Fed. 403; Imperial Coal Co. v. Port Royal Coal Co., 138 Pa. 45, 20 Atl. 937; Cincinnati Gas Co. v. Western Siemans Co., 152 U. S. 200, 14 Sup. Ct. 523, 38 L. Ed. 411; Anvil Mining Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814. But the difficulty of applying that doctrine here is that the defendants were not parties to the contract with the complainant, and, while they

[1] Specially assigned.

can be made to respect it, the measure of relief beyond this accorded in equity, under the circumstances, extends merely to the advantages or benefits which they have derived from sales made in disregard of it. As said in Kerr on Injunctions, p. 39, a court of chancery has no inherent power to ascertain the amount of damages sustained by reason of tortious acts unattended with profits to the wrongdoer; and that is the situation here. It required an act of Parliament to change this in England (Acts 22 & 23 Victoria, c. 27; De Vitre v. Betts L. R. 6 Eng. & Ir. App. 319); and, however it may be in the different states in this country, the only modification to be found in the federal law is with respect to the infringement of patents, effected by direct act of Congress (Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395]; Livingston v. Woodworth, 15 How. 559, 14 L. Ed. 809; Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000; Root v. Railway, 105 U. S. 189, 26 L. Ed. 975).

Judged by this, no exception can be taken to the course pursued by the master in the accounting before him. As against the sales made by the defendants, in order to determine the profits which they had derived, they were entitled to offset the legitimate expenses incurred in making them; and, the disinfectants in question having merely formed a part of the general business in which they were engaged, and no separate account having been kept by which to determine just what was chargeable thereto, the only thing left to do was to apportion the expenses among the different commodities dealt in, according to the gross sales of each, as was done. Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566; The Tremolo Patent, 23 Wall. 518, 23 L. Ed. 97. If this did not produce a just result, it was incumbent on the complainant to show it, which, except by way of argument, there has been no attempt to do. It is true that, as carried on by the complainant, the disinfectant business was apparently a profitable one. The small amount of sales also, which are reported by the defendants, and the show of loss which they make, are in marked contrast with their former contention that the complainant did not push the business as he ought, on which ground they claimed the right to terminate the agency. Neither do they comport with the manifest desire displayed by the defendants to shoulder him out of the business, and get it into their own hands. But, however this may be, there is nothing tangible in it by which to affect the result. We cannot say, for instance, that the defendants' sales must have been more extensive than they admit, or that, rightly managed, there was a decided and definite profit in them. The question is what they actually did and made, and not what they might or ought to have done; and for this, as the case stands, we have nothing but the figures which they have furnished, which—whatever doubt may be thrown upon them—there is not enough to discredit, much less is there anything to lay hold of to make up a different account.

In view of the conclusion which is so reached, it is not necessary to decide whether, as held by the master, the defendants were only liable for the original or crude chloronaptholeum, so-called, or whether they should account for euchrelyptum, sometimes spoken

f as extra refined chloronaptholeum as well. These names are nerely fanciful, and, however effective in disposing of the goods, fford no guide. I have to confess, however, and I trust it is not nappropriate to say, that the master seems to have put too narrow construction upon the complainant's contract on which the ques-ion depends, and that, in my judgment, it extends to both these uids. It is true that they differ in composition, and are not alto-ether the same in effect or manner of use. But not only was the ne brought forward by the inventor as an equipment for his patent isinfectors in substitution for the other on complaint that it did ot work, and was thereafter treated in the transactions between he parties as taking its place, thus furnishing a construction of the ontract to which the defendants are committed, but by the express erms of that instrument the complainant was to have not only the xclusive sales of West disinfectors, and the disinfecting fluid nown as chloronaptholeum, but of "all appliances connected with he sale of same patented and manufactured by said" West as well; provision which is broad enough to include another and different isinfectant, such as the one in question, coming from the same ource, and designed to accomplish practically the same end. With-ut enlarging upon this, however, it is not material, as already tated; for although the master rejected an offer to prove the sales f chloronaptholeum, which apparently threw them out of the case, hey were in fact shown in the statement taken from the books of he defendants, which was put in evidence; and when he came to nake up his report he took them into consideration in the alterna-ive account which he stated, and by this it is found that, whether he defendants be charged with the sales of the one or the other isinfectant, they derived nothing whatever therefrom, the result n either case being a loss.

The exceptions are overruled, and the report of the master is onfirmed.

Ex parte MOEBUS.

(Circuit Court, D. New Hampshire. March 31, 1905.)

No. 527.

1. FEDERAL COURTS—HABEAS CORPUS—REGULARITY OF EXTRADITION PROCEEDINGS.

A petition for a writ of habeas corpus *held* not to state a case for federal interference on the ground of irregularity in extradition proceedings, in view of the rule of the Supreme Court that a large measure of credence and conclusiveness must be accorded to proceedings before the Governor in such cases.

2. EXTRADITION—ESCAPED PRISONER—LAPSE OF SENTENCE.

A convict who escapes before the completion of his term of imprisonment is not entitled to an allowance of the time while he is so at large on his sentence, and lapse of time will not affect its validity and effectiveness as a basis for extradition proceedings.

3. FEDERAL COURTS—HABEAS CORPUS FOR STATE PRISONER—SUFFICIENCY OF PETITION.

A petition for a writ of habeas corpus, which shows on its face that the petitioner, since his extradition from another state, has been confined

in a penitentiary for five years upon no other process of commitment than the Governor's warrant, states a case of deprivation of rights under the Constitution of the United States, which authorizes and requires a federal court to take jurisdiction.

Habeas Corpus. On motion to dismiss petition.

Fremont E. Shurtleff, for petitioner.

Edwin G. Eastman, Atty. Gen. of New Hampshire, for respondent.

ALDRICH, District Judge. Under this second petition of a person claiming to be Henry E. Moebus for a writ of habeas corpus, to which there is a motion to dismiss on the ground that no questions for the federal courts are involved, and upon the ground of want of jurisdiction, three questions are presented, viz.: That extradition was improperly influenced by an obsolete indictment on which an individual named Max Shinburn had already been tried and convicted; that the extradition was irregular and contrary to law; that the petitioner has illegally been confined in the New Hampshire State Prison since November, 1900, in violation of the Constitution of the United States, and solely on the alleged authority of a writing, a copy of which is attached to the petition and marked "Exhibit A."

The hearing so far is only preliminary, the Attorney General of New Hampshire appearing specially, without prejudice, for the warden of the State Prison, for the purpose of raising the question of jurisdiction. In the present aspect, I can only consider what is presented upon the face of the petition.

In view of the case of Munsey v. Sheriff of Merrimac County (decided January 30, 1905, by the Supreme Court of the United States) 25 Sup. Ct. 252, 49 L. Ed. —, which accords a large measure of credence and conclusiveness to proceedings before the Governor in matters of extradition, upon the ground that such proceedings are summary in their nature and that the person demanded has no constitutional right to be heard before the Governor, who must decide upon such evidence as is satisfactory to him whether the person demanded has been substantially charged with the crime and whether he is a fugitive from justice, I conclude that, so far as alleged irregularities in the extradition proceedings are concerned, the petition before me does not state a case for federal interference upon that ground.

Under the allegation as to the obsolete indictment, the question is raised in argument whether a sentence of ten years, imposed upon one Max Shinburn, prior to 1866, who illegally escaped before the expiration of the term of the sentence, is so obsolete that it should be treated as lapsed. I do not consider that the petition so far raises this question as to require an authoritative decision. The informal suggestion of the Attorney General, however, is that the petitioner is in fact Max Shinburn, and that he is being held to serve out an unexpired sentence, from which he escaped in 1866, and which was imposed upon a proper conviction in a regular proceeding prior thereto, while counsel for the petitioner contends

that the petitioner is not Max Shinburn, and, if he were, that the sentence has lapsed, and that the law would not warrant his present confinement. I am asked by both sides to pass upon this question, and I do so only to the end that it shall be understood that I do not take jurisdiction of the case and direct further proceedings upon that ground.

I see no reason, upon principle or authority, why an escaped convict should be allowed time on the sentence while illegally at large upon unlawful escape, and the order requiring the warden to answer is in no way influenced by the idea that the unserved sentence imposed upon Max Shinburn has lapsed. Rex v. Ratcliffe, 18 How. St. Tr. 429; 1 Hale, P. C. 602; 1 Russell on Crimes, 453; Cleek v. Commonwealth, 21 Grat. 777; People v. Kuhn, 67 Mich. 539, 35 N. W. 88; Ex parte Clifford, 29 Ind. 106; Woodward v. Murdock, 124 Ind. 439, 24 N. E. 1047.

Looking at the petition as a whole, and considering the exhibit which is included as a part thereof, the substantial allegation is that the petitioner was extradited from the state of New York in 1900 upon an executive warrant, and that he has been kept in confinement in the New Hampshire State Prison by its warden, Mr. Cox, since the 8th day of November, 1900, solely under the Governor's warrant, and that such restraint of liberty is in violation of the Constitution of the United States. This allegation under oath, according to the provision of the federal statutes, must be accepted as so far stating a situation in which a person is deprived of his liberty without due process of law as to justify a federal court in requiring the respondent to answer and set out the process under which the person is held. Under the circumstances of this case, we can only look to the face of the petition, and, as said by the Supreme Court in Ex parte Royall, 117 U. S. 241, 250, 6 Sup. Ct. 734, 739, 29 L. Ed. 868:

"Undoubtedly the writ should be forthwith awarded, 'unless it appears from the petition itself that the party is not entitled thereto.'"

Even under the authority of this case, I do not propose to order the writ under present conditions, but do feel constrained to direct that the warden of the State Prison state by way of answer or return under what process the petitioner, calling himself Henry E. Moebus, is held.

Since Ex parte Royall, 117 U. S. 241, 245–50, 6 Sup. Ct. 734, 29 L. Ed. 868, and the statutes to which that case refers, there can be no question of the power of the Circuit Court to grant writs of habeas corpus to persons in jail or in prison, restrained of liberty in violation of the federal Constitution, and if a question like that presented in the Slaughter-House Cases, 16 Wall. 37, 21 L. Ed. 394, and that presented in Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, are federal questions as to due process of law in respect to property, and a question as to the regularity of a trial for murder in a state which has abolished the grand jury (Hurtado v. People of California, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232), and one relating to the regularity of a criminal trial by a state

panel of 8 jurors, rather than by a jury of 12 persons, are federal questions of due process in respect to life or liberty (Thompson v. Utah, 170 U. S. 349, 18 Sup. Ct. 620, 42 L. Ed. 1061), it must follow that an allegation of confinement in a state prison for a substantial period, like five years, upon no process whatever other than an executive warrant, presents a federal question, which calls for interference, at least to the extent of requiring the person against whom the restraint is alleged to answer.

Motion to dismiss denied. The warden of the State Prison is required to answer and show cause why the writ should not issue. If counsel do not agree upon the time in which this should be done, I will fix a time upon application of either party.

DANCEL et al. v. GOODYEAR SHOE MACHINERY CO. OF PORTLAND, ME.

(Circuit Court, S. D. New York. Ferbuary 2, 1905.)

1 ASSIGNMENT OF CONTRACT—ASSUMPTION BY ASSIGNEE—CONSTRUCTION OF AGREEMENT.

A bond executed by one corporation to another, whose entire property and assets it had purchased, by which it covenanted to pay and discharge all debts, liabilities, and obligations of the obligee, and to adopt, perform, and fulfill all of its contracts and engagements, creates a direct and primary liability of the purchaser in equity on a contract assigned as a part of the assets, which is not affected by a further covenant therein to indemnify and hold harmless the obligee and its directors and stockholders.

2. SAME—SUIT TO ENFORCE—PARTIES.

In such case, where the selling company, after transferring to the purchaser all of its property, good will, books, and papers, and surrendering its capital stock, transacted no further business and held no more meetings of its directors or stockholders, whether legally dissolved thereby or not, it is not an indispensable party to a suit in equity against the purchasing company to enforce its liability on such contract.

3. EVIDENCE—RECORDS OF CORPORATION—AUTHENTICATION.

Where a corporation, on a sale of its property and assets to another corporation, also caused to be transferred to the latter all of its stock and its books and records, which thereafter remained in the possession and under the control of the purchasing company, entries in such books relating to the transaction are admissible against such company in a suit, without further authentication.

4. EQUITY—DECREE—PROVISION FOR FUTURE INSTALLMENTS TO BECOME DUE ON CONTRACT.

A decree in equity, giving judgment on a contract by which the defendant is obligated to pay monthly installments, not all of which are due, may provide, also, for future installments, and that judgment may be entered for the same as they fall due, on application to the court and notice to defendant's solicitor.

In Equity.

See 120 Fed. 839; 128 Fed. 753.

J. Philip Berg (Roger Foster, of counsel), for complainants.

Edward H. Childs, for defendant.

HAZEL, District Judge. This action was brought to recover unpaid installments alleged to be due upon a written contract, dated January 2, 1892, between complainants' intestate and the Goodyear Shoe Machinery Company of Hartford, Conn. The contract relates to an assignment to said company of letters patent issued to Christian Dancel, and contains the following provision:

"That the Goodyear Company, in consideration of said assignments and of the agreements of said Dancel herein contained, doth agree to pay to said Dancel in each year, while the United States letters patent No. 459,036 remain in force as a valid patent, the sum of five thousand dollars, as an annuity, such annuity to be payable monthly in installments of four hundred and sixteen and two-thirds (416⅔) dollars each."

On March 9, 1893, during the lifetime of Dancel, the Goodyear Shoe Machinery Company of Hartford, Conn. (hereafter referred to as the "Connecticut Company"), transferred to the defendant, a Maine corporation, by written bill of sale, all its property, including the Dancel patent and "all books of account, good will, and all other property and rights owned by it." Thereupon the defendant executed and delivered to the Connecticut Company a bond, which provided that the "obligor shall pay and discharge all debts, liabilities, and obligations of the obligee," and "shall adopt, perform, and fulfil all contracts and engagements now binding on" the Connecticut Company. The defendant expressly agreed to assume and pay the costs and expenses of winding up the corporate affairs of the Connecticut Company, and also to indemnify and hold harmless the obligee and its directors and stockholders. Christian Dancel, to whom installments under the contract were payable, died on October 12, 1898. The installments were paid to Dancel during his lifetime, and one payment was made after his death. On August 15, 1900, the defendant in writing refused to make further payments, claiming that the obligation ceased with the death of Dancel. The contract does not contain words of succession by inheritance. That it was the intention of the contracting parties that the sum of $5,000 annually should be paid in monthly installments to Dancel during the life of the patent, and upon his death to his surviving personal representatives, has been squarely decided by the Circuit Court of Appeals, which previously considered this point. Goodyear Shoe Machinery Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300. The appellate court states:

"It is abundantly settled by the authorities that a bequest or grant of an annual sum, with words of limitation, such as for a definite term or for the life of another person, does not lapse with the life of the annuitant, but survives to his personal representatives; and the words of limitation fix its duration. This was decided by Lord Chancellor Hardwicke in the early case of Savery v. Dyer, 1 Amb. 139, and is said, in Montanye v. Montanye, 29 App. Div. 377, 51 N. Y. Supp. 538, never to have been questioned since. It is only when there is no explanatory language as to its duration that an annuity is limited to the life of the annuitant."

Such construction of the annuity provision of the contract is the law of this case and binding upon this court. The defenses principally relied upon are nonjoinder of party defendant, in that the Connecticut Company is an indispensable party to the suit, and

that the defendant did not assume the debts and obligations of that corporation and is not primarily liable therefor. The answer also challenges the jurisdiction of the court, which objection necessitates a short explanation.

This cause was originally brought at law in the state court, and was removed to this court because of diverse citizenship. The original answer admitted the assumption by the defendant of the debts and obligations of the Connecticut Company, but denied that the contract survived Dancel's death. Upon trial, judgment was directed for plaintiffs upon the pleadings, and an appeal therefrom was duly taken. The Circuit Court of Appeals decided that the effect of the agreement between the defendant and the Connecticut Company was to create the relation of principal and surety, with the result that the defendant became primarily liable for the obligations arising from the contract with Dancel, and it was held that the remedy of the plaintiffs was in equity, and not at law. The judgment was accordingly reversed, and the complaint dismissed, without prejudice, however, to an application by plaintiffs for leave to replead in equity. Permission to thus reframe the complaint into a bill of equity having been allowed, defendant interposed a plea to the jurisdiction on the ground that, as no equity process had been served, article 3, § 2, of the federal Constitution had been violated. The plea was overruled. Therefore the question of jurisdiction need not be again passed upon.

Defendant contends that when the action was at law the question of parties was immaterial, while in equity a proper enforcement of the covenant is dependent upon the jurisdiction of the court over all parties whose rights may be affected by the decree sought; that, in the absence of the Connecticut Company, neither its obligation to complainants nor the assumption of such liability by the defendant can be established. That this court sitting in equity is unable to enforce a contract of indemnity, in the absence of a party whose rights are necessarily affected by the decree, is beyond dispute. Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792; 16 Am. & Eng. Ency. Law (2d Ed.) 176; Turk v. Ridge, 41 N. Y. 201. This principle, however, is inapplicable here. The distinction between a right of recovery under a covenant in a bond of indemnity and an agreement to pay the debts and assume the obligations of the indemnitee is clear. Such covenant to indemnify does not impair a covenant to pay. Wicker v. Hoppock, 73 U. S. 94, 18 L. Ed. 752; In re Negus, 7 Wend. 503; Pork v. Jackson, 17 Johns. 239. To the same effect see Johnson v. Risk, 137 U. S. 300, 11 Sup. Ct. 111, 34 L. Ed. 683.

Complainants' chief contentions are based upon the asserted dissolution of the Connecticut Company and the surrender of its capital stock, together with its inertness since the sale of its assets and the assumption by the defendant of the contract in question. The principal question, however, is whether the defendant assumed the obligations of the contract to pay the annuity, and not whether it agreed merely to indemnify the Connecticut Company. That it did so assume the contract and agree to discharge the selling com-

pany from liability is established by the proofs. As previously stated, the Connecticut Company transferred to the defendant all its property, including the Dancel patent, the seal of the corporation, and all its books and papers. Certificates of stock in the defendant company were issued to all the stockholders in exchange for their stock in the Connecticut Company. The defendant paid the installments to Dancel during his lifetime, and even made one payment thereafter. The bond obligated the defendant to fulfill all contracts binding upon the Connecticut Company and to pay the expenses for actually winding up its affairs. Its provisions, fairly construed in connection with the facts proved, are corroborative of the proposition that the defendant equitably assumed the obligations of the contract in suit. It is shown that certain officers and directors of the selling company became officers and directors of the defendant, or the United Shoe Machinery Company, which subsequently acquired a majority of the stock and property of the defendant. No assets were retained by the Connecticut Company, and there are no claims outstanding against it. Presumably the defendant paid all the debts, as agreed, thus emphasizing an assumption of liability pursuant to the selling arrangement. There has been no meeting of the stockholders or directors of the Connecticut Company, nor has any business been transacted. It appears, by apparently contemporaneous entries in its account books under date of March 9, 1893 (which books after the transfer were kept by the defendant), that said company was dissolved and a new corporation, the defendant, organized. It also appears from such books that a debit and credit balance, including an amount due Dancel, was transferred to appropriate accounts relating to the business of defendant.

The defendant contends that the statements contained in the books of account are not properly authenticated; it not being shown by whom or in what manner they were kept. It is not a stranger to the transaction, however. Hence this rule cannot be successfully invoked. It had access to the books in question at all times, with exclusive possession and full power to examine the same. Therefore it is presumed to have had such knowledge of their contents as justified their reception as evidence against it. 2 Wharton on Evidence, 321; McCord v. Manson, 17 Ill. App. 118; Shepard v. Bank of Missouri, 15 Mo. 143; Terry v. McNeil, 58 Barb. 141; Abbott's Trial Evidence (2d Ed.) pp. 60, 61. The witness Howe, an officer of the defendant and former counsel of the Connecticut Company, testified to the effect that the earlier corporation was not in fact dissolved, although admittedly no business has been transacted by it since the sale in 1893; that there was no assumption of the contract; and that the defendant's liability depended wholly upon the indemnity bond. This evidence is not entitled to probative force; for, as indicated, a different intention is clear. Whether the company, by disposing of all its property, surrendering its capital stock, and abandoning its business, was dissolved, as evidently was contemplated, is not a necessary question for decision. The facts, considered in connection with the broad lan-

guage of the bond, clearly show an intent to assume and pay all the obligations of the Connecticut Company, and entitle the complainants to enforce the covenant against the defendant. That may be done, as stated in Goodyear Shoe Machinery Co. v. Dancel, supra, "upon the equitable doctrine that a creditor shall have the benefit by subrogation of any obligation or security given by the principal to the surety for the satisfaction of the debt." This determination disposes of the important question presented.

The next point for consideration is whether the Connecticut Company, which confessedly is not within the jurisdiction of the court, is an indispensable party to the suit. The facts preclude the view that such company has an interest in the litigation. Even conceding it to be a proper party to the action, it certainly is not an indispensable one. The general rule, as stated in Encyclopedia of Pleading and Practice, vol. 15, p. 615, that where a necessary and indispensable party is beyond the jurisdiction, or for some other reason cannot be brought before the court, the court cannot proceed, does not strictly apply where, as here, the defendant, in consideration of the transfer to it of the property of the Connecticut Company, primarily assumed the obligations of the contract in question; the assignor retaining no further interest therein. Story on Eq. Pl. § 81.

The complainant is entitled to a decree directing the payment of the installments falling due from month to month, beginning November 30, 1898, with interest and costs. The judgment may also contain a provision for payment of the monthly installments to fall due, and, unless such payment is made, judgment may be entered for such unpaid installments upon application to this court and notice to defendant's solicitor. Libby v. Rosekrans, 55 Barb. 202; Fleming v. Soutter, 6 Wall. 747, 18 L. Ed. 847.

A decree may be entered accordingly.

SUSSMAN v. PORTER.

(Circuit Court, D. New Jersey. May 5, 1905.)

CONTRACT—PUBLIC POLICY.

An agreement to procure the consent of property owners for the construction and maintenance of a trolley line in front of their properties, and also to obtain a municipal franchise to operate such trolley line for a fee contingent upon success, *held* to be contrary to public policy, and void, and that no part of the stipulated compensation can be recovered.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 587.]

(Syllabus by the Court.)

On Demurrer to Declaration.

Patterson & Rhome, for plaintiff.
John M. Enright, for defendant.

CROSS, District Judge. The defendant has demurred to the first count of the declaration, which is founded upon a contract therein

set forth at length, dated December 31, 1902, between James E. Degnan, of the first part, and Charles A. Porter, the defendant, of the second part, which contract, it is duly averred, has been assigned by said Degnan to Arthur Sussman, the plaintiff. The contract recited that Porter was a stockholder and director of the Monmouth Electric Company, a corporation of the state of New Jersey, owning and operating a street railway in the town of Red Bank, in said county, which it was desirous of extending through certain streets in Long Branch, in said county, as particularly set forth in said contract; that Degnan was willing to undertake the labor incident to securing the requisite rights of way of the abutting property owners along such proposed extension, and the requisite municipal franchise, and to pay and discharge all expenses and costs in connection therewith (except as thereinafter provided), upon the terms and conditions thereinafter set forth; that in consideration of the benefits that would accrue to Porter by reason of the right to construct such proposed extension he was willing to pay the sum of money and deliver the securities thereinafter mentioned to Degnan "in return for the municipal consent as aforesaid and property owners' consents," and thereupon said Degnan agreed "to obtain the municipal consent of the Long Branch Commission to the construction, operation, and maintenance of such proposed extension or railway," and all things connected therewith and incident thereto, and to pay and discharge all the expenses in connection with the obtaining of such consents of the property owners and municipal authorities (except such charges and expenses as might be imposed on said company by the terms of the ordinance granting such consent) for the price or sum of $5,000 in cash and $5,000 in 4 per cent. bonds of said railway company, secured by a first mortgage upon its property, to be paid as follows: $1,000 upon the execution of the agreement, $4,000 as the party of the first part might require the same for expenses in the performance of the contract, and as he might from time to time demand in writing from the party of the second part, and $5,000 in bonds as aforesaid, when the said municipal franchises, together with the necessary consents of property owners, were secured and accepted by said company. Then follow certain provisions exempting Degnan from any obligation to obtain the consent of the Central Railroad Company of New Jersey or the Atlantic Coast Electric Company to a grade crossing, unless the same could be done without expense, and an agreement on the part of the defendant to pay such additional sums as might be necessary to purchase real estate or personal property, if such purchase should become necessary in carrying out the contract. The contract further provided that, in case Degnan failed to secure the requisite rights of the property owners and municipal authority as above provided for all and every extensions, franchises, and consents, he should render forthwith a just and true account of all the disbursements he might have made from the moneys paid and to be paid to him by virtue of the contract, and should forthwith pay to the party of the second part the balance of any money so paid to him, whereupon the party of

the second part was to be released and discharged from the payment of any other expenses and charges for the services of the party of the first part or otherwise; provided, however, that, if the consummation of the contract were prevented or interfered with by the party of the second part, the party of the first part should be entitled to receive a reasonable sum for his services in the premises. It was further stipulated in the contract that the aforesaid consents should be obtained on or before April 1, 1903, unless prevented by litigation or an extension should be granted by the parties thereto.

But one ground of demurrer is assigned, namely, "that the contract set forth in plaintiff's declaration and upon which his right to recover is based is illegal, contrary to public policy, and void, among other things, in that said contract engages to reward plaintiff's assignor for services in securing a municipal franchise from the Long Branch Commission."

The declaration avers, among other things, that Degnan secured the rights of way of the abutting property owners and the aforesaid municipal franchise, and that he paid all the expenses and costs provided in said agreement before April 1, 1903; and in particular it avers that said Degnan obtained the municipal consent of the Long Branch Commission to the construction, operation, and maintenance of said proposed extension of railway; and that in consideration of the said services, disbursements, acts, and conduct of the said Degnan the said defendant agreed to pay, and was liable to pay the said Degnan, the aforesaid sum of $5,000 in cash and $5,000 in bonds in the manner above stated. A further averment in the declaration is that "the said Long Branch Commission did, by reason of the labor and efforts of the said James E. Degnan, undertaken and done in consideration of said contract, and the securing and filing of said requisite rights of way by him, cause its municipal consent to be given in and by an ordinance duly and legally adopted and published by said commission to the construction and operation and maintenance of said extension of railway," which was accepted by said the Monmouth Electric Company.

The first count in the declaration is based entirely upon the agreement above summarized, which provided that for obtaining certain consents of property owners and a municipal franchise to be granted by ordinance by a municipal corporation known as the Long Branch Commission, Degnan was to be paid by the defendant, $1,000 in cash, $4,000 for expenses as needed and demanded by him in writing, and $5,000 in bonds, contingent upon his procuring the municipal franchise and necessary consents; and that in case of failure to procure the same he was forthwith to render an account of all his disbursements from the moneys paid to him under the contract, and immediately pay over to the defendant the balance of any such money. The compensation provided in the contract is demanded in the suit for having procured the consents of the property owners and the municipal franchise, and a careful inspection of the contract shows that Degnan was to do nothing else to be entitled to it. Other matters, such as the price of property, real

or personal, which it might be necessary to purchase, and such money as might be necessary to obtain a railroad crossing, and as might be fixed by the commission as a condition of granting the franchise, were to be paid in addition to the stipulated compensation. Counsel for the defendant contends that the facts appearing in the first count of the declaration bring the case within the authorities which hold that contracts for services in obtaining legislation, government contracts, or otherwise influencing governmental action, are contrary to public policy, and void. In Providence Tool Company v. Norris, 2 Wall. 45, 17 L. Ed. 868, the court holds that an agreement for compensation for procuring a contract from the government to furnish its supplies is against public policy, and cannot be enforced by the courts. Justice Field, in delivering the opinion of the court, says:

"The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have uniformly been held invalid, and the decisions have not turned upon the question whether improper influences were attempted or used, but upon the corrupting tendency of the agreement. Legislation should be solely for the public good. * * * Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. * * * It is sufficient to observe generally that all agreements for pecuniary consideration to control the business operations of the government, or the regular administration of justice, or the appointments to public office, or the ordinary course of legislation are void as against public policy without reference to the question whether improper means are contemplated or used in their execution."

It is not, therefore, a question whether improper influences were contemplated or used or not, but the contract is vitiated from the fact that it provides for the procurement of legislation, whether municipal or otherwise. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country. See Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 26 L. Ed. 539, and Marshall v. Bal. & O. R. R. Co., 16 How. 314, 14 L. Ed. 953.

In Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347, and Bermudez Asphalt Pav. Co. v. Critchfield, 62 Ill. App. 221, it is held that employment to procure the passage of ordinances for paving streets at a compensation, which, except for a monthly allowance, is contingent upon success in obtaining the necessary ordinances and in securing the paving contracts consequent thereon, is void on grounds of public policy; and in the course of the opinion it is said an ordinance passed by the common council, providing for the paving of a public street, is a species of legislation as much as an act passed by the Legislature, though the body passing it is subordinate in its character, and is created by the Legislature itself. The rule, therefore, which makes void a contract for a contingent compensation for obtaining legislation applies as well to the common council of a city as to the Legislature of a state. The doctrine laid down

in Tool Company v. Norris, ubi supra, is adopted in the opinion and a large number of additional cases cited.

In the case of Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519, it is said of a similar contract that it matters not that nothing improper was done or was expected to be done by the plaintiff; it is enough that such is the tendency of the contract, and that it is contrary to sound morality and public policy leading necessarily in the hands of designing and corrupt men to improper tampering with members, and the use of extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts, or tends to corrupt, some, or if it deceives, or tends to deceive or mislead, some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal. The following cases are of the same general character: Coquillard's Adm'r v. Bearss, 21 Ind. 482, 83 Am. Dec. 362; Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60; Gil v. Williams, 12 La. Ann. 219, 68 Am. Dec. 767; Houlton v. Dunn, 60 Minn. 26, 61 N. W. 898, 30 L. R. A. 737, 51 Am. St. Rep. 493; Mills v. Mills, 36 Barb. 474. And in Weed v. Black, 2 MacArthur, 268, 29 Am. Rep. 618, the court uses the following language: "If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself;" while in Rose v. Truax, 21 Barb. 361, where the agreement was to use influence, efforts, and labor in procuring the passage of a law by the Legislature, the court held the agreement void as against public policy, and that, as it was entire, no recovery could be had even for legitimate services thereunder.

Cases to the above effect might be cited indefinitely, and very many are cited in the cases already referred to. It is clearly deducible from them that a contract to procure or influence legislation is bad, whatever the intention of the parties may have been, and whether the influences actually exerted thereunder were honest or corrupt. It is the temptation to corruption and dishonesty which the courts will not tolerate. It will be noticed, too, that some of the cases cited lay great stress upon the fact that a contingent fee is dependent upon the success of the service. The rule of law in all these and similar cases is that the court will not aid either party to the contract, but each will be left in the position in which he has placed himself. Judicial aid will not be given to either party to a corrupt agreement. This is not because the court desires to favor either party, but because the agreement is corrupt and tainted. In the case at bar an all-important part of the agreement was the procurement of municipal legislation. This was the service stipulated for, and this was the service agreed to be rendered by the plaintiff's assignor. What he was to do in furtherance of the agreement, or how it was to be done, is not stated in terms, but under the cases that is a matter of indifference; we are not compelled to read between the lines of the contract to spell out its methods, or ascertain how it was to be carried out, although it may well be that an itemized account of how the moneys were expended that were advanced for "expenses" could tell the story

in no uncertain terms. In this connection it must also be borne in mind that the payment of the stipulated fee was contingent upon success, and that, if failure ensued, Degnan was to account for his expenses, but, if he succeeded, he could retain all the money, and no questions would be asked. Under the circumstances disclosed by the declaration, we are compelled to hold that the agreement is void.

It is contended in behalf of the plaintiff, however, that, even if the part of the contract just discussed cannot be enforced, the contract is nevertheless severable, and that as $5,000 of the consideration was to be paid to the plaintiff's assignor upon demand in writing, and as such demand has been made, and the sum has not been paid, he in entitled to recover, in any event, to this extent. It is manifest, however, that such is not the case. The contract is entire, and the consideration is entire. The contract was to procure consents and municipal legislation for a fixed compensation. The plaintiff's assignor was as much bound to do the one thing as the other—that is to say, he was bound to do both—and the defendant bound himself to pay the stipulated price for the services thus to be rendered. He did not bind himself to pay $5,000, or any other sum, for the property owners' consents, and to deliver the bonds, or any part of them, or any other stipulated consideration, for procuring the municipal franchise. If the agreement were not void, and a part only of the services had been rendered, it would still be impossible to apportion the consideration; but, as the agreement is contrary to public policy, and void, clearly no part of the consideration can be recovered.

The demurrer to the first count is sustained.

THE WINNIE.

(District Court, S. D. New York. April 24, 1905.)

1. TOWAGE—SUIT AGAINST TUG—EVIDENCE OF CONDITION OF SEA.
   In determining the condition of the sea during a towage service in controversy, the allegations of the pleadings and the observations of the witnesses taken on the water are to be regarded, rather than a record condition of the wind noted at a weather station several miles distant and at a considerable altitude above the water.
2. SAME—INJURY OF TOW BY POUNDING IN ROUGH WATER—LIABILITY OF TUG.
   It is the duty of a tug to exercise care to provide against the injury of a tow alongside by pounding against her side when the water is rough, and she is liable for an injury so received because of the improper arrangement of the tow.

In Admiralty. Suit against tug for injury of tow.

James J. Macklin, for libellant.
Robinson, Biddle & Ward, for claimant.

ADAMS, District Judge. This action was brought by William H. Follette, the owner of the canal boat P. J. Fermoil, to recover

against the steamtug Winnie, the damages suffered by him through an injury received by the canal boat while in tow of the tug on the 20th day of January, 1901.

It appears that the Winnie had two boats in tow, one on each side, the Fermoil being on the port side, bound from Atlantic Basin to a stake boat off Liberty Island, where the boats were to be taken by a regular Amboy tow. The tide was ebb. Both sides allege that the wind was strong from the southwest, causing a choppy sea, but according to testimony from the Weather Bureau, it appears that the records did not show that such was the condition. It seems that the pleadings and the observations of the witnesses, taken on the water, should be regarded in a case of this kind, rather than a record condition of the wind, noted from a point several miles distant and at a considerable altitude above the water.

When the tow started from Atlantic Basin, the water being rough, such a degree of care as the condition required was imposed upon the tug. It appears that the boat was in fairly good condition when she started on the voyage and that when she was delivered at the stake boat she had two planks broken on her starboard side, caused by pounding against the bluff of the tug's bow.

The testimony in the case is very conflicting, the libellant's one witness, the master of the boat, stating that the towed boats were drawn, at the bow, within 5 or 6 feet of each other, with the effect of bringing the Fermoil's side, about amidships, against the bluff of the tug's bow, which, in connection with the rough water, caused the damage. The claimant, on the other hand, contends, by several witnesses, that the boats were not drawn closely together at the bow but fastened properly alongside the tug, with her width, some 18 or 20 feet, between them, and further that such a method of towing as the libellant contends for, would not only have been improper and negligent, but practically impossible, because it would have required the boats to have been pushed sidewise to some extent.

The preponderance of the testimony, as well as the probabilities, in view of the additional strain put upon the tug, are with the claimant, but unless something of the kind contended for by the libellant was done, I see no way of accounting for the damage. The claimant urges that it was caused by a lack of a proper arrangement of the boat's fenders, which permitted her side to pound against the tug in consequence of some ferry boat swells, which were unavoidably encountered. The libellant's testimony shows that the boat had a fore and aft fender, 14 to 16 feet long, arranged to protect her against the tug's up and down fenders, one of which was just forward of the break and the others not touching. I feel constrained to adopt the libellant's contention with respect to the rough water and arrangement of the tow, and the conclusion is reached that the tug did not exercise the care the injured boat was entitled to.

Decree for the libellant, with an order of reference.

LARGE v. CONSOLIDATED NAT. BANK.

(Circuit Court, S. D. New York. January 24, 1905.)

1. JURISDICTION OF FEDERAL COURTS—MANDAMUS—AMOUNT IN DISPUTE.

On an application to a federal court by a shareholder in a national banking association for a writ of mandamus to compel the association to permit him to inspect a list of its shareholders, based on Rev. St. § 5210 [U. S. Comp. St. 1901, p. 3498], the pleadings must show that the matter in dispute exceeds the value of $2,000 to give the court jurisdiction.

[Ed. Note.—Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

2. SAME—ORIGINAL ACTION FOR MANDAMUS.

A federal court has power to issue a mandamus only in the exercise of a jurisdiction to which such proceeding is ancillary.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 803.]

Petition for Writ of Mandamus.

Morris J. Hirsch, for the motion.
Mr. Hill, opposed.

WALLACE, Circuit Judge. This is an application for a mandamus to compel the defendant to permit the plaintiff to have an inspection of its list of shareholders, granted upon section 5210 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3498]. It must be denied for two reasons:

First. It does not appear by the petition that the matter in dispute exceeds the value of $2,000. The only averment from which the amount in controversy can be ascertained is that the plaintiff is the registered owner of 10 shares of the capital stock of the defendant. The controversy is, therefore, not one of which this court has jurisdiction.

Second. This court has power to issue a mandamus only in the exercise of a jurisdiction to which it is an ancillary proceeding. Notwithstanding the very cogent reasons given in the dissenting opinion in Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743, to the contrary, the judgment in that case must be accepted as controlling upon this court.

The petition is denied.

VON MUMM et al. v. STEINMETZ.

(Circuit Court, S. D. New York. January 9, 1905.)

UNFAIR COMPETITION—PRELIMINARY INJUNCTION.

Although unfair competition, by simulating the dress of complainants' goods, is apparently shown, a preliminary injunction will not be granted, where it appears that defendant has publicly used the same dress for many years.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 108.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

In Equity. Suit for unfair competition in trade. On motion for preliminary injunction.

Kerr, Page & Cooper, for the motion.
Mayer & Gilbert, opposed.

LACOMBE, Circuit Judge. This seems to be a case, such as referred to in the opinion of the Circuit Court of Appeals in this circuit, in Von Mumm v. Witteman, 91 Fed. 126, 33 C. C. A. 404, where "a producer or dealer in champagne has used the rose-colored soft metal capsule of complainants in such a way as to delude the customer into the belief that the wine offered for sale is complainants' product." The immediate customer, of course, would not be deluded; but the get-up of the package is such as would make it easy to deceive the purchasers of single bottles for immediate consumption. However, in view of the fact that this form and style of package has been used by the makers of the wine which defendant sells for many years, and has been publicly exhibited at the Chicago, Buffalo, and St. Louis Expositions, a preliminary injunction will not be granted; all questions being reserved for final hearing.

SPINKS v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, E. D. Kentucky. March 30, 1905.)

No. 2,393.

1. INSURANCE—CONTRACT LIMITATIONS — VALIDITY — QUESTION OF GENERAL LAW—FEDERAL COURTS—STATE DECISIONS.

Whether a provision in an insurance policy that no action shall be brought after the lapse of a year from the date of insured's death is valid is one of general public policy, as to which federal courts will follow federal decisions, though in conflict with the decisions of the highest courts of the state.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. SAME.

A provision in an insurance policy that no action shall be brought after the lapse of one year from the date of insured's death is valid.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1545.]

3. POLICIES—CONSTRUCTION—FORFEITURE.

An insurance policy expressly provided that a failure to make any payment of dues for expenses or mortuary premiums, as provided, should render the contract null and void, but declared that when the policy had been in force for five years, and insured died before the expiration of ten years, within six months from the date of the maturity of dues unpaid, or within six months from the date of mortuary calls unpaid, the certificate should, nevertheless, be payable as though payment of such dues or mortuary premium had been made when due. *Held*, that such extension provision gave insured an extension of six months as to both annual dues and mortuary premiums, so that, if either was not paid within such extended period, the policy was forfeited.

S. J. Crawford, for plaintiff.
Pirtle, Trabue, Doolan & Cox, for defendant.

COCHRAN, District Judge. The demurrer to the petition presents two questions for determination. One is whether the provision in the policy sued on that no action shall be brought after the lapse of one year from the date of the death of the insured is valid. If it is, it is conceded that the plaintiff's right of action is barred and the demurrer should be sustained. The Supreme Court of the United States in the case of Riddlesbarger v. Hartford Ins. Co., 7 Wall. 389, 19 L. Ed. 257, decided that such a provision in a policy of insurance is valid. The Kentucky Court of Appeals, in the recent case of Union Central Life Ins. Co. v. Spinks, 83 S. W. 615, decided that it is not. In view of these decisions the question is not at large with me. The only thing I have to decide is which of them I should follow.

It is contended by the plaintiff that I should follow the Court of Appeals decision, because this is a case where the decision of the state court as to the law is binding on the federal court. His position is in effect this: If this case were before the Supreme Court, it would follow the Court of Appeals decision, rather than its own previous decision. This being so, this court should do likewise. He cites quite a number of decisions in support of this contention. But none of them are pertinent to the question we have here. In each one of those cases the question involved was either whether the decision of the state court that a statute of the state was not in violation of the state Constitution or as to its meaning should be followed, or whether a statute of the state was applicable to the case in hand and was binding on the federal court. It was held that said decisions should be followed and said statutes were binding. We have no such case here. The validity, construction, or application of a statute is not involved here. The sole question is whether or not the provision in question is against public policy. The Supreme Court has held that it is not. The effect of the decision in the Riddlesbarger Case is thus stated in the subsequent case of Southern Express Company v. Caldwell, 21 Wall. 264, 22 L. Ed. 556, by Mr. Justice Strong:

"Conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time less than the statutory period of limitation are enforced as not against legal policy."

The Kentucky Court of Appeals holds that it is. In the case cited above Judge O'Rear said:

"We conclude that the provision in the policy that no suit should be maintained upon it, unless begun within one year from the death of the insured, was in contravention of the public policy of the state."

It is possible, however, that a decision of the state court as to what is public policy may or may not be binding upon the federal court. The line is drawn by Mr. Justice Gray in the case of Hartford Fire Ins. Co. v. Chicago & St. P. Ry. Co., 175 U. S. 100, 20 Sup. Ct. 37, 44 L. Ed. 84, in the following extract from his opinion therein, to wit:

"Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union,

when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law, or of general jurisprudence of national or universal application, are governed by the law of the state as expressed in its own Constitution and statutes, or declared by its highest court."

The only contingency, then, in which a question of public policy arising in a federal court is governed by the law of the state, as declared by its highest court, is when it is not controlled "by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence of national or universal application." If a particular question as to what is public policy so arising is controlled "by the principles of the commercial or mercantile law, or of general jurisprudence of national or universal application," it is not governed by the law of the state as declared by its highest court. In that case the question involved was as to whether a provision, in a lease by a railroad company of part of its right of way, exempting it from liability for any damages to building or personal property situated thereon, resulting from the negligence of its officers or agents, or from fire communicated from its locomotive, was invalid, as against public policy. The state court had held that it was not. The federal courts, inferior and Supreme, held likewise. They so held, independent of the decision of the state court. But in the federal courts it was considered whether the particular question as to public policy was a question of general or local law, and whether, therefore, the federal courts would have been bound to follow the state decision, had it been of a different opinion on the question as to what public policy required. The Circuit Court of Appeals for the Eighth Circuit held that it was a question of general law, but Judge Caldwell dissented from this position. Hartford Fire Ins. Co. v. Chicago St. P. Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193. The Supreme Court of the United States took Judge Caldwell's view of the matter. Mr. Justice Gray said:

"The validity of the agreement now in controversy does not depend upon the Constitution, laws, or treaties of the United States, or upon any principle of the commercial or mercantile law or of general jurisprudence."

And again:

"Under such circumstances that decision (to wit, the state decision), being upon a question of statutory and local law, was rightly followed by the Circuit Court."

An instance where the question of public policy was one of general law may be found in the case of N. Y. C. R. R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627. In that case it was held that a provision in a contract by a railroad company with a shipper of cattle, exempting the former from liability to the persons riding free to take charge of the stock for injuries caused by the negligence of its employés, was invalid as against public policy. This it so held, though it was claimed that the court had held otherwise. Mr. Justice Bradley said:

"But on a question of general commercial law the federal courts administering justice in New York have equal and co-ordinate jurisdiction with

the courts of that state; and in deciding a question of such importance to the whole country, a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage come to the conclusions that they have, we should not feel satisfied, without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law."

This brings us, then, to a determination of the question as to on which side of the line this case falls. Is the question as to whether a provision similar to the one involved herein is against public policy one of general or local law? It seems to me that it is one of general law. Statutes of limitation are universal. The principles upon which they have been enacted are universal. And it seems to me to follow that the principles involved in determining the question whether a contract providing a different limitation from that prescribed by the statute is against that policy of the statute, or otherwise against public policy, are equally universal. If this be true, the question itself is one of general jurisprudence, and not one of local law. The opinion of the Court of Appeals is not based upon any peculiar feature of the statutes of limitation of this state differentiating them from similar statutes in other jurisdictions. The reasoning upon which it is based is equally applicable to any jurisdiction. It seems to me that the question as to the validity of a provision in a policy of insurance prescribing the period within which resort may be had to the courts is as much a question of general jurisprudence as the question as to the validity of a provision therein that all disputes shall be referred to arbitration, thereby excluding the insured from all resort to the courts.

Besides this, we have pretty much the same condition of things as that referred to by Mr. Justice Bradley in relation to the position of the New York courts as to the question involved in the Lockwood Case. The decision of the Kentucky Court of Appeals in the case relied on was rendered December 9, 1904. This was after the demurrer herein had been orally presented and submitted, but before the briefs were filed. According to the decisions of the Court of Appeals of Kentucky at that time the provision in question was valid. In the cases of Owen v. Insurance Co., 87 Ky. 571, 10 S. W. 119, and Kentucky Mut. Fund Ins. Co. v. Turner, 89 Ky. 665, 13 S. W. 104, the validity of such a provision was assumed. In the cases of Lee v. Union Central Life Ins. Company (Ky.) 56 S. W. 724, and Smith v. Herd, 110 Ky. 56, 60 S. W. 841, 1121, it was expressly held that such a provision was valid. So that, if the demurrer had been disposed of at the time it was submitted, Kentucky law, as laid down by its highest court, would have required that the demurrer be sustained. I do not think, therefore, that this is a case where the federal court should follow the latest decision of the state court.

The other ground of demurrer is that all the rights under the policy sued on were forfeited in the lifetime of the insured. The policy provided for the payment by the assured annually, on the 10th day of December, of the sum of $15 as dues for expenses, and with-

in 30 days from the first week day of the months of February, April, June, August, October, and December of mortuary premiums. By clauses 2 and 3 of the policy it was expressly provided that a failure to make any of the payments stipulated for should terminate the contract and render it null and void. If there had been nothing else in the contract in relation to these payments, there could be no question but that a failure to pay either the annual dues or mortuary premiums at the times provided for would have terminated the policy absolutely. The assured had to be up with both payments in order to keep the policy alive. Payment of the annual dues as provided would not keep it alive, if the mortuary premiums were not paid as provided, and vice versa. This, however, was not all. For the benefit of members who had kept their policies alive for five years this portion of clause 8 was inserted. It is in these words:

"Provided the certificate or policy has been in force for five years from its date, in that event and before the expiration of ten years from its date death shall occur within six months from the date of maturity of dues unpaid, or within six months from the date of the mortuary calls which such member has omitted or neglected to pay, this certificate or policy shall nevertheless be payable to the beneficiary in the same manner as if payment of such dues or mortuary premium had been made when due."

The assured had kept his policy alive for five years, and not for ten, at the time of his death. He was not behind at all in his annual dues. He was more than six months behind in his mortuary premiums. Plaintiff contends that by clause 8 it is expressly provided that, if death of the assured shall occur within either six months, the policy shall be payable. Such does not seem to me to be its meaning. It should be read in connection with the other provisions of the policy. So read, the effect of it is to give the assured six months' extension of time as to both annual dues and mortuary premiums within which they may be paid. If either is not paid within such extended period, the same result follows as when either is not paid, where there is no such extension.

The demurrer is sustained.

PEPPER v. ROGERS.

(Circuit Court, D. Massachusetts. April 18, 1905.)

No. 1,789.

DOCUMENTARY EVIDENCE—REMOVAL FOR USE IN ANOTHER DISTRICT—POWER OF COURT.

A federal court has no power to order an examiner appointed to take testimony in an equity case to remove to another district, for use there in examining witnesses, books and documents which have been produced before him by witnesses within the district, obedient to subpœnas duces tecum, and which are merely in his custody temporarily by courtesy.

In Equity. On motion for order directing the removal of documentary evidence to another district for use in examining witnesses there.

See 128 Fed. 987.

Whipple, Sears & Ogden, for complainant.
Boyd B. Jones, for various gas companies.

PUTNAM, Circuit Judge. This case is at issue on bill, answer, and replication. An examiner has been appointed to take proofs, not only in this district, but in other districts, including the Southern District of New York, the appointment being by agreement of parties. The examiner has been taking some proofs in New York, but the proceeding there has been suspended, awaiting the result of this motion. The examiner has also taken sundry proofs in the District of Massachusetts, and, in the course of the taking of the same, sundry witnesses, officers of various corporations, have produced before him certain corporate books and documents, which the complainant desires to use in the Southern District of New York, in connection with completing the examination of witnesses there, urging that the books and documents referred to, produced in this district, are in the custody of the examiner. The examiner is willing to take the responsibility and care of transferring the same to the Southern District of New York, and the complainant applies for an order of this court directing such transfer to be made.

The corporations referred to appear and object to the granting of the order, both because they urge that the court has no power in the premises, and also because, they say, if the court has the power, it should not, under the circumstances, use its discretion in that behalf.

The complainant admits that he finds no precedent for his application, and the court is compelled to observe that it knows of none. The complainant relies on several decisions where orders have been made with reference to the production of books out of the district on an accounting before masters. These orders, however, are in accordance with the well-settled practice in equity, and with rule 77. He also cites Chaplin v. Puttick (1898) 2 Q. B. 100; but this case is entirely apart from the question before us. It related to the transfer of a mere album in litigation, which the court claimed itself to be authorized to take into its own possession. Very possibly this court might make an analogous order about a specific piece of property which was in litigation in equity; but in Chaplin v. Puttick the opinion expressly referred, for authority to make the transfer, to the standing orders of the Supreme Court, which, we must assume, were within the jurisdiction of that court to make. These orders and the practice in reference to them will be found given at length in the Annual Practice of the Supreme Court. Chaplin v. Puttick, therefore, furnishes no analogy which would sustain us in granting the present litigation.

As the books and documents referred to were produced under subpœnas duces tecum, they are in the care of the examiner only by courtesy, and temporarily. They are not so in his possession as to give him or the court any general authority over them. The powers of this court with reference to witnesses and their books and documents are hedged in on every side, as is thoroughly ex-

plained in the careful opinion of Judge Colt in Dancel v. Goodyear Shoe Machinery Company (C. C.) 128 Fed. 753. So far as we are advised, we have no power to grant the application; and

The clerk will enter an order that the same is denied.

In re HOY.

(District Court, N. D. Iowa, C. D. April 24, 1905.)

No. 574.

BANKRUPTCY—PERSONS SUBJECT TO INVOLUNTARY ADJUDICATION—PERSON ENGAGED CHIEFLY IN FARMING.

An alleged bankrupt had for some years conducted a law and collection office; his principal business in connection therewith being the making of collections, and the renting of property for others, and collecting the rents therefor. During the two years prior to the filing of the petition his total earnings from such business did not exceed $450, and were little, if any, above his expenses. He owned a farm of 470 acres, which was improved and rented until about a year prior to the filing of the petition; he being, however, a partner in the stock thereon and consulted in regard to its management. At this time the lease expired, and he thereafter conducted the farm himself, being at the place a considerable portion of the time and moving his family there some time before the commission of the alleged acts of bankruptcy. The gross income from the farm during that season, which was not a favorable one, was about $1,800. His indebtedness arose principally out of his purchase and operation of the farm. *Held*, that from the time of his assuming the conduct of the farm he was engaged chiefly in farming, and was not subject to be adjudged an involuntary bankrupt.

[Ed. Note.—What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

In Bankruptcy. On hearing of creditors' petition in involuntary bankruptcy.

D. W. Telford, Cliggitt, Rule & Keeler, and Kenyon & O'Connor, for petitioning creditors.

Glass, McConlogue & Witwer, Healy Bros. & Kelleher, and Blythe, Markely & Rule, for Hoy and others.

REED, District Judge. August 23, 1904, the First National Bank of Mason City and other creditors of William Hoy filed in this court a petition asking that he be adjudged bankrupt, for that he had, on April 27, 1904, while insolvent, executed mortgages upon all of his real and personal property to others of his creditors, with intent to prefer them over the petitioning creditors. Hoy in due time answered the petition, and alleged that for more than six months last past his chief occupation was that of a farmer, and that during all of that time he was engaged chiefly in farming and the tillage of the soil, and was not, therefore, liable to be adjudged an involuntary bankrupt. Testimony has been taken, and the matter is now submitted upon such testimony and the issues so presented.

That Mr. Hoy was insolvent on April 27, 1904, and had been for some time prior thereto, and that on that date and subsequently

thereto, before the filing of the petition, he made mortgages for a large amount upon all of his real estate and the most of his personal property to certain of his creditors, with intent to prefer them over the petitioning and other creditors, admits of no doubt under the testimony; and the only question to be determined is, can he be adjudged an involuntary bankrupt? Section 4b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]) provides:

"Any natural person, except a wage earner or person engaged chiefly in farming or the tillage of the soil, * * * may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. * * *"

What constitues the chief or principal occupation of a person, where he is engaged in more than one kind of business, is often difficult to determine. It is so largely a question of fact that each case as it arises must be determined upon the particular facts and circumstances thereof. The testimony very clearly shows that on April 27, 1904, when it is alleged that the acts of bankruptcy were committed, Mr. Hoy was, and for some time prior thereto had been, engaged in the business of farming in Cerro Gordo county, in this district, and also in the law and collection business at Mason City, in said county. Hence the question, what was his principal or chief business at the time of the making of the mortgages? At the time of the hearing (November, 1904) he was 64 years old. He was reared and lived upon a farm until 18 years of age. He then taught school for about four years, afterwards read law, and was admitted to the bar in 1878, and soon after engaged in the law and collection business. In 1891 or 1892 he located at Mason City, and for a time did a lucrative business in collections, loaning money, and renting farms for others, and collecting and remitting the rents therefor, had an office upon the ground floor in the business center of the city, and employed two clerks in the conduct of such business. When he located at Mason City he owned five farms, which he rented to others for a cash rental, and he estimated that he was worth from $30,000 to $40,000. In about 1896 his business began to decline, and continued to from that time on. It can hardly be said that he ever did a strictly law business. It was principally collections, loaning of money, and renting of real estate for others. For the years 1903 and 1904 he had only five cases in the district court, one of which was his own for the collection of a fee; and the aggregate of his fees for the four cases, if collected in full, was only $85. For the same period he had some twenty cases before justices of the peace, for which and other collections the aggregate of his fees was about $170, and for the renting of farms and the collection of rents his fees would be nearly $200, if all were collected; so that his entire income from his law and collection business for the years 1903 and 1904, up to the time of the hearing in November, would be about $450. He had, some time prior to July, 1903, given up his office on the ground floor, and rented rooms upon the second floor in another part of the city. For these he was to pay $13 a

month. He sublet or rented desk room in these, and after January, 1904, lodged there nights, a part of the time; and he said that his entire income from this business was insufficient to pay the running expenses of his office.

Shortly after locating at Mason City he bought a tract of land some seven miles from the city. To this he added by other purchases and by building thereon, so that on April 27, 1904, he owned 470 acres of land, fairly well improved, with good buildings thereon, which he valued at $70 per acre, and was incumbered for more than $14,000. This farm he rented in 1898 to a brother-in-law for five years from July 1st, and together they stocked the farm. The brother-in-law lived upon it and carried it on, but at all times consulted with Mr. Hoy in regard to the management of the same. Because of unfavorable seasons and the almost total failures of crops in 1902 and 1903, the income from the farm for those years was less than the expense of running the same. At the expiration of the lease, July 1, 1903, the brother-in-law surrendered to Mr. Hoy all his interest in the live stock, except one horse, and Mr. Hoy assumed the indebtedness incurred in the operation of the farm; and from that time on he assumed the actual control and management of the same himself, rented about 100 acres, and carried on and worked the rest with the aid of hired help—the brother-in-law's family remaining on the farm until March 1, 1904, and boarding Mr. Hoy when there, and the help employed by him to carry on the farm. In January, 1904, he moved his family and all their furniture to the farm, where they have since lived. During the fall and winter of 1903 and 1904 he spent considerable time at his office in Mason City, but at all times communicated by telephone with the farm, directing the help employed thereon, and when the weather was bad he lodged in his office; but after the 1st of March, 1904, or, at best, when seeding time commenced, and during the haying and harvest, he was at the farm a good deal of the time. He also did some business at his office in the way of collections, but this he says was largely in closing or winding up matters that he had had for some time. One of the suits in the district court was commenced in the fall of 1904, and at the time of the hearing was not disposed of. The season of 1904 was better than for the two previous years, but was also an unfavorable one. The gross income of the farm for that year was over $1,800, and there is also grain and feed not disposed of, which is being fed to stock. The expenses of running it are not shown, but Mr. Hoy says they were not nearly that amount. In ordinary years it is estimated that the farm would produce from $2,500 to $3,500.

While it is true that Mr. Hoy has maintained an office at Mason City since he assumed the management of the farm, and has done some law and collection business since that time, the amount thereof and the income therefrom is so small, as compared with the business management, control, and ordinary income from the farm, that it cannot be said to be his principal or chief business. He has not kept up his library for some two or three years, has only partial

sets of the Iowa Reports, the Northwestern and Northeastern Reporters, and about 25 volumes of miscellaneous text-books, and had offered these for sale prior to 1903; and other circumstances tend to show that before he assumed the exclusive management of the farm his intentions were to give up his law and collection business and devote his entire time to the management of the farm. The great bulk, and perhaps all, of his indebtedness was incurred in the purchase, improvement, and stocking of his farm, and little, if any, was incurred in connection with his law or collection business.

After he had made the mortgages which it is alleged constitute the acts of bankruptcy complained of, some of the petitioning creditors or their attorneys urged him to file a voluntary petition in bankruptcy, and he prepared or caused to be prepared such a petition, apparently with a view of filing it, but finally concluded not to do so. In the petition so prepared he claimed exemption as a lawyer, and stress is laid by the petitioning creditors upon this and some other circumstances appearing in the testimony as showing that he then claimed to be a lawyer. This, however, is not deemed of controlling importance; for the testimony shows that in several of the conversations with attorneys in regard to this he was desirous of knowing which occupation would enable him to claim the larger amount of exemptions, and to some of them he expressed the desire to claim 40 acres of the land as his homestead. But, whatever he may have claimed was his occupation, it must be held to be that which the testimony shows was his chief or principal business.

Without reviewing the testimony further, it must suffice to say that a careful consideration of all thereof leads to the conclusion that for a number of years prior to July 1, 1903, Mr. Hoy was engaged to a considerable extent in farming, and that since that time he has been engaged chiefly therein. It follows, therefore, that he cannot be adjudged an involuntary bankrupt, and that the petition must be dismissed; and it is so ordered.

In re TALTON.

(District Court, E. D. North Carolina. April 14, 1905.)

1. BANKRUPTCY—ALLOWANCES TO REFEREE—SERVICES AS SPECIAL MASTER.
Where the statutory fees received by a referee are sufficient to compensate him liberally for all services rendered in a case, he will not be given a further allowance on account of an extra service rendered as special master in connection with a composition.

2. SAME—ATTORNEY'S FEES.
Only reasonable compensation will be allowed attorneys in composition, when the rules of court are complied with.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 897.]

In Bankruptcy. On report of referee and petition for allowances.

Davis & Godwin, for petitioning creditors.

H. L. Cook, for bankrupt.

PURNELL, District Judge. This cause is before the court now upon the report of the referee on allowances asked by attorneys. The bankrupt, it appears, by a mortgage of his wife's property, in which he testified he had no interest, and over which he had no control, has raised a sufficient amount to offer a composition of 40 cents on the dollar. Now comes the attorneys, and one asks for a fee of $175, and the attorney for the bankrupt for $50, to be paid out of the estate.

This court has at some length and with considerable labor tried to define the law in regard to attorney's allowances, with which it is presumed the counsel and referee are familiar; but it seems that the court is to continue to be plagued and harassed with petitions for exorbitant fees and allowances which petitioners would not charge unless callous to future patronage. In re Carr & Co., which came up from this division of the district, reported in 117 Fed. 572, which is in accord with the several cases reported in Loveland on Bankruptcy, 139 (2d Ed.), and with the opinion of Judge Brawley in Re Goldville Manufacturing Company (D. C.) 123 Fed. 579, this court laid down a rule for the allowance of attorney's fees, which rule must be adhered to and respected by referees and attorneys.

In the judgment of the court, a fee of $50 is full compensation for the service rendered by the attorney for the petitioning creditors, and $20 for the attorney of the bankrupt. This amount is allowed, and no more.

The petition of the referee for an allowance as special master is refused. The amendment to the bankrupt law of 1903 allows him $15, and 25 cents on each claim, and one-half of 1 per cent. on amounts paid out. He has held two meetings, and will receive for these services over $40. The court cannot see that he is entitled to any more. True, this is a service not required of him strictly under the statute, as composition proceedings are to be heard by the judge; but it is in aid of the court and for the convenience of parties, and an officer of the court should be willing to render this service, especially when he is well paid under the statute.

Petitions all disallowed, except as herein specified.

UNITED STATES v. GREEN.

(District Court, N. D. New York. April 26, 1905.)

1. RENOVATED BUTTER—INTERSTATE COMMERCE—PACKAGES—STAMPS—REMOVAL—OFFENSES—STATUTES.

Act Cong. May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1903, p. 265], providing for the inspection of renovated butter, imposes a special tax thereon, represented by coupon stamps; and section 5, 32 Stat. 196 [U. S. Comp. St. Supp. 1903, p. 269], declares that all applicable parts of Act Aug. 13, 1890, c. 839, 26 Stat. 414 [U. S. Comp. St. 1901, p. 3185], providing for inspection of meats for export, and of Act March 3, 1891, c. 555, 26 Stat. 1090, as amended March 2, 1895, c. 169, 28 Stat. 732 [U. S. Comp. St. 1901, p. 3190], providing for the inspection of live cattle, etc., carcasses, meat products, etc., which are the subject of interstate com-

merce, shall apply to process or renovated butter. Act Cong. March 3, 1891, § 4, as amended by Act March 2, 1895, § 3, requires inspected meat products to be stamped and labeled, and declares that any person who shall knowingly and wrongfully deface and destroy any such stamps, according to the regulations of the Secretary of Agriculture, shall be guilty of a misdemeanor. *Held*, that such section 4 was applicable to the oleomargarine act, so that the removal of stamps and caution notices attached to original packages of renovated butter, which is the subject of interstate commerce, constituted an offense.

2. Same—Termination of Interstate Commerce—Subsequent Acts—Effect. Under Oleomargarine Act (Act Cong. May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1903, p. 370]) § 1, declaring that renovated butter transported into any state, and remaining there for use or sale, shall on arrival be subject to state laws for the exercise of police powers, as though produced within the state, the arrival of renovated butter, duly stamped and labeled as provided by such act, within a state other than that from which it was shipped, did not divest the butter of its interstate commerce character, so as to immediately entitle the consignee to remove such marks and labels, without liability for violating such act.

Demurrer to indictment charging the defendant, a wholesale importer and dealer in butter, with the crime of having removed, at Binghamton, Broome county, N. Y., the words "Renovated Butter," also the stamps and caution notices, from original packages of that article manufactured, so labeled or marked, and so stamped, etc., and sold to the defendant in the state of Ohio, and by him brought or shipped into the state of New York for sale at wholesale and in improper packages, and there resold after the said words, stamps, and notices had been removed. By this act of removing the said words and such stamps and notices from such packages, the defendant is alleged to have committed a crime, in violation of the acts of March 2, 1895, c. 169, § 4, 28 Stat. 732 [U. S. Comp. St. 1901, p. 3190], March 2, 1901, c. 805, 31 Stat. 926 [U. S. Comp. St. 1901, p. 3193], and May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1903, p. 408]. The defendant demurs on the ground that the said acts do not constitute a crime.

Geo. B. Curtiss, U. S. Atty.
A. M. Sperry, for defendant.

RAY, District Judge. By the oleomargarine act approved May 9, 1902, c. 784, 32 Stat. 194 [U. S. Comp. St. Supp. 1903, p. 267] (Public No. 110), it is provided (section 4), after defining butter and "adulterated butter":

"* * * That 'process butter' or 'renovated butter' is hereby defined to mean butter which has been subjected to any process by which it is melted, clarified or refined and made to resemble genuine butter, always excepting 'adulterated butter' as defined by this act. That special taxes are imposed as follows: Manufacturers of process or renovated butter shall pay fifty dollars per year and manufacturers of adulterated butter shall pay six hundred dollars per year. Every person who engages in the production of process or renovated butter or adulterated butter as a business shall be considered to be a manufacturer thereof. * * * That every person who carries on the business of a manufacturer of process or renovated butter or adulterated butter without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars. * * * That every manufacturer of process or renovated butter or adulterated butter shall file with the collector of internal

revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns of material and products, shall put up such signs and affix such number of his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five hundred dollars; and the sum of said bond may be increased from time to time and additional sureties required at the discretion of the collector or under instructions of the Commissioner of Internal Revenue. * * * That upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound, and that upon process or renovated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of one-fourth of one cent per pound, to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound. The tax to be levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing engraving, issuing, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to the stamps provided by this section."

Section 5 provides as follows:

"All parts of an act providing for an inspection of meats for exportation, approved August thirtieth, eighteen hundred and ninety, and of an act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof which are the subjects of interstate commerce, approved March third, eighteen hundred and ninety-one, and of amendment thereto approved March second, eighteen hundred and ninety-five, which are applicable to the subjects and purposes described in this section shall apply to process or renovated butter. And the Secretary of Agriculture is hereby authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. All process or renovated butter and the packages containing the same shall be marked with the words 'Renovated Butter' or 'Process Butter' and by such other marks, labels, or brands and in such manner as may be prescribed by the Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other state or territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section. The Secretary of Agriculture shall make all needful regulations for carrying this section into effect, and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other states or in course of exportation or shipment he shall have power to confiscate the same. Any person, firm, or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court."

The act approved March 3, 1891, c. 555, 26 Stat. 1090, as amended by Ag. Ap. bill, approved March 2, 1895, c. 169, 28 Stat. 732 [U. S. Comp. St. 1901, p. 3190] (Public No. 555), being "An act to provide for the inspection of live cattle," etc., provides in section 1 for

the inspection of all cattle, etc., intended for export to foreign countries from the United States, and in section 2 for a careful inspection of all live cattle, the meat of which is intended for exportation to any foreign country. Section 3 of such act reads as follows:

"Sec. 3. The Secretary of Agriculture shall cause to be inspected, prior to their slaughter, all cattle, sheep, and hogs which are subjects of interstate commerce and which are about to be slaughtered at slaughterhouses, canning, salting, packing, or rendering establishments in any state or territory, the carcasses or products of which are to be transported and sold for human consumption in any other state or territory or the District of Columbia, and in addition to the aforesaid inspection, there may be made in all cases where the Secretary of Agriculture may deem necessary or expedient, under the rules and regulations to be by him prescribed, a post-mortem examination of the carcasses of all cattle, sheep, and hogs, about to be prepared for human consumption at any slaughterhouse, canning, salting, packing, or rendering establishment in any state or territory or the District of Columbia, which are the subjects of interstate commerce."

Section 4 of the act, as amended, reads as follows:

"Sec. 4. That said examination shall be made in the manner provided by rules and regulations to be prescribed by the Secretary of Agriculture, and after said examination the carcasses and products of all cattle, sheep, and swine found to be free of disease and wholesome, sound, and fit for human food shall be marked, stamped, or labeled for identification as may be provided by said rules and regulations of the Secretary of Agriculture. Any person who shall forge, counterfeit, simulate, imitate, falsely represent, or use without authority, or knowingly and wrongfully alter, deface, or destroy any of the marks, stamps, or other devices provided for in the regulations of the Secretary of Agriculture, of any such carcasses or their products, or who shall forge, counterfeit, simulate, imitate, falsely represent, or use without authority, or knowingly and wrongfully alter, deface, or destroy any certificate or stamp provided in said regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. The Secretary of Agriculture is hereby authorized to make such rules and regulations as he may decide to be necessary to prevent the transportation from one state or territory or the District of Columbia into any other state or territory or the District of Columbia, or to any foreign country, of the condemned carcasses or parts of carcasses of cattle, sheep, and swine, which have been inspected in accordance with the provisions of this act. Any person, company, or corporation owning or operating any such slaughterhouse, abattoir, or meat curing, packing, or canning establishment, or any employee of the same, that shall willfully violate any provision of this act shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished for each offense by a fine not exceeding one thousand dollars or imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It will be noted that section 3 of the act of March 3, 1891, provides for the inspection prior to slaughter of all cattle, sheep and hogs which are the subject of interstate commerce, and which are about to be slaughtered at certain establishments in any state or territory of the United States, and the carcasses or products of which are to be transported and sold for human consumption in any other state or territory than the one in which such cattle, etc., are slaughtered. A post mortem examination of the carcasses of such animals about to be prepared for human consumption at such places may also be made when same are the subjects of interstate commerce. This examination is to be made in the manner provided by

rules and regulations to be prescribed by the Secretary of Agriculture, and after such examination such carcasses and products as are found to be free of disease, wholesome, sound, and fit for human food are to be marked, stamped, or labeled for identification in such manner as may be provided by the rules and regulations of the Secretary of Agriculture. Evidently it was the purpose of Congress to provide for an inspection and an examination of all such animals, and of the meat, etc., of all such animals, intended for human food, and either made or intended to be made the subject of interstate commerce. Section 4 clearly provides for the marking, stamping, or labeling of these products, and the purpose of such marking, stamping or labeling is declared to be the identification of such meats or products. Evidently the means of identification, to wit, the marks, stamps, or labels, are to attend, go with, and be attached to these meats or products until they have reached the hands of the consumer. If not, the law would be complied with by merely marking, stamping, or labeling these meats or products; and the purchaser or manufacturer would be at liberty to remove, cancel, or destroy the marks, stamps, or labels immediately thereafter, or at any time when he desired to transfer the title thereto to another person, and keep such person in ignorance of the fact that the meats or products had been subject to the inspection and examination above referred to, and were or had been the subjects of interstate commerce. Section 4 declares, among other things, that any person who shall knowingly and wrongfully alter, deface, or destroy any of the marks, stamps, or other devices provided for in the regulations of the Secretary of Agriculture, of any such carcasses or other products, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $1,000, or imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

These marks, stamps, or labels kept upon the meat products referred to will tell to the officers of the government and to all dealers whether or not such products have been properly inspected and examined, and whether or not they are or have been subjects of interstate commerce. Such marks, etc., will also tell whether or not such meats have been approved by the proper authorities as fit for human consumption. They will also enable the government to follow and identify such meats, etc., if for any reason such action becomes necessary. Section 5 of the oleomargarine act, approved May 9, 1902, and above quoted, has made the provisions of the above act approved March 3, 1891, as amended, applicable to process or renovated butter, and has provided that the Secretary of Agriculture shall cause a rigid sanitary inspection to be made of all factories and storehouses where process and renovated butter is manufactured, packed, or prepared for market, and of the products thereof, and of all materials going into the manufacture of same. The oleomargarine act also provides that:

"All process or renovated butter and the packages containing the same shall be marked with the words 'Renovated Butter' or 'Process Butter' and by such other marks, labels or brands and in such manner as may be prescribed by the

Secretary of Agriculture, and no process or renovated butter shall be shipped or transported from its place of manufacture into any other state or territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section."

The oleomargarine act, approved May 9, 1902, not only provides that renovated butter and the packages containing the same shall be marked with the words "Renovated Butter" or "Process Butter," but that it shall not be transported or shipped into any state or territory, or any foreign country other than that of its manufacture, until it has been so marked. Section 5 of that act also imposes a penalty for the shipment, transportation, or removal of such renovated butter to another state or territory, if such provision for marking or labeling shall not have been complied with.

Congress evidently had a purpose in providing in section 5 that all parts of the act for an inspection of meats, etc., and above referred to, applicable to the subjects and purposes described in the oleomargarine act, should apply to process or renovated butter. The provisions in the oleomargarine act providing for inspection and the making of needful rules and regulations for carrying the act into effect, etc., correspond, as to purpose, etc., with the provisions of sections 1, 2, and 3 of the act for inspection of live cattle, etc., approved March 3, 1891, and as subsequently amended. In the oleomargarine act we find no provision making it a criminal offense to forge, counterfeit, etc., or to knowingly and wrongfully alter, deface, or destroy, any of the marks, stamps, or other devices provided for in the regulations of the Secretary of Agriculture or in the law; but we must conclude, and it is evident, that there is as much necessity for such a provision in regard to renovated or process butter as in reference to meats, etc., intended for human consumption. Butter is used largely for human food, and the act bears on its face abundant evidence that one of its purposes is to prevent the interstate transportation and sale of process or renovated butter unless properly stamped, labeled, etc.

Is it necessary, proper, or advisable that the stamps, marks, labels, etc., upon renovated or process butter, or the packages containing same, shall not be removed, altered, or defaced until such article has reached the hands of the consumer? Evidently so. Otherwise, at any time after the process or renovated butter has left the factory, on its way to another state or territory, the labels and marks may be removed with impunity; and especially after such renovated butter has reached another state is the person transporting it at liberty to remove all such marks. Its identity as process or renovated butter is then destroyed, and it may be sold and resold in the state or territory to which shipped as genuine butter, or, as applied to this case, the renovated butter, manufactured in Ohio, and being a subject of interstate commerce, and having entered into interstate commerce, having been shipped to and received in the state of New York by a dealer in butter, and not a consumer, is, with the marks removed, placed upon the market as genuine butter, and, with the marks to identify it as process or renovated

butter removed, may be transported to the state of Connecticut, or any other state, or to a foreign country, as genuine butter. If the marks, etc., "for identification," have been removed, the government cannot follow it, even while remaining an article of interstate commerce. If such stamps, labels, etc., may be removed, then the purpose of the law, aside from the payment of the original tax imposed upon such a product, is absolutely defeated. It is evident that Congress intended to incorporate and has incorporated into the oleomargarine law the act approved May 9, 1902, section 4 of the act approved March 3, 1891, being "An act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof, which are the subjects of interstate commerce, and for other purposes," as amended, so far as applicable, and section 4, as amended, is applicable and pertinent and necessary to carry into full force and effect the purpose of the oleomargarine law, which applies to renovated or process butter. Applying the provisions of section 4 of the act of March 3, 1891, as amended, to the oleomargarine law, and we would have that section incorporated therein read as follows:

"That said examination shall be made in the manner provided by rules and regulations to be prescribed by the Secretary of Agriculture, and after said examination all process or renovated butter found to be wholesome, sound and fit for human food shall be marked, stamped or labeled for identification as may be provided by said rules and regulations of the Secretary of Agriculture. Any person who shall forge, counterfeit, simulate, imitate, falsely represent or use without authority or knowingly and wrongfully alter, deface or destroy any of the marks, stamps or other devices provided for in the regulations of the Secretary of Agriculture of any such process or renovated butter, or who shall forge, counterfeit, simulate, imitate, falsely represent or use without authority, or knowingly and wrongfully alter, deface or destroy any certificate or stamp provided in said regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. * * *"

Substantially the only change necessary to be made in section 4 in order to adapt it to the oleomargarine act is to strike out the words "carcasses or other products" wherever they occur, and insert in lieu thereof the words "process or renovated butter."

It seems to this court self-evident that the plain intent and purpose of Congress was to make it a criminal offense and punishable to forge, counterfeit, simulate, imitate, falsely represent, or use without authority, or knowingly and wrongfully alter, deface, or destroy, any of the marks, stamps, or other devices provided for in the regulations of the Secretary of Agriculture of any process or renovated butter, or to forge, counterfeit, simulate, imitate, falsely represent, or use without authority, or to knowingly and wrongfully alter, deface, or destroy, any certificate or stamp provided in said regulations, and to declare either of such offenses a misdemeanor, and to provide a punishment on conviction by a fine not exceeding $1,000, or imprisonment not exceeding one year, or both, in the discretion of the court. Instead of incorporating the language of the act of March 3, 1891, as amended March 2, 1895, into

the oleomargarine law, said act was referred to, and it is explicitly provided that:

"All parts of an act providing for the inspection of meats for exportation, approved August 30, 1890, and of an act to provide for the inspection of live cattle, hogs, and the carcasses and products thereof, which are the subjects of interstate commerce, approved March 3, 1891, and of the amendment thereto approved March 2, 1895, which are applicable to the subjects and purposes described in this section, shall apply to process or renovated butter."

It follows necessarily that if the purposes of the oleomargarine law are substantially the same as the purposes of the meat and cattle inspection law, above referred to, the provision above referred to, making it a crime to remove or deface the stamps, marks, etc., has been incorporated in, and must be read into and as a part of, the oleomargarine law. Congress is not supposed to have used the language it did in section 5 of the oleomargarine act without a purpose, and the language used either incorporates the criminal provisions referred to into that act, or fails to incorporate any part of the cattle and meat inspection law into the oleomargarine act; and the language of section 5, referred to, becomes meaningless and inoperative.

Section 4 of the oleomargarine act, among other things, provides:

"* * * And that upon process or renovated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of one-fourth of one cent per pound, to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound. The tax to be levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing engraving, issuing, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to the stamps provided by this section."

Without going in detail into the provisions of law relating to the affixing of stamps, etc., and the cancellation thereof, it is sufficient to call attention to section 3364 of the Revised Statutes [U. S. Comp. St. 1901, p. 2202], which provides for the affixing of a label to each package of tobacco or snuff manufactured; and such section also provides that:

"Every manufacturer of tobacco who neglects to print on or affix such label to any package containing tobacco made by or for him, or sold or offered for sale by or for him, and every person who removes any such label so affixed from any such package, shall be fined fifty dollars for each package in respect to which such offense shall be committed."

See, also, sections 3373, 3374 [U. S. Comp. St. 1901, p. 2206].

The act of June 6, 1896, c. 337, 29 Stat. 255 [U. S. Comp. St. 1901, p. 2239] entitled "an act defining cheese, and also imposing a tax upon and regulating the manufacture, sale, importation and exportation of filled cheese," contains the following section (section 9):

"That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving,

issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section."

This provision incorporating into that law the existing provisions of law governing the engraving, issue, sale, accountability, effacement and destruction of stamps relating to tobacco and snuff was made the subject of discussion by the Supreme Court of the United States in Cornell v. Coyne, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. Ed. 504. Both in the opinion of the court by Mr. Justice Brewer, and in the dissenting opinion by Mr. Justice Harlan, that section and its effect are discussed; and it is nowhere suggested that the language of section 9 of the filled-cheese act does not fully incorporate therein the provisions of existing law relating to the engraving and effacement and destruction of stamps on packages of tobacco and snuff.

In the opinion of this court, the provisions of law referred to are effectively incorporated in the oleomargarine law, and are to be read and enforced as a part thereof.

But for section 1 of the act, process or renovated butter would remain an article and subject of interstate commerce until it had reached the hands of some purchaser, in the state to which carried, other than the general dealer importing it for sale only. How far section 1 operates to permit the purchaser of process or renovated butter, who has removed it to a state other than the one where manufactured, to "treat it as his own," or "do with it and the packages in which contained as he likes," is a necessary subject of inquiry. Section 1 reads:

"That all articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any state or territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such state or territory or the District of Columbia, be subject to the operation and effect of the laws of such state or territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such state or territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

This court is not prepared to assent to the claim that this section wholly divests the articles named therein, including process or renovated butter, of their character as subjects of interstate commerce, immediately on their arrival in a state other than that of their production, at least to such an extent as to permit the removal of all marks, labels, etc., required by the national law to be affixed when a subject of interstate commerce. Marked and labeled by order of the general government "for identification" and stamped, the tax having been paid, the process or renovated butter so marked or labeled is distinguishable from all other. Other process or renovated butter made in the same factory, and equally subject to the law, but not inspected, marked, labeled, or stamped, may be shipped into another state at the same time. Has

the general government lost jurisdiction over the latter because of section 1 of the act in question? May not the government officials follow it? Can inspection or tax or both be avoided by shipping it over the border of the state? Has not the government marked and labeled, or caused to be marked and labeled, that which was examined and inspected, and on which the tax was paid, for purposes of identification—for the purpose of distinguishing it from that not inspected and examined, and on which the tax has not been paid? Has not the government the right to demand that such marks and labels and stamps shall remain until the article reaches the ultimate consumer, or at least until it has passed to a purchaser in the state to which taken, and has become commingled in the common mass of property in the state? Does not the purchaser who takes the article from one state to another take it with knowledge of the law, and does he not assent to the proposition that such marks, etc., shall remain?

It is true that section 1 of this act is substantially the same as a similar section in what was known as the "Wilson Bill," and which was made the subject of examination and decision by the Supreme Court of the United States in In re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572. In that case the court said (page 560, 140 U. S., page 868, 11 Sup. Ct., 35 L. Ed. 572):

"Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature."

And again (page 562, 140 U. S., page 869, 11 Sup. Ct., 35 L. Ed. 572):

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

As early as the decision of Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678, it was held that interstate commerce could not be stopped at the external boundaries of the state, but must enter the interior of the state, and includes a sale therein. This power to sell, as a part of interstate commerce, was applied in that case to foreign commerce, but Chief Justice Marshall said the power would be the same as applied to commerce between the states.

In Schollenberger v. Pennsylvania, 171 U. S., at page 23, 18 Sup. Ct. 765, 43 L. Ed. 49, the court said:

"In the absence of congressional legislation, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state."

Without going into the numerous cases bearing to some extent, even though indirectly, on the question, this court is of the opinion that in making process or renovated butter transported into a state, and remaining therein for use, consumption, sale, or storage therein, subject on arrival in such state to the operation and effect of the laws of such state enacted in the exercise of its police power to the same extent and in the same manner as though such articles

had been produced in such state, and declaring that same shall not be exempted from such laws by reason of being introduced into such state in original packages or otherwise, Congress did not intend to confer any power and has not conferred any power on any person to remove the marks, labels, stamps, etc., from process or renovated butter. When the packages are used, the marks, stamps, etc., are to be destroyed. New York has passed no law allowing this to be done, and it is not seen that such a law could be passed in the legitimate exercise of the police power of the state. Section 1 of the oleomargarine act was not intended to abrogate any penalty imposed for the violation of the penal provisions referred to, or to permit the acts therein forbidden, or to empower a state to make any law interfering with the operation of such laws, unless there should arise a conflict between the laws of the United States and those of the state passed in the legitimate exercise of its police power. It is perfectly clear that to permit the removal of the stamps, marks, labels, etc., on packages of a food product of this character, and specifically authorized by law, while such articles remain an article of interstate commerce, or even thereafter, when we consider the objects and purposes of the law, would not only defeat the objects and purposes of the legislative body as to inspection, etc., but open the doors wide to frauds on the revenue. The placing of the marks, etc., on the packages, implies they are to remain.

Attention has been called to the proviso in the act of March 2, 1901, "An act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1902" (31 Stat. 926). That proviso reads as follows:

"That the Secretary of Agriculture may construe the provisions of the act of March third, eighteen hundred and ninety-one, as amended March second, eighteen hundred and ninety-five, for the inspection of live cattle and products thereof, to include dairy products intended for exportation to any foreign country, and may apply, under rules and regulations to be prescribed by him, the provisions of said act for inspection and certification appropriate for ascertaining the purity and quality of such products, and may cause the same to be so marked, stamped, or labeled as to secure their identity and make known in the markets of foreign countries to which they may be sent from the United States their purity, quality, and grade; and all the provisions of said act relating to live cattle and products thereof for export shall apply to dairy products so inspected and certified."

I find nothing in this proviso inconsistent with the views expressed. This proviso amplifies the power of the Secretary of Agriculture as to dairy products intended for exportation to any foreign country, but does not purport to limit the powers before granted by the acts to which attention has been invited. It has no possible reference to dairy products transported or to be transported from one state to another—interstate commerce, pure and simple.

It is not necessary here to recite the rules and regulations of the Secretary of Agriculture duly made and promulgated pursuant to and by virtue of the statutes above quoted. It is sufficient to say that they are ample, in due form, and provide for coupon stamps to

be securely affixed to the side of the package and canceled. "Such stamps must contain the name of the collector, his district and state, and show thereon the date of payment of the tax, the number of pounds, and the number of the factory." Also for labels on each package, on which are to be printed the number of the factory, the revenue district and state in which situated, and also a notice containing the words "Renovated Butter" or "Process Butter," etc. These stamps, marks, or labels, and notices, affixed to packages of renovated butter at the factory in Ohio, were removed by the defendant after same reached the city of Binghamton, N. Y., where the packages were put in cold storage. The defendant purchased the goods in Ohio, brought them to New York for sale, where he removed all these stamps and marks, and thereafter sold same—such renovated butter—in New York.

The indictment states facts constituting a crime, and the demurrer thereto is overruled.

In re PEASLEY.

(District Court, D. New Hampshire. March 29, 1905.)

No. 899.

BANKRUPTCY—SECURED CLAIM—VENDEE'S LIEN.

In the absence of any authoritative state decision or statute governing the case, a vendee under a contract for the purchase of land, who has recorded his bond for a deed and paid the purchase money on the bankruptcy of the vendor without having conveyed, is entitled to prove his claim as one secured by an equitable lien on the land.

In Bankruptcy.

On the 5th day of June, A. D. 1903, the bankrupt contracted to sell to one Eugene G. Bradshaw, of Gardner, in the county of Worcester and commonwealth of Massachusetts, for the sum of $4,600, certain lands, buildings, mills and mill privileges, and standing timber, which said lands, buildings, etc., comprised practically all the realty then owned by the bankrupt; and on said 5th day of June the said Peasley executed a bond in the sum of $5,000 to the said Bradshaw, conditioned upon Peasley giving Bradshaw a good and sufficient warranty deed of the above property. The bond acknowledged the receipt of $200, and set forth that $1,000 was to be paid in 15 days from date, and the balance of the purchase price, $3,400, was to be paid in 30 days. A full description of the land, water privileges, standing timber, etc., is set out in the bond. The bond was signed by Charles A. Peasley and witnessed by two witnesses, and was on the 7th day of July, 1903, recorded in the office of the register of deeds for Sullivan county, where the property was situated. Thereafter the conditions of the bond relating to time were extended to July 15th, and on July 15th $3,400 was paid into the hands of A. L. Mansfield, of Hillsboro Bridge, to hold until Peasley should, on demand, deliver a good and sufficient warranty deed, when the said Mansfield was to pay the $3,400 over to Peasley. This arrangement was made by agreement of all parties interested. One thousand dollars had previously been paid, making in all $1,200 that had come into the hands and possession of Peasley under the contract for sale; and it is this sum of $1,200 for which the said Everett claims a lien upon the real estate. On the 29th day of July, Eugene G. Bradshaw assigned all his rights and interests in the bond and in the property contracted to be conveyed to the claimant, John Everett.

Some time after the 15th day of July, 1903, Peasley tendered to Bradshaw or his assignee, Everett, a deed of all property covered by the bond, which was

refused by Bradshaw or Everett or both, on the ground that it did not convey good title to the property. Thereupon Peasley brought a bill in equity in the superior court for the county of Suffolk and commonwealth of Massachusetts for specific performance; and within four months of the bankrupt proceedings Everett brought suit against Peasley in the superior court for the county of Sullivan and state of New Hampshire for breach of contract, and, to secure any judgment therein, attached this same property.

Bradshaw or his assignee was given possession of a part of the real estate, viz., the mill and water privilege, and occupied the same and operated the mill for a few months, but at the time bankruptcy proceedings were commenced had withdrawn from the premises, and the property was then in the control and possession of Peasley, the bankrupt.

The bankrupt proceedings were begun by a voluntary petition on the ——— day of ———, 1904, at which time the $3,400 was still in the hands of the said Mansfield, and the two suits mentioned were pending in the respective courts. No action has been taken in the suit of Everett against Peasley for breach of contract. On the 29th day of June, 1904, in the bill of equity brought by Peasley against Bradshaw et al., the following decree was entered:

"Commonwealth of Massachusetts.

"Suffolk, ss. Superior Court. In Equity.

"Charles A. Peasley vs. Eugene G. Bradshaw et als.

"Final Decree.

"This cause came on to be heard upon the report of the special master, and thereupon, by agreement of counsel, the plaintiff having become bankrupt and his trustees having elected not to prosecute said action, it is ordered, adjudged, and decreed that the master's report be confirmed, and that the bill be, and hereby is, dismissed without costs.

"By the Court,

"Henry E. Bellew, Ass't Clerk."

Everett has proved a claim against the estate of Peasley for the $1,200, which claim has been allowed. He now asks to have it allowed as secured, and the referee has opened the case for the purpose of allowing it as secured, if it is entitled so to be, and as though the proof had originally been made for a secured indebtedness.

John Everett, for creditor.
Jesse M. Barton, for trustee.

ALDRICH, District Judge (after stating the facts as above). The question here is whether Mr. Everett, who held the bankrupt's bond for a deed of lands in New Hampshire, was entitled to have his claim for part payment of the purchase money under the bond allowed against the bankrupt estate as a lien claim.

The creditor's position is that, having paid a certain sum of money under the bond contract, and the obligor having been prevented from performance by reason of bankruptcy, that his claim should be allowed as a claim secured by an equitable lien resulting inherently from the situation. As the creditor's position involves a question relating to an interest in real estate, under a familiar rule, we must be governed by New Hampshire law in respect to lands, if it can be ascertained that there is any positive expression of New Hampshire law in respect to a question like the one presented here.

The views of counsel have been expressed with care, and apparently upon full research. It is conceded by counsel who argues against the lien, and it is unquestionably true, that, under the general law of equity as administered in England and in many of our

states, a lien results in favor of the vendee who pays money under a contract like the one presented here. This is upon the ground, as said in Washburn on Real Property (4th Ed. vol. 1, *509), that, "where the contract is executory, as fast as the purchase money is paid in, it is a part performance of such contract, and to that extent the payment of the money, in equity, transfers to the purchaser the ownership of a corresponding portion of the estate." See, also, Story's Eq. Jur. § 1217, and note; Pomeroy's Equity, §§ 167, 1263; Jones on Liens, §§ 1061, 1105. It is also unquestionably true that there is no positive expression by the Supreme Court of New Hampshire upon the subject, so we must accept the question as one not controlled by legislative act or by judicial decision in New Hampshire. Indeed, it is expressly treated as an open question in this state in Arlin v. Brown, 44 N. H. 102, as well as in the later case of Sawyer v. Peters, 50 N. H. 143, 144. In view of the fact that such a lien has never been held to result in New Hampshire, and in view of the strongly reasoned case of Ahrend v. Odiorne, 118 Mass. 261, 267, 19 Am. Rep. 449, I hesitate about applying the English equity rule to this situation. It must be borne in mind, however, that Massachusetts courts administer a limited equity system, rather than the comprehensive chancery system of England, and that the case of James v. Gray, 131 Fed. 401, 65 C. C. A. 385, decided by the Court of Appeals for the First Circuit, not only holds that equitable claims are provable under the present bankruptcy law, but that federal courts administering the general law of equity, as accepted in England and as generally accepted in this country, will recognize and establish an equitable claim within the purview of the general rules of equity, though, under the decisions of the state court, it has no status under the local law. From that extreme view I dissented, but the authority of the case is one by which I must be governed, and, while it is not necessary in this case to put the decision upon that extreme ground, in view of the universally accepted principle that federal courts administer the general law of equity with respect to a subject upon which there is no positive or express rule of local law, I have concluded to hold that this claim should have the status of a claim secured by an equitable lien. The money was advanced by the vendee in reliance upon the bond. There is no question made against that proposition, and, whether it safeguarded the vendee's interest or not, he attempted to give notice of his interest to the world by having his bond recorded, and performance under the contract was suspended by the arm of the bankruptcy law.

Under New Hampshire law, assignees, as, for instance an administrator of an insolvent estate, are neither attaching creditors nor purchasers for value (Adams v. Lee, 64 N. H. 421, 422, 423, 13 Atl. 786), and an obligee in a bond for a deed has an equitable interest in the land which the bond covers (Marston v. Osgood, 69 N. H. 96, 97, 38 Atl. 378).

While New Hampshire is a state in which interests in land are generally required to be set out in the records by way of mortgage, it excepts from the operation of its statutes such trust interests "as

may arise or result by implication of law." Pub. St. 1901, c. 137, § 13. In view of the New Hampshire statutes, and what would seem must be accepted as a strong intimation in Arlin v. Brown, 44 N. H. 102, that a resulting lien upon land might be held to exist in New Hampshire in a proper case, I do not consider that I am offending any settled policy or principle of New Hampshire law by the conclusion that I reach.

If the parties fail to adjust the matter of interest, the question of interest will first be passed upon by the referee.

The decision of the referee directing that the claim be allowed as an unsecured claim is reversed, and there should be further proceedings not inconsistent with this opinion.

MYRTLE v. NEVADA, C. & O. RY. CO

(Circuit Court, D. Nevada. April 22, 1905.)

No. 800.

1. REMOVAL OF CAUSES—TIME FOR REMOVAL—AMENDMENT OF COMPLAINT.
The law is well settled that an amendment to a complaint in the state court which transforms a nonremovable case into a removable one gives the defendant the right to remove if he acts promptly.

2. SAME—FEDERAL QUESTION.
A federal question which will confer jurisdiction on a United States court either by original process or by removal must be a question of law as stated by the plaintiff in his complaint, and, when a legal question arising under the Constitution or a law or treaty of the United States has been decided by the Supreme Court, it ceases to be a federal question for removal purposes. Where the facts only are in dispute, the federal court cannot take jurisdiction.

[Ed. Note.—Jurisdiction in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purch. Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.]

3. SAME.
An action in a state court to recover for personal injuries alleged to have been received by reason of the failure of defendant railroad company to properly equip its cars with safety appliances is not removable merely because of an allegation in the complaint that defendant is engaged in interstate commerce, where it does not appear that there is any controversy as to the construction or effect of the federal law relating to railroads engaged in such commerce, since the questions of fact whether defendant is engaged in interstate commerce, and, if so, whether it has complied with the law, are not federal questions.

On Motion to Remand to State Court.

Curler & King, for plaintiff.
Dodge & Parker and Cheney & Massey, for defendant.

HAWLEY, District Judge (orally). This action was commenced in the state court to recover damages against the defendant for injuries alleged to have been received by plaintiff by the negligence, carelessness, and failure of defendant to provide suitable couplings on its cars.

The motion to remand is based upon several grounds: (1) The action is not subject to removal under the statutes of the United States; (2) it was not removed within the time required by the statutes of the United States; (3) the petition upon which said order of removal was made does not state any legal grounds authorizing the removal; (4) the suit is not of a civil nature, in law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the statutes of the United States applicable thereto.

The facts shown by the record and petition for removal may be briefly stated as follows: The original complaint was filed in the state court November 7, 1904. Thereafter a demurrer was interposed to said complaint, and was overruled on December 16, 1904, and the defendant given until December 29th to answer. On December 27th the defendant filed its answer. On February 11, 1905, the plaintiff, having previously obtained leave so to do, filed an amendment to his complaint. On February 13th the defendant demurred to the amended complaint upon the ground that said amended complaint did not state facts sufficient to constitute a cause of action. This demurrer was sustained, and the plaintiff given leave to file an amended complaint. This amendment contained an averment as follows:

"That the said defendant now is, and at all the times and dates hereinafter mentioned was, the owner and operator of a line of railroad extending from the city of Reno, in the county of Washoe, state of Nevada, northerly through said county of Washoe to a station called Madeline, in Lassen county, state of California, and a common carrier engaged in interstate commerce, and, as such common carrier, was at all the times and dates hereinafter mentioned hauling passengers and freight from Reno, Washoe county, state of Nevada, to the station called Madeline, in the state of California, and at various points along the line of said railroad between the said city of Reno, Nev., and the said station of Madeline, Cal., and doing a regular interstate commerce business."

On February 21, 1905, the defendant petitioned the state court for, and obtained, an order of removal from said court to the Circuit Court of the United States. In this petition it is alleged that the amended complaint involves the question of the liability of petitioner, under the provisions of the Constitution of the United States, and the act of Congress entitled "An act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers," etc., approved March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), and the acts amendatory thereof.

"Your petitioner further shows that the original complaint, filed herein on the 7th day of November, 1904, did not involve any questions of liability of your petitioner under the provisions of the Constitution above cited, or under the provisions of that certain act of Congress above specified, and was not a suit arising under the Constitution and laws of the United States, and that for the first time said questions under the provisions of the Constitution of the United States and said act were involved and presented by the filing of said amended complaint of said plaintiff on the said 20th day of February, 1905."

The petition for removal shows that the plaintiff and defendant were at the time of the commencement of this action, and still are, citizens and residents of the state of Nevada. The contention of counsel for petitioner is that its answer theretofore filed did not prevent it from removing the cause as soon as it appeared that a federal question was involved.

The law is now well settled that an amendment to a complaint in the state court, which transforms a nonremovable case into a removable one, allows the suit to be removed into the Circuit Court, if the defendant acts promptly. This matter is elaborately discussed by the Supreme Court in Powers v. Chesapeake & Ohio Ry., 169 U. S. 92, 100, 18 Sup. Ct. 264, 42 L. Ed. 673. Among other things, the court said:

"The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought."

See, also, Speckart v. German National Bank (C. C.) 85 Fed. 12, 14; Bailey v. Mosher (C. C.) 95 Fed. 223, 225; Guarantee Co. v. Hanway, 104 Fed. 369, 374, 44 C. C. A. 312; Moon on Removal of Causes, § 157, and authorities there cited. The petition for removal was filed in time if the amended complaint presents such a federal question as to authorize a removal under the act of 1887–88.

Does the mere fact that the plaintiff for the first time in his amended complaint asserts that the defendant, in running its cars at the time of the injury, was engaged in interstate commerce, justify the removal of the action from the state court? To entitle the defendant to removal, it must show that the action arises under the act of Congress; that the plaintiff claims a legal right thereunder, which legal right is controverted by the defendant. The controversy must be one as to the construction of the statute, as distinguished from the questions of fact. It does not appear in the present case that there is any controversy between the parties as to the construction of the law. That question has been settled by the decision of the Supreme Court in Johnson v. Southern Pacific Railroad, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. ——. Is there any federal question involved in this case?

A federal question which will confer jurisdiction upon a United States court, either by original process or by removal, must be a question of law as stated by the plaintiff in his complaint, and not a question of fact. Where the facts only are in dispute, and the federal law governing the case is uncontroverted, the United States court cannot take jurisdiction. When a legal question arising under the Constitution or a law or a treaty of the United States is decided by the Supreme Court, it ceases to be a federal question. State v. Bradley (C. C.) 26 Fed. 289; Austin v. Gagan (C. C.) 39

Fed. 626, 5 L. R. A. 476; Montana Ore P. Co. v. Boston Co., 85 Fed. 867, 29 C. C. A. 462; California Oil & G. Co. v. Miller (C. C.) 96 Fed. 12; Peabody G. M. Co. v. Gold Hill M. Co. (C. C.) 97 Fed. 657, 660. The question of fact as to whether the defendant was engaged in interstate commerce, and whether, if so engaged, its cars were coupled as provided for in said act, can be tried and determined in the state court as well as here. In Railroad v. Bell, 176 U. S. 321, 328, 20 Sup. Ct. 399, 44 L. Ed. 486, the suit was brought in the Circuit Court of the United States. It was claimed that a federal question was involved, under a declaration of the plaintiffs that they "claim title to the said land under and by virtue of a patent granted by the government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Fla., in 1883," etc. The court said:

"In view of the frequent and recent decisions of this court on this subject, it is not necessary to argue the proposition that the mere assertion of a title to land derived to the plaintiffs, under and by virtue of a patent granted by the United States, presents no question which of itself confers jurisdiction on a Circuit Court of the United States."

And, because the plaintiffs' declaration disclosed no federal question, the suit was dismissed for want of jurisdiction.

The cause of action as presented in plaintiff's amended complaint is not one necessarily arising under the Constitution and laws of the United States, within the meaning of the provisions of the judiciary act of 1887–88. In Shoshone M. Co. v. Rutter, 177 U. S. 505, 507, 20 Sup. Ct. 726, 44 L. Ed. 864, in the course of the opinion, Mr. Justice Brewer said:

"We pointed out in the former opinion (Blackburn v. Portland G. M. Co., 175 U. S. 571, 576 [20 Sup. Ct. 222, 44 L. Ed. 276]) that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for, if it did, every action to establish title to real estate (at least in the newer states) would be such a one, as all titles in those states come from the United States, or by virtue of its laws. As said by Mr. Chief Justice Waite, in Gold Washing & Water Co. v. Keyes, 96 U. S. 199, 203 [24 L. Ed. 656]: 'The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. * * * Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which "really and substantially involves a dispute or controversy" as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States.'"

See, also, Gibbs v. Crandall, 120 U. S. 105, 7 Sup. Ct. 497, 30 L. Ed. 590; New Orleans v. Benjamin, 153 U. S. 411, 424, 14 Sup. Ct. 905, 38 L. Ed. 764; Western Union T. Co. v. Ann Arbor R. Co., 178 U. S. 239, 244, 20 Sup. Ct. 867, 44 L. Ed. 1052; Defiance Water Co. v. Defiance, 191 U. S. 184, 191, 24 Sup. Ct. 63, 48 L. Ed. 140; Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870.

The motion to remand is granted.

MOTT v. CHEW et al.

(Circuit Court, D. New Jersey. May 6, 1905.)

NEGLIGENCE—DAMAGES—PROXIMATE CAUSE.

Defendants contracted to furnish plaintiff a tug to leave P. not later than April 7, 1903, to haul stones to protect an ocean bulkhead, which plaintiff was constructing, from tides and storms. Plaintiff alleged that on April 7th he had completed 500 feet of the bulkhead, which he then desired to have protected by stone ballast, but that defendants willfully delayed the departure of the tug, and then sent it with a scow in tow so that it did not reach plaintiff's property until April 10th, and was unable to then tow enough stone to protect the bulkhead before April 12th, when a violent storm occurred, and wrecked all that part of the bulkhead constructed, except that which had been protected by stones towed on two days after the tug's arrival. *Held*, that defendants' negligence in failing to promptly and properly transmit the tug as agreed was the proximate cause of plaintiff's damage.

On Contract. Demurrer to Declaration.

Grey, McDermott & Enright, for plaintiff.
Watkins & Avis, for defendants.

LANNING, District Judge. By his declaration in this case the plaintiff avers that on April 3, 1903, he was the owner of Woodland Beach, a summer resort or park in the state of Delaware, and was then engaged in building a bulkhead to protect the beach from the action of the tides and from being destroyed by storms; that the defendants on April 3, 1903, entered into a contract with the plaintiff whereby they agreed to furnish the plaintiff with a tugboat of sufficient power to tow barges of 50 tons' capacity from Collins Beach, in the state of Delaware, to the above-mentioned Woodland Beach, and that the tugboat should leave Philadelphia "not later than the 7th day of April, 1903, and should continue in the employ of said plaintiff until the completion of the work, which was described as being the removal of stone from the face of Collins Beach, or the doing of anything which the plaintiff might desire or order"; that on or about April 7, 1903, the plaintiff had completed about 500 feet of the bulkhead, which he then desired to have protected by stone ballast; and that he had engaged the defendants' tugboat for the express purpose of securing stones from Collins Beach for the protection of the bulkhead against tides and storms. The declaration also contains the following averment:

"The said defendants, well knowing the purpose for which their said tug was hired by the plaintiff, and well knowing the danger from storms to which said bulkhead was exposed, willfully and carelessly neglected to leave Philadelphia on the 7th day of April, 1903, according to the terms of their said agreement, and did not leave until the 8th day of April, 1903, and willfully and against the express orders of said plaintiff towed a large scow to said Woodland Beach, by reason whereof the said tugboat was greatly delayed, and did not reach said Woodland Beach until the evening of Friday, the 10th day of April, 1903, three days later than she should have arrived, and three days later than the said defendants had contracted she should arrive; and by reason of the said delay, and the failure of the said tugboat to leave Philadelphia on the 7th day of April, 1903, the said tugboat, after her arrival at Woodland Beach, was unable to tow enough stone to protect said bulkhead

before Sunday, the 12th day of April, 1903, and on said 12th day of April, 1903, a violent storm occurred at said Woodland Beach, and entirely wrecked and washed away the plaintiff's said bulkhead, except a few feet of said bulkhead, which was protected by stones towed by said tugboat on Saturday, the 11th day of April, 1903—the day after her arrival—and greatly washed away and damaged the plaintiff's said beach, to the damage of the said plaintiff four thousand dollars."

There are several grounds of demurrer, but they are all founded on the general charge that the alleged negligence of the defendants was not the proximate cause of the damage complained of by the plaintiff.

I think the demurrer must be overruled. The plaintiff specifically charges in his declaration that the defendants knew the special circumstances existing when the contract was made, and the damage from storms likely to arise in case of delay. On April 7th the bulkhead was in that stage of construction which rendered it important that it should be properly protected by stone ballast before any storm should occur. The case is therefore brought, as I think, within the doctrine of the English leading case so often referred to and followed by the courts of this country. Hadley v. Baxendale, 9 Exch. 341; also 5 English Ruling Cases, 502. The rule laid down in that case was stated in these words:

"When two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (i. e., according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

To the same effect, see American Notes to Hadley v. Baxendale, 6 English Ruling Cases, bottom of page 624; Boutin v. Rudd, 82 Fed. 685, 27 C. C. A. 526. The same principle was applied in the case of Parmalee v. Wilks, 22 Barb. 539, and in Taylor Manufacturing Company v. Hatcher Manufacturing Company (C. C.) 39 Fed. 440, 3 L. R. A. 587.

The demurrer will be overruled, with costs, and with leave to the defendants to plead within a reasonable time, if they desire it.

KING v. DAVIS et al.

(Circuit Court, W. D. Virginia. December 21, 1903.)

1. EJECTMENT—JUDGMENT—EXECUTION—DELAY—REVIVAL.

Where a judgment in favor of plaintiff in ejectment was not enforced by a writ of possession within a year and a day after it was entered, it is insufficient to support a writ subsequently issued without being revived, both as provided by Code Va. 1887, § 3577 [Va. Code 1904, p. 1910], and at common law.

SAME—SCIRE FACIAS—PROCEEDINGS—FINAL JUDGMENT.

A scire facias proceeding to revive a default judgment in ejectment in the Virginia federal courts is matured at rules, but the office judgment on default does not become final until there is either a judgment of the court at the following term, confirming it, or until the term, or the 15th day thereof, has passed without an order setting it aside.

PROCESS—SERVICE—NAME OF DEFENDANT.

Where a defendant named "Francis" was personally served with process in which he was named "France," and he was subsequently given a notice that plaintiff would ask leave to amend, in which his name was properly spelled, he is bound by a judgment, though he failed to appear.

SAME—SUBSTITUTED SERVICE—POSTING ON FRONT DOOR.

Under Code Va. 1887, § 3207 [Va. Code 1904, p. 1684], authorizing substituted service by posting on the "front door," a return showing service by posting up and leaving on "the door" of defendant's usual dwelling house does not show a valid service.

SAME—SERVICE ON WIFE.

Code Va. 1887, § 3207 [Va. Code 1904, p. 1684], authorizes substituted service by delivering a copy at defendant's usual place of abode, and giving information of its purport to his wife or any person found there, "who is a member of his family," and above the age of 16 years. *Held*, that such section should be construed as requiring that the wife should be a member of defendant's family in order to be entitled to receive the process, so that a return showing service by leaving a copy with defendant's wife, but not stating that she was a member of defendant's family, is insufficient.

SAME—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A question as to whether presumptions will be made in aid of a defective return of substituted service is a question of general law, with reference to which decisions of the highest state courts are not conclusive on the federal courts.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

SAME—JUDGMENTS—VACATION—MOTIONS—PLEAS.

Where, on scire facias to revive a default judgment in ejectment, it appeared that the returns of service as to two of the defendants were insufficient to show a valid service on them, the judgment will be held void as to them under either their motions to vacate or their pleas of nul tiel record, but subject to the right of amendment of the returns of service in certain cases.

SAME—AMENDMENT OF RETURN OF SERVICE.

Where, in ejectment, the returns of service as to two of the defendants were defective, one for failure to show that the door of defendant's abode on which the process was posted was the "front door," and the other for failure to show that defendant's wife, with whom the process was left, was a member of his family, such returns, though made by a private person, might be amended to show the fact, as against defendants themselves, on scire facias to revive a default judgment against defendants.

SAME—FEDERAL COURTS—STATE DECISIONS.

Whether a return of substituted service of process in federal courts can be amended is a question of the power of the court, with reference to which it is not bound by state decisions.

10. SAME—DECLARATION—AMENDMENT.

Under Code Va. 1887, § 3253 [Va. Code 1904, p. 1712], authorizing an amendment of plaintiff's declaration before defendant's appearance, where, in ejectment to recover land, the original declaration contained not only a description of the land sued for, but an allegation that defendants were unlawfully withholding the possession thereof from plain-

tiff, he was entitled to amend the description in such declaration before defendants' appearance, whether defendants were personally or constructively served.

11. SAME—DEFAULT JUDGMENT—RULE TO PLEAD—SERVICE—VACATION OF JUDGMENT AFTER TERM.

Code Va. 1887, §§ 2733, 3284 [Va. Code 1904, pp. 1406, 1728], having dispensed with the necessity of a rule to plead before entry of a default judgment in ejectment where there has been no appearance, the fact that no such rule was served, as directed by a court order, was not ground for vacation of a default judgment long after the term at which it was rendered.

12. SAME—STATEMENT OF DAMAGES—FILING—WRIT OF INQUIRY.

Since Code Va. 1887, § 2751 [Va. Code 1904, p. 1412], authorizes the filing of a statement of damages in ejectment after the filing of the declaration, but before defendants' appearance, and before trial, it was proper for the clerk, in entering confirmation of the common order on default, to award a writ of inquiry, though no statement of damages had been filed.

13. SAME—FINAL JUDGMENT.

The office judgment, on default in ejectment, cannot in any case become final without the intervention of the court or jury.

14. SAME.

Where no statement of damages in ejectment was filed, so as to require an inquiry either by the court or jury, as provided by Code Va. 1887, § 2751 [Va. Code 1904, p. 1412], the court was authorized, at the term following the office judgment after default, or at any subsequent term, to enter judgment that plaintiff recover possession of the land sued for, and make such office judgment final, without setting the cause for inquiry at the next term.

15. SAME—WRIT OF INQUIRY.

Where, in ejectment, defendants were in default, and the case was ripe for final judgment without a writ of inquiry at the time an order was entered reciting that, defendants' time to plead having expired, it was ordered that the case be set for inquiry at the next term, and that the clerk notify defendants thereof by mail, the entry of such order was a mere irregularity, and did not affect the validity of a final judgment subsequently entered.

16. SAME—CONSTRUCTION OF ORDER.

Where, in ejectment, there was no necessity of an inquiry, and the court entered an order, after the case was ripe for final judgment, reciting that, defendants' time to plead having expired, the cause was set down for inquiry, such recital was equivalent to an order making the office judgment final.

17. SAME—LEAVE TO AMEND—NOTICE—SERVICE.

Notice of leave to amend a declaration in ejectment being unnecessary, an erroneous judgment of the court that the return of service of such notice was sufficient was immaterial, and could not be considered an error of law sufficient to justify vacation of the final judgment.

18. SAME—ERRORS OF FACT—MATERIALITY—EFFECT.

Defendants in ejectment, not being entitled, as a matter of right, either to notice of an application to amend the declaration, or to service of a rule to plead before judgment, findings of fact by the trial court with reference to the service of such a notice and rule on certain of the defendants, if erroneous, are not material, and therefore are insufficient to authorize a vacation of a final judgment in favor of plaintiff.

19. SAME—SCIRE FACIAS—REPUGNANT PLEAS.

Under Code Va. 1887, § 3264 [Va. Code 1904, p. 1718], authorizing a defendant in any action to plead as many several matters as he shall think necessary, pleas to scire facias to revive a default judgment in

ejectment, denying service of process, declaration, and notices in the manner and at the time and places stated in the returns, and alleging service by an unauthorized person, are not objectionable, though repugnant.

20. SAME—DENIAL OF SERVICE—CONTRADICTING RECORD—COLLATERAL ATTACK.
A plea to a writ of scire facias to revive a judgment denying service of process is a collateral attack on the judgment, on which defendants are not entitled to contradict the record, showing a valid service, by evidence aliunde.

21. SAME—SERVICE—PRIVATE PERSON—AUTHORITY.
Code Va. 1887, § 3207 [Va. Code 1904, p. 1684], providing that any sheriff, sergeant, or constable shall serve a notice within his county, and make return of the manner and time of service, and that such return, or a similar return by any other person who verifies it by affidavit, shall be evidence of the manner and time of service, authorizes service by any person if the return be verified by affidavit.

22. SAME—PLEA.
Under Code Va. 1887, § 3207 [Va. Code 1904, p. 1684], authorizing service by any person, a plea alleging that the person making the service was the paid agent of the plaintiff, employed to compromise with divers claimants of the land sued for and to aid plaintiff in recovering the land, etc., is insufficient.

23. SAME—DEFENSES—FRAUD.
That a judgment in ejectment was recovered by fraud is no defense in a collateral proceeding by scire facias to revive the judgment.

24. FEDERAL COURTS—JURISDICTION—VACATION OF JUDGMENT—FRAUD.
Federal courts of equity having jurisdiction to vacate judgments at law procured by fraud, under Rev. St. U. S. § 723 [U. S. Comp. St. 1901, p. 583], forbidding suits in equity where there is an adequate remedy at law, fraud is no ground for vacation of a default judgment in ejectment, recovered in a federal law court at a former term, in such court.

25. SAME—ACTION AGAINST TENANT—TERMINATION OF LEASE—PLEA.
Where, in ejectment, a landlord claiming title to a part of the premises was not made a party, a plea by his tenant in possession, at the time the action was begun, to scire facias to revive a judgment by default against the tenant, that he was a mere tenant in possession, and that since the judgment his lease had expired, and he had surrendered possession and removed from the land, is insufficient to prevent judgment against him.

26. SAME—SUBSEQUENT POSSESSION OF LANDLORD—ESTOPPEL—RES JUDICATA.
Code Va. 1887, § 2756 [Va. Code 1904, p. 1414], provides that a judgment in ejectment shall be conclusive as to the title or right of possession established in such action on the party against whom it is rendered, and against all persons claiming from, through, or under such party by title accruing after commencement of such action. *Held*, that where a tenant, and not a landlord, was sued in ejectment to recover land of which the tenant was in possession, and, before execution, the tenant removed and the landlord entered, either personally or by another tenant, neither the landlord nor such subsequent tenant could be considered as claiming through or under the former tenant who was a party to the suit, and the landlord was therefore not bound by the judgment as an estoppel.

27. SAME—OPENING OF JUDGMENT.
Where ejectment was brought by a third person against a tenant, and the landlord had no knowledge of the action in time to have himself made a party, he is entitled to have a judgment against the tenant entered by default opened, and to be allowed to defend on a petition therefor, filed before execution of the writ of possession.

28. SAME—FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.
Where ejectment was brought in a federal court in which the requisite diversity of citizenship appeared, and, after judgment against a tenant of a part of the tract, his landlord, who was not a party to the suit, ap-

peared and sought to have the judgment opened, the fact that such landlord is of the same citizenship as plaintiff would not oust the court of jurisdiction.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

At Law.

The questions now to be decided originated in an action of ejectment brought in this court at Harrisonburg in 1896 by Henry C. King against the following 17 persons: John Allen, Cyrus Blankenship, Reese Davis, Bazil Dotson, David Dotson, John Dotson, Ransom Dotson, Elijah Estep, H. M. Francis, Montreville Hunt, Robert Hurley, Archibald Justus, S. W. McInturf, Jane Mounts, Levi Woolford, Mary Woolford, and Wm. R. Woolford. The notice attached to the declaration, required by section 2727 et seq., Code 1887 [Va. Code 1904, p. 1404], was addressed to each of the above-named defendants. In the declaration the land sued for is described in the language of the Morris grant (Watkins v. King, 118 Fed. 524, 526, 55 C. C. A. 290). The return of service of the notice and declaration is silent as to S. W. McInturf, Mary Woolford, and Wm. R. Woolford. It is not in the required form as to Cyrus Blankenship and Reese Davis. As to H. M. Francis, a question has been raised because his name is erroneously spelled "France" in these and in some of the papers to be subsequently mentioned. The return as to the remaining defendants is in valid form. The service was made by one Manns, not an officer, who verifies his return. See section 3207, Code 1887 [Va. Code 1904, p. 1684]. In accordance with the notice the declaration was filed, and therewith the above-mentioned return of service, on June 15, 1896. At the second June rules, 1896, the common order was noted as to all the defendants except McInturf and Mary and Wm. R. Woolford. At the first July rules following the clerk's entry in the rule docket was "Common order confirmed and writ of inquiry." Nothing further seems to have been done until July 11, 1898. On that day the plaintiff issued a notice (to be hereafter designated as the notice of July 11, 1898) addressed to each of the above-named 17 defendants, to the effect that he would on July 19, 1898, or as soon thereafter as counsel could be heard, ask leave to file an amendment to his declaration, "giving more specific description of the premises declared for," and that he would also move for a rule requiring the defendants to plead to said declaration. The return of service of this notice does not mention McInturf, Mary Woolford, or Wm. R. Woolford. It is not in the required form as to John Allen, Cyrus Blankenship, Reese Davis, H. M. Francis, Archibald Justus, and Levi Woolford. As to the remaining defendants the return is in strictly regular form. It should be stated here that the name of Montreville Hunt is occasionally spelled in the various papers in this record "Montville," and occasionally "Monteville." The name Justus is occasionally spelled "Justice." But no point has been made as to these differences in spelling.

On July 19, 1898, the following order was entered:

"At an adjourned term of the Circuit Court of the United States of America for the Western District of Virginia, held at the courthouse in Harrisonburg on Tuesday, July 19th, 1898. Present, Hon. John Paul, Judge, presiding.

"Henry C. King v. Reese Davis et als. Ejectment.

"This day came the plaintiff herein by his counsel in open court, and presented a proposed amendment to his declaration in this cause, and moved the court for leave to file the same; and the said proposed amendment being inspected by the court, and it being deemed proper to be made, and it appearing to the court that due notice of the intention of plaintiff to offer said amendment at this time has been given to defendants Reese Davis, Jane Mounts, Elijah Estep, Monteville Hunt, Robert Hurley, H. M. Francis, Cyrus Blankenship, Bazil Dotson, Ransom Dotson, John Dotson, John Allen, and Archibald Justice, it is ordered that plaintiff have leave to amend his declaration herein in the direction of a more specific description of the premises therein claimed, and to file herein his said proposed amendment, which is accordingly done.

"And it appearing that defendants herein have not heretofore pleaded to said declaration, on further motion of plaintiff, by his counsel, it is ordered that a rule to plead to said declaration be, and the same is hereby, awarded, requiring defendants who were served with notice of said motion as aforesaid to appear and plead to said declaration, as amended, at or before the September next rules of this court, and requiring the other defendants in said case to appear and plead to said declaration at the second rule day after said rule shall have been served upon them.

"July 19th, 1898. John Paul, Dist. Judge."

The amended declaration filed under the foregoing order on July 19, 1898, commences: "Now comes the plaintiff above named, and, by leave of court first had, amends his declaration, heretofore filed herein, so far only as relates to the description of the premises therein declared for, by inserting after the description therein the following words, viz., 'which said tract of land is more particularly and more accurately described according to a resurvey thereof made by W. D. Sell, C. E., in the year 1895, under order of this court, as follows, to wit.'" The description that follows is of the location of the Morris grant, as contended for by King in the case of Watkins v. King, 118 Fed. 527, as shown on the plat in that report, by the letters "A. P. H. I. J. M."

Bearing date of July 19, 1898, there are in the papers of this cause many identical copies of a rule to show cause why certain defendants should not plead to the amended declaration. But no attempt appears to have been made to serve this rule.

The next step taken in the cause was the entry on October 31, 1899, of the following order:

"At an adjourned term of the Circuit Court * * * continued and held at the courthouse in Harrisonburg, on Tuesday the 31st day of October, 1899:

"Henry C. King v. Reese Davis et als. In Ejectment.

"It appearing to the court that the defendants have not appeared or pleaded herein, and time to plead having expired, on motion of plaintiff by his counsel, it is ordered that said cause be set down for inquiry at the next term of this court, and that the clerk notify the defendants hereof, and of the time of holding said term, by sending copies of this order and of the order fixing said term to said defendants by mail.

"Oct. 31st, 1899. John Paul, Dist. Judge."

On November 17, 1899, there was filed a copy of the foregoing order, to which was appended the following certificate:

"I, A. K. Fletcher, clerk of the above named court, do certify that on 17th day of November, 1899, I transmitted to each of the defendants in the above cause a copy of the foregoing order and of the order therein referred to as by the above order directed. A. K. Fletcher, Clerk."

It may here be stated that by act of September 25, 1890, the regular terms at Harrisonburg are required to be commenced on the Tuesday after the first Monday in June and December. C. 922, 26 Stat. 474 [U. S. Comp. St. 1901, p. 437].

At the December term, 1899, nothing appears to have been done. At the June term, 1900, a jury was sworn to execute the writ of inquiry, and on June 23, 1900, a verdict was returned finding for the plaintiff in fee simple all the land in this state embraced within the lines as claimed by the plaintiff in the amended declaration. The judgment entered on June 23, 1900, reads, so far as now material, as follows:

"This day came the plaintiff by his counsel, and the defendants not appearing or pleading, the court proceeds to execute the writ of inquiry awarded at rules, and thereupon came a jury. * * *

"And thereupon it is considered by the court that the plaintiff, Henry C. King, recover of the defendants Reese Davis, Ransom Dotson, David Dotson, H. M. France, Archibald Justus, Cyrus Blankenship, Samuel W. McInturf, John Allen, Mary Wolford, Wm. R. Wolford, Levi Wolford, Elijah Estep, Monteville Hunt, Bazil Dotson, and Robert Hurley, and each of them, the land and premises in the declaration and verdict described, to the extent of

an estate in fee therein, and that he recover the possession of said premises, together with his costs herein expended, and that the clerk of this court do issue a writ of possession directing the marshal of this court to place the said plaintiff in the possession of said premises.

"June 23, 1900. John Paul, District Judge."

It should be here stated that by an order entered December 2, 1902, the judgment rendered against Samuel W. McInturf, Mary Woolford, and Wm. R. Woolford was annulled, without resistance by the plaintiff, on the ground that no notice had ever been given these defendants.

Nothing further was done until March 27, 1902, at which time, without any order of court authorizing it, the clerk issued a writ of possession. Before any proper effort to enforce this writ was made, my attention was called to the fact that it had been issued. I thereupon suggested to counsel a belief that the issue of the writ was irregular. This view was apparently acquiesced in by plaintiff's counsel, and no further attempt was made to execute the writ. On March 20, 1903, a writ of scire facias was issued, addressed to Reese Davis, Ransom Dotson, David Dotson, H. M. France, Archibald Justus, Cyrus Blankenship, John Allen, Levi Woolford, Elijah Estep, Monteville Hunt, Bazil Dotson, and Robert Hurley, requiring them to appear at the clerk's office at the second April rules, 1903 (April 20th), to show cause why King should not have execution of his judgment against them. Upon the return of this writ, the clerk, conceiving the return to be proper as to all the defendants named, matured the cause at rules, and on May 11, 1903 (again without action by and without the knowledge of the court), issued another writ of possession. When this fact came to my knowledge I informally directed the marshal not to execute the writ of possession until further order, and advised counsel that I was of opinion that the writ of possession should not have been issued prior to the term succeeding the maturing of the scire facias. At that term (June Term, 1903), at Harrisonburg, by consent, no further action was taken then to transfer the cause to Lynchburg, to be taken up at a special term to commence July 1, 1903. During said last-mentioned term the plaintiff, conceiving the revival of the judgment by scire facias to have been unnecessary, moved that a writ of possession be forthwith issued. This motion was opposed, and was taken under advisement. At the same time the defendants moved that the judgment of June 23, 1900, be vacated. This was opposed, and time taken by the court for consideration. The defendants then each filed pleas of nul tiel record, on which issue was joined, and also offered to file sundry other pleas in writing, to the filing of which objection was made, and these questions were also reserved. Briefs have been sent me by counsel, and it is now my duty to dispose of at least some of the interesting questions thus raised.

M. F. Stiles and Daniel Trigg, for plaintiff.

R. R. Henry and E. M. Fulton, for defendants.

McDOWELL, District Judge (after stating the facts). 1. The motion of plaintiff that a writ of possession be issued without regard to the scire facias should, I think, without considering any other ground, be overruled on the ground that the judgment must be revived before execution can properly be issued. The delay in issuing the writ of possession was not caused by injunction, agreement, or by appellate proceedings. Under these circumstances, at the common law, unless the writ were issued within a year and a day after the judgment, the judgment must be revived. Freeman on Executions, vol. 1, § 27; volume 2, § 470; Adams, Ejectment, p. 346; 7 Ency. Pl. & Pr. 351. The Virginia statute (section 3577 Code 1887 [Va. Code 1904, p. 1910]) fixes the time at one year. It is not necessary to decide that this statute applies in this case as

well as where the judgment is for money; for if not, the common-law rule is left in force.

2. The procedure on the writ of scire facias should conform, as nearly as may be, to the state procedure. Rev. St. U. S. 914 [U. S. Comp. St. 1901, p. 684]. The following Virginia authorities show that under the state practice the action on the scire facias takes the same course as an ordinary action at law in which a writ of inquiry is dispensed with under section 3285, Code 1887 [Va. Code 1904, p. 1729]. It is matured at rules, but the office judgment on default does not become final until there is either a judgment of the court at the following term confirming it, or until the term, or possibly the 15th day thereof, has passed without an order setting it aside. 2 Barton, Law Pr. p. 1034; Russel v. Clayton, 3 Call, 41; Lyons v. Gregory, 3 Hen. & M. 237; Evans v. Freeland, 3 Munf. 119; Day v. Pickett, 4 Munf. 104; Jones v. Doe, 6 Munf. 105; Cosby's Ex'rs v. Bell's Adm'x, 6 Munf. 282; Lang v. Lewis' Adm'r, 1 Rand. 277; Early v. Clarkson's Adm'r, 7 Leigh, 83; Rogers v. Denham's Heirs, 2 Grat. 200; Williamson v. Crawford, 7 Grat. 202; Richardson's Adm'r v. Prince George Justices, 11 Grat. 190; and McVeigh v. Bank, 76 Va. 267.

3. The motion made in behalf of all the defendants to vacate the judgment of June 23, 1900, is now to be considered. Leaving out of view McInturf and Mary and Wm. R. Woolford (as to whom the judgment has heretofore been vacated), the defendants are, as named in the declaration:

(1) John Allen.
(2) Cyrus Blankenship
(3) Reese Davis.
(4) Bazil Dotson.
(5) David Dotson.
(6) John Dotson.
(7) Ransom Dotson.
(8) Elijah Estep.
(9) H. M. France.
(10) Monteville Hunt.
(11) Robert Hurley.
(12) Archibald Justus.
(13) Jane Mounts.
(14) Levi Woolford.

Of the above, Jane Mounts and John Dotson are not mentioned in the judgment or in the scire facias. As to these two defendants, at least, no writ of possession can issue now, and we need not further consider them.

Of the remaining twelve defendants, I am of opinion that the return of service of the original declaration and notice is sufficient as to

John Allen.
Bazil Dotson.
David Dotson.
Ransom Dotson.
Elijah Estep.
H. M. Francis.
Monterville Hunt.
Robert Hurley.
Archibald Justus.
Levi Woolford.

(a) As to H. M. Francis:

The declaration (and notice) is against H. M. France.

The return shows personal service on H. M. France.

The notice of July 11, 1898, is addressed to H. M. Francis.

The imperfect return thereon shows service thereof on the wife of H. M. Francis.

The order of July 19, 1898, recites service of the notice of July 11, 1898, on, and orders a rule to plead against, H. M. Francis.

The judgment of June 23, 1900, is against H. M. France.

The scire facias is addressed to H. M. France.

The service thereof was made on H. M. Francis.

The defendant's name, as shown by his pleas to the scire facias, is H. M. Francis.

Does the mistake in the spelling of the defendant's name nullify the judgment? It is probable that the one-syllable word "France" and the two-syllable word "Francis" should not be held idem sonans. However, I do not understand that it is claimed that the original declaration and notice were not served on the defendant Francis. As the service was personal, and not constructive, the weight of American authority is to the effect that the defendant sued in the wrong name, even if he does not appear, is bound by the judgment. 14 Ency. Pl. & Pr. 300, 301; 1 Black, Judgments (2d Ed.) § 213. And especially should this be the rule where the defendant's name is properly spelled, as here, in the notice that leave to amend would be asked, which notice, it is not denied, reached the defendant.

(b) The return as to Cyrus Blankenship shows an attempt at a substituted service, as follows:

"And on said Cyrus Blankenship, on June 5, 1896, by posting up and leaving upon the door of his usual dwelling place a like copy of said notice and declaration, neither the said Cyrus nor any member of his family over the age of sixteen years being found by affiant in said district."

The objection to this return is that it does not affirmatively show that the papers were left posted on the "front door." Code 1887, § 3207 [Va. Code 1904, p. 1684]. Substituted service of process is a departure from the common law, and the return must affirmatively show a compliance with all the essential requirements of the statutes. 4 Minor, 646; Staunton B. & L. Co. v. Haden, 92 Va. 206, 23 S. E. 285. Indeed, it has been said that everything is to be inferred against such return which the departure from the statute will warrant. 22 Am. & Eng. Ency. (1st Ed.) note 1, p. 183. But, at the least, such return is to be strictly construed, and nothing may be added by intendment. See 22 Am. & Eng. Ency. (1st Ed.) 152, 182, 183, and notes; U. S. v. Telephone Co. (C. C.) 29 Fed. 33; Harris v. Hardeman, 55 U. S. 345, 14 L. Ed. 444; Earle v. McVeigh, 91 U. S. 503, 23 L. Ed. 398; Alexandria v. Fairfax, 95 U. S. 780, 24 L. Ed. 583; Settlemier v. Sullivan, 97 U. S. 447, 24 L. Ed. 1119; Lewis v. Botkin, 4 W. Va. 538; Midkiff v. Lusher, 27 W. Va. 441. Applying these principles to the return as to Blankenship, it must be held that there was no sufficient service as to him.

(c) As to Reese Davis: The return is objected to for several reasons, but I find only one point that strikes me as of much force: There is no affirmative statement in the return that Davis' wife, although found at his usual place of abode, was a member of his family. It is contended that for this reason the return is fatally defective. The statute (section 3207, Code 1887 [Va. Code 1904, p. 1684]), reads:

"* * * Or, if he [the defendant] be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife or any person found there, who is a member of his family, and above the age of 16 years; or, if neither he nor his wife, nor any such person be found there, by leaving such copy posted at the front door of said place of abode. Any sheriff, sergeant or constable, thereto required, shall serve a notice within his county or corporation, and make return of the time and manner of service. * * *. Such return, or a similar return by any other person who verifies it by affidavit, shall be evidence of the manner and time of service."

So far as I have been able to ascertain, it is impossible to settle the question here presented on authority. In Judge Moncure's opinion in Goolsby v. St. John, 25 Grat. 156, the return was: "Executed on Robert Goolsby by leaving a copy at his house with sister: and on James Rector by leaving copy at his house with wife." In the opinion, which is obiter as to this question, and which contains (page 155) a quotation of the statute in which the punctuation is erroneous, it is said:

"* * * The summons was executed * * * by leaving a copy at the house of each with a sister of one and the wife of the other, without saying that the defendants were not found at their usual places of abode, that the sister in the one case, and the wife in the other, were members of the families of the defendants respectively, and above the age of sixteen years. * * *"

In Judge Anderson's opinion in Smithson v. Briggs, 33 Grat. 183, which is also obiter as to this question, and which gives a quotation of the statute in which the punctuation is erroneous, it is said:

"But if delivered to his wife or other person, the service will not be good unless it be delivered at his usual place of abode, and, if not delivered to his wife, the person to whom it is delivered must not only be over sixteen years of age, but must be a member of his family."

The form given in 1 Barton's Law Practice (2d Ed.) note, p. 271, seems to indicate that the return need not state that the wife is a member of the defendant's family. The form given in 2 Barton's Chancery Practice (2d Ed.) p. 1267, seems to indicate that the return should state that the wife is a member of the defendant's family.

In construing a return of substituted service of process, no presumptions should be made in its favor. Hence we are not at liberty to presume that Davis' wife was a member of his family, although found at her husband's usual place of abode. Therefore the question here is, did the Legislature mean that the clause, "who is a member of his family," should qualify the noun "wife" as well as the noun "person"? The statute is so punctuated as to indicate that such was the intention. If the intent had been otherwise, I think the proper punctuation would be, "* * * to his wife, or any person found there who is a member of his family, and above the age of sixteen years." The punctuation as found in the Code of 1887 is found in the Codes of 1873, 1860, and 1849. See, also, Code 1819, vol. 1, p. 506, c. 128, § 66. It is often said that the punctuation is no part of a statute, and it is certainly true that the punctuation is the most fallible indicium by which to construe a statute. 1 Fed. St. Ann. xl; 23 Am. & Eng. Ency. (1st Ed.) 334. But in a case of grave doubt as to the intent, the punctuation may

aid in determining the question. Sutherland, Stat. Constr. § 232. Is there here any grave doubt as to the intent? I am sure the Legislature would never have provided for constructive service on a defendant's wife except on the assumption that she were a member of his family. And it is not always the case that a man's wife is a member of his family. Where husband and wife have separated and live apart, or have been divorced a mensa, the wife is not, within the intent of this statute, as I think, a member of her husband's family. And it is not impossible that she might be found at his place of abode in his absence, although not a member of his family. Indeed, under such circumstances she would naturally select a time when her husband is absent to visit her children, for instance, at the husband's home. This statute only authorizes service on the defendant's wife in case she be found at his usual place of abode. If service on the wife were allowed at any place, it would be more clear that the words "who is a member of his family" were intended to qualify the word "wife." As service is only allowed at the husband's usual place of abode, we cannot say that it is certain that the qualifying clause applies to the word "wife," unless we assume that the Legislature contemplated and provided for a case where a man's wife, who had ceased to be a member of his family, was found, by a person seeking to serve process, at the husband's usual place of abode. Such a state of facts would very rarely exist. It is possible that the Legislature either never contemplated such a state of facts, or thought it too improbable of occurrence to provide for it. But as such state of facts could exist (and, if it did, the wife, under such circumstances, would be at least as little likely as any stranger to see that the process reached the husband), and as the Legislature may have contemplated its existence, it seems to me that a grave doubt as to the true interpretation of the statute does exist. Such being the case, I must follow the meaning indicated by the punctuation, and hold that as to Reese Davis the return of service is fatally defective because it does not affirmatively show that his wife was a member of his family. In this connection it is proper to say that I have not overlooked the opinion of the majority of the court in Smithson v. Briggs, 33 Grat. 183. Even if not overruled in effect by later cases, it is not binding on this court. It is not an opinion construing a statute of this state; it relates to a question of general law—whether presumptions will be made in aid of a defective return of substituted service. On this question I must follow the authorities hereinabove cited, and hold that presumptions in aid of such returns cannot be indulged. Having reached the conclusion that the returns of service as to Blankenship and Davis are invalid, it follows that, in the present state of the record, under either their motions to vacate the judgment or their pleas of nul tiel record, the judgment should be held invalid. Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444; Earle v. McVeigh, 91 U. S. 503, 23 L. Ed. 398; Alexandria v. Fairfax, 95 U. S. 774, 24 L. Ed. 583, and Id., 28 Grat. 16; Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110.

It may be that now, before any order is entered, the plaintiff will

move to allow the return of service as to Blankenship and Davis to be amended. If Manns is alive and within reach, and if he can truthfully make affidavit that he left the declaration and notice for Blankenship posted on his front door, and that the wife of Davis was at the time of the service a member of Davis' family, an interesting question presents itself.

In none of the cases last above cited was there any effort made to have the invalid returns of service corrected, and we do not know what would have been decided had such effort been made. There is a class of cases (of which Staunton B. & L. Co. v. Haden, 92 Va. 202, 23 S. E. 285, and Dillard v. Central Va. Iron Co., 82 Va. 734, 1 S. E. 124, are types) where the return cannot by amendment be made valid, as where service on the agent of a corporation was made within less than the prescribed number of days before the return day, or where service was not made on the proper agent or not made at the proper place. With such cases we are not now concerned. Of them it may be truly said that the judgment is void ab initio, and that nothing can be done to make it valid. In the case at bar, if the services were in fact properly made, the want of jurisdiction is apparent and not real. And I am inclined to the opinion that the amendment should be allowed and the judgment held valid, at least so far as these defendants themselves are concerned. In Stotz v. Collins, 83 Va. 423, 2 S. E. 737, a default judgment had been rendered on an invalid return of substituted service of process. After the close of the term the judgment defendant moved that this judgment be vacated. Instead of so doing, the lower court allowed the return to be amended, and dismissed the motion to vacate. This was affirmed by the Court of Appeals. In Shenandoah R. C. v. Ashby, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898, an invalid return of service of process was allowed to be amended 13 years after a default judgment founded on such return, Judge Lewis saying:

"The case is not within the principle that proceedings which are void ab initio cannot be rendered valid by amendment, for here the effect of the amendment was not to confer jurisdiction upon the circuit court, but only to perfect the proof of the jurisdiction which it had previously acquired, but of which the evidence prescribed by the statute was wanting."

In Stone v. Wilson, 10 Grat. 533, Judge Moncure said:

"A court from which process is issued may permit the sheriff's return thereon to be amended at any time, even though a suit or motion founded on the original return be then pending, and even though the proposed amendment be inconsistent with the original return and take away the foundation of the suit or motion." Citing Wardsworth v. Miller, 4 Grat. 99; Smith v. Triplett, 4 Leigh, 590; Bullitt's Ex'rs v. Winston, 1 Munf. 269; Rucker v. Harrison, 6 Munf. 181.

This question is, I think, one of the power of the court, and therefore this court is not bound by these Virginia decisions. However, they seem to me sound, and the proposition is not without the abundant support of other authorities. 2 Freeman, Executions (2d Ed.) §§ 358–360, and authorities cited. See, also, Rickards v. Ladd,

6 Sawy. 40, Fed. Cas. No. 11,804; Ex parte Worley (D. C.) 19 Fed. 586.

It is true that the person who made the service in this case was not an officer, but this fact does not seem to me sufficient to prevent a sworn amendment by him. The Virginia statute (section 3207 supra) puts a private person, who makes affidavit to his return, upon the footing of an officer. In 10 Grat. 533, it is said that a deputy sheriff, other than the one who made the return, may make the amendment. And it is generally held that amendments may be made after the officer has gone out of office, and when no longer under the sanction of his oath of office. Reasonable notice of the motion to allow the amendment should be given, and the court must be satisfied of the truth of the proposed amendment before it will be allowed. The question of amendment addresses itself to the discretion of the court, and is allowed only in furtherance of justice. 2 Freeman, Ex. § 360.

I should say, in passing, that, of the 10 defendants with whom we are now concerned, the service of the notice of July 11, 1898, is defective as to John Allen, H. M. Francis, Archibald Justus, and Levi Woolford, and good as to the remainder. As to Levi Woolford the return is defective, inter alia, in that it does not show that the notice was left posted; as to Allen, Francis, and Justus, in that, inter alia, it does not state that information of the purport of the paper was given their wives. Consequently the recital in the order of July 19, 1898, that the notice of July 11, 1898, had been given, is erroneous as to Allen, Francis, and Justus. In this order neither David Dotson nor Levi Woolford are mentioned by name.

4. We now reach the motion to vacate the judgment on the two following grounds: (1) That there were such wide departures from the accepted modes of procedure as to nullify the judgment; and (2) there were errors of fact for which the judgment should be vacated.

(a) The Amendment to the Declaration. The first alleged departure from the accepted modes of procedure was the action of the court in allowing the amended declaration to be filed, followed by judgment in conformity thereto. The allegation in support of the motion to vacate the judgment is that the description given in the Morris grant (which was followed in the original declaration) does not, when properly laid down on the ground, cover the land claimed by the defendants, while the description given in the amended declaration does include the defendants' lands. Treating this allegation as true, can this court properly vacate and annul a judgment of a former term? The judgment defendants (except Cyrus Blankenship and Reese Davis, as to whom it is not now necessary to discuss this motion) were under the jurisdiction of the court, and had not entered their appearance. The declaration served on them contained not only a description of the land declared for, but also the allegation that they were unlawfully withholding the possession thereof from the plaintiff. The right to allow a proper amendment exists in ejectment as in other actions. See Adams, Ejectment, pp. 226-229; Sedgwick & Wait, Trial of

Title (2d Ed.) §§ 454b and 464; Holmes v. Grabeel (C. C.) 81 Fed. 147; Strader v. Goff, 6 W. Va. 261; Blackwell v. Patton, 7 Cranch, 472, 3 L. Ed. 408; Smith v. Price, 13 S. W. 428, 11 Ky. Law Rep. 896. By section 3253, Code 1887 [Va. Code 1904, p. 1712], the plaintiff may of right amend his declaration before the defendant's appearance. The objection to the motion to vacate the judgment that occurs to me as most vital is that it does not go far enough. Let us first consider the question as to those defendants who were personally served with the original declaration, and then as to those who were constructively served, and who may never in point of fact have received or read the original declaration.

(1) If a defendant receives a declaration (and the necessary notice as to when and where it will be filed), and makes no appearance, can he, after the term at which is entered a default judgment which follows a description furnished by an amended declaration (never served on the defendant), have the judgment vacated, or have an inquiry made into the matter, on the mere allegation that the original description does not in fact, when properly laid down, embrace the land claimed by him, while the description in the amended declaration and judgment does cover his land? It seems to me that he must also allege that he was led by the description in the paper served on him to believe that his land was not embraced in plaintiff's claim, and also, I think, that the description was such that he reasonably could thus construe it. A failure to make such allegation must be treated as an admission that he construed the description as embracing the land claimed by him. A want of power to allow the amendment, in such a case as we have here, must be based on a want of jurisdiction, and this must be predicated on want of notice and opportunity to defend. If the defendant construed, or in reason should have construed, the original description as embracing the land claimed by him, he had notice and opportunity to defend. He was as fully put on notice under such circumstances as if the original declaration had used the same description as that given in the amended declaration. From the admission that the original description was construed by the defendant as embracing his land, it follows that such description was at the most merely imperfect, and, moreover, that the uncertainty or other imperfection therein was latent. I cannot conceive that there is want of power under such circumstances to allow an amendment which merely removes a latent and undiscovered uncertainty in the description.

(2) In case a defendant did not in fact receive and read the original declaration, if it be proper to admit of such assumption, the reasoning is the same as in the case above considered. The inquiry, if it be proper to enter upon such inquiry, is this: Would the description, if the defendant had read it, have reasonably led him to believe that his land was not embraced in plaintiff's claim? The mere allegation that the original description—in the light, doubtless, of facts not discovered until after judgment—does not, when properly laid down, embrace the defendant's land, is not

sufficient. If the original declaration, taken as a whole, was such that it would have reasonably put the defendant on notice that the land claimed by him was declared for, the amendment was properly allowed.

(b) The Rule to Plead. While, by the Codes of 1849 (part 2, p. 559, c. 135, § 12), 1860 (page 610, c. 135, § 12), and 1873 (page 959, c. 131, § 12), a rule to plead had to be served on the defendant in ejectment before a default judgment could be entered against him, the Code of 1887 (sections 2733, 3284 [Va. Code 1904, pp. 1406, 1728]) makes a change in this respect. And, where there has been no appearance, no rule to plead is required. Hence, while it may have been irregular to render judgment without service of the rule to plead, since the order of July 19, 1898, directed that such rule be served, it was not, in my opinion, a gross departure from the ordinary procedure.

But it is argued for the defendants that, as the order of July 19, 1898, directed that a rule to plead be served, they were at liberty to assume that nothing further would be done in the cause until they had been served with such rule. The argument is that a defendant who has been duly served with process is theoretically in court and cognizant of the orders entered; that these defendants (being thus in theory cognizant of the order of July 19, 1898) were at liberty to depart and do nothing further until served with the rule to plead. But it does not seem to me that the extraordinary powers of a court to vacate a judgment long after the term of its rendition can properly be exercised because of an imaginary surprise suffered by the defendant, or because of a mere possibility that a defendant may have been surprised. The defendants do not allege that they were present on July 19, 1898, and do not, as I understand, pretend that they ever heard of the order of that date until long after the final judgment was rendered.

(c) The Order of October 31, 1899. It seems from Goodwyn v. Myers, 16 Grat. 336, and Witten v. St. Clair, 27 W. Va. 766, that the statement of damages claimed by the plaintiff in ejectment (Code 1887, § 2751 [Va. Code 1904, p. 1412]) need not be filed at the time the declaration is filed, but may be filed later, before the appearance of the defendant and before trial. Such being the law, it is proper in every case for the clerk, in entering the confirmation of the common order, to make an entry (as was done in the case at bar) awarding the writ of inquiry. It follows that the office judgment in ejectment cannot in any case become final without the intervention of the court or jury. James River Co. v. Lee, 16 Grat. 424; Smithson v. Briggs, 33 Grat. 182. But in a case such as we have here, where the plaintiff files no statement of damages, and the defendant is in default, I see no reason why the court cannot, at the term following the office judgment or at any subsequent term, enter judgment that the plaintiff recover the possession of the land in the declaration (or amended declaration) described, and thus make final the office judgment. No statement of damages having been filed, no reason for an inquiry of damages either by the court or a jury (Code 1887, § 2752 [Va. Code 1904, p. 1413])

exists; the cause is matured; the defendant is in default; the time has come when the court can properly render judgment for the plaintiff on the right of possession. It follows that on October 31, 1899, the court could legally have rendered judgment. It was, under the circumstances of this case, I think, irregular and unnecessary to set the cause down for inquiry at the next term. But before the defendants can complain that the order of October 31, 1899, was a gross departure from the established modes of procedure, it must appear, as it seems to me, that the court at that time could not legally have rendered judgment against them. The objection to this order is that it decrees that the time allowed the defendants to plead had expired. While this order, and the mailing of a copy thereof to the defendants, is unusual, and while it may have led the defendants to believe that their time to plead had expired, the real question is whether or not it was competent for the court at that time to cut off the defendants' right to plead. If this order had been that the plaintiff recover the land, and even if a copy thereof had been sent by mail to the defendants, they would have no cause of complaint. Now, as the court took the unusual course of setting a cause down for inquiry when there was nothing about which an inquiry could properly be made, this question arises: If the defendants had appeared at the December term, 1899, could they have demanded as of right to be allowed to plead not guilty? It seems to me that they could not. Section 3288, Code 1887 [Va. Code 1904, p. 1733], provides that if a defendant against whom a judgment is entered in the office shall, before it becomes final, appear and plead to issue, the judgment shall be set aside. The statement in the order of October 31st that the time to plead had expired should be treated as equivalent to an order making the office judgment final as to the only question in the case. As there was no statement of damages, there was nothing to be inquired of under the writ of inquiry. The court had on that date the right to enter final judgment in the usual form, and the unusual procedure shown in the order of October 31st was a mere irregularity. I doubt if it was even an error for which the judgment of June 23, 1900, would have been reversed on ordinary writ of error.

But even if I be wrong in this conclusion, it seems to me that we have here no such wide departure from the established modes of procedure as to have deprived the court of its jurisdiction and render the judgment finally entered a nullity. Illustrations of such cases are: Upon a money demand the court has no power to pass sentence of imprisonment. In an action of libel the court cannot order the specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. The sentence of a person charged with felony without the intervention of a jury. The decree of a court of equity upon oral allegations. Windsor v. McVeigh, 93 U. S. 282, 23 L. Ed. 914. The judgment of a trial court after proper removal to the appellate court, or of a state court after removal of the cause to a federal court; or, in some instances, a judgment rendered after the close of a term at which such judgment could law-

fully be rendered; or, in some cases, judgments prematurely rendered, and judgments outside of the scope of the pleadings. Morrill v. Morrill (Or.) 23 Am. St. Rep., note 116 et seq. In Windsor v. McVeigh, 93 U. S. 282, 23 L. Ed. 914, the defendant appeared and offered his answer, and, on the ground that he was a rebel, his answer was stricken from the files. It is true that notice and an opportunity to defend are essential to jurisdiction. But in the case at bar the defendants now in question had notice and full opportunity to defend, and they are, it seems to me, complaining of what is at the most a mere irregularity.

(d) Recital in Order of July 19, 1898. In the order referred to is a recital, which in my opinion is erroneous, to the effect that (inter alia) Allen, Francis, and Justus had been duly served with the notice of July 11, 1898. It is difficult to decide whether this should be treated as a recital of fact, or as a conclusion of law upon consideration of the return of service of said notice as to these defendants. It is possible that the court read the return and came to the conclusion that it was sufficient. If so, the error is one of law; but it cannot be considered one sufficient to nullify the judgment. Notice that leave to amend would be asked was unnecessary. Therefore an erroneous judgment that the return of service of such notice was sufficient would not be of vital moment, and cannot be considered an error of law of such character as to justify a vacation of the final judgment.

Errors of Fact.

We come now to the alleged errors of fact, which it is contended authorize vacating the judgment.

(1) I shall first consider the case of Allen, Francis, and Justus, as their case differs from that of the other defendants in that, as to them, the order of July 19, 1898, erroneously recites that they had been served with the notice of July 11, 1898. Treating this recital as an error of fact, it is first to be noted that these defendants do not unequivocally allege that the notice did not in fact reach them. But aside from this, I do not regard this error as one sufficient to justify a vacation of the judgment. As before stated, the plaintiff had a right to amend without leave, and without giving notice of his intent to ask leave. Hence the plaintiff unnecessarily gave or attempted to give these three defendants a notice to which they were not entitled. The court, as we assume, being under the erroneous belief that such notice had been given these defendants, proceeded with the case. But what follows from this? The errors in fact for which, on writ of error coram vobis, a court will vacate a judgment, are errors in material matters which prejudiced the defendant, and which, if known in season, would have prevented the rendition of the judgment.

In 5 Ency. Pl. & Pr. pp. 27, 28, it is said:

"The office of the writ of coram vobis is to bring the attention of the court to, and obtain relief from, errors of fact * * * such as, if known in season, would have prevented the rendition and entry of the judgment questioned."

In Bronson v. Schulten, 104 U. S. 416, 26 L. Ed. 797, it is said:

"* * * The writ of error coram vobis * * * was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding."

See, also, 2 Foster's Fed. Pr. (3d Ed.) § 379, and 1 Black, Judgments (2d Ed.) § 306, p. 467. To my mind, if it were a fact that the notice of July 11, 1898, had never reached these defendants, and if this fact had been known to the court, it would have been immaterial, and would not have prevented the rendition of any order subsequently made.

(2) Let us now consider the alleged error of fact relating to the rule to plead. On this question we may consider the case of all ten defendants who were properly served with the original declaration. On this point it seems to me sufficient to say that nothing in the record satisfies me that Judge Paul was under any misconception of fact as to the service of the rule to plead. When a judgment defendant moves that judgment be vacated for error of fact, he assumes the burden of proof, and must show satisfactorily that such error existed. While it is possible that Judge Paul believed the rule to plead had been served on the defendants in accordance with the order of July 19, 1898, it is equally possible that he came to the conclusion that such service was unnecessary, and made the two later orders with knowledge that the rule had not been served. The absence of recitals in the later orders touching the service of the rules to plead, and the unusual direction in the order of October 31, 1899, that a copy thereof be sent the defendants by mail, certainly lend color to the belief that he was not under the impression that the rule had been served. It is also to be noted that, as the service of a rule to plead is not required under the Code of 1887, what has been above said as to the materiality of the error of fact applies also to this point.

It follows from what has been said that the motion to vacate the judgment, so far as founded on the matters above discussed, is as to all the defendants, except Cyrus Blankenship and Reese Davis, without merit.

5. The Pleas to the Scire Facias. It should here be stated that, while John Allen was not properly served with the scire facias, he has appeared and pleaded thereto.

Pleas No. 1. Nul Tiel Record. These pleas, under the circumstances here, raise no question that has not already been considered. 11 Ency. Pl. & Pr. p. 1151. The issue on the pleas of nul tiel record of each of the ten remaining defendants must be decided in favor of the plaintiff.

Pleas No. 2. These pleas consist of a pro forma denial of service of process. They deny that Manns served the declaration and notices in the manner and at the time and places stated in his returns. By section 3264, Code 1887 [Va. Code 1904, p. 1718], a defendant in any action may plead as many several matters as he shall think necessary. This statute is construed to mean that repugnant pleas may be filed at the same time. 4 Minor, p. 739. Consequently the repugnance between pleas 2 and pleas 3 does not

make either improper. The question as to plea No. 2 is whether or not, in a case such as we have here, the return of service of process can be contradicted. As to the defendants with whom we are now concerned, the original declaration has on it a sufficient return of service. In other words, the record affirmatively shows the requisite service of process. Wilcher v. Robertson, 78 Va. 617. Moreover, the order of October 31, 1899, which recites that the time to plead had expired, is perhaps to be construed as a recital, in effect, that the defendants in question had been served with process. The plea to a writ of scire facias is a collateral attack upon the judgment sought to be revived. Sharon v. Terry (C. C.) 36 Fed. 346, 1 L. R. A. 572; 1 Black, Judgments (2d Ed.) § 252; Foster v. Crawford (C. C.) 80 Fed. 991. There is, I think, room for no doubt that on collateral attack by a party to the original suit, on a judgment of a domestic court of general jurisdiction, the affirmative showing of jurisdiction made by the record cannot be controverted by evidence aliunde. 12 Ency. Pl. & Pr. 205 et seq.; 12 Am. & Eng. Ency. (1st Ed.) p. 147x; Wilcher v. Robertson, 78 Va. 617. It follows that the objection to filing the pleas No. 2 should be sustained.

In considering the motion to vacate the judgment on the grounds set up in the pleas, I have not felt at liberty to treat pleas No. 2 as unequivocal denials of service of process, because they are contradicted by pleas No. 3. The right to vacate a judgment after the term on evidence that there was no service of process will not, therefore, be now considered.

Pleas No. 3. The matter set up in these pleas is that Manns was the paid agent of the plaintiff at the time he served the process, employed by King to compromise with adverse claimants, to persuade such claimants to compromise, and to aid King in recovering the land. Even assuming that the matter set up in these pleas is of a nature that can be set up as a defense to a scire facias, the point made does not seem to me to present a valid defense. Section 3207, Code 1887, supra, certainly authorizes service by any person, if the return be verified by affidavit. Had the intent been that no one in the employ of the plaintiff could make service, such intent would have been indicated. It is a further argument against the supposition that such could have been the intent, that any private individual serving a notice for a plaintiff is pro hac vice the plaintiff's agent, and almost invariably he is the plaintiff's agent for reward. If this statute, like section 3232 [Va. Code 1904, p. 1703], required that the nonofficial person making service be not a party and not interested in the subject-matter of the controversy, a somewhat nicer question might have been raised. But even if the statute could be thus construed, I doubt if the allegations in pleas No. 3 are sufficient. It is not alleged that Manns had any interest in the subject-matter, or any interest at all other than the sentimental interest of a zealous agent. It is not even alleged that his reward depended upon the success of his efforts to compromise, or to prevent resistance by the defendants to the action of the plaintiff. I am of opinion that the objection to the filing of pleas No. 3 should

be sustained. It follows from what has been said that it is unnecessary to discuss the point raised by these pleas as ground of the motion to vacate, even assuming that the matter is of such character as could be considered on the motion to vacate.

Pleas No. 4 of Bazil Dotson, Robert Hurley, and Ransom Dotson. These pleas are practically the same. The plea of Ransom Dotson is here set out, as it is the strongest of the three.

"And, for a further plea in this behalf, this defendant says that at the time of the alleged service of a copy of the declaration in ejectment, set forth in the record in this cause, and of the copies of the notices set forth in said record upon this defendant, in manner and form as shown in the returns and affidavits of service thereof, made thereon by A. J. Manns, he, the said A. J. Manns, stated to this defendant that he, this defendant, need not mind about going to court; that they (meaning the plaintiff) would not take our land (meaning the lands of this defendant and the other defendants named in said declaration); that the notice did not amount to anything; and that said Manns then and there advised this defendant to go and see Col. V. A. Wilder, who was then and there the agent and representative of the plaintiff, Henry C. King, and compromise the suit with said Wilder; that that was the best thing that this defendant could do, and the easiest terms that he could get off on; and further stated, then and there, to this defendant, that the plaintiff, King, did not want the land, and would not take it if he got a judgment for it; that he only wanted the timber that was on the land. And this defendant further avers that said A. J. Manns was then and there the agent and employé of the said Henry C. King in serving said declaration and notices, and in making said statements to this defendant.

"And this the defendant is ready to verify.

"Henry & Graham, P. D.

"Sworn to before me by Ransom Dotson this July 1st, 1903.

"W. M. Mauzy, D. C."

Treating these pleas as sufficiently alleging fraud in the procurement of the judgment, I am of opinion that such matter cannot be set up as a defense to a scire facias. In 1 Black, Judgments (2d Ed.) § 493, it is said, in treating of the defense in scire facias: "Nor is it permissible to set up in defense that the judgment sought to be revived was obtained by fraud. * * *" See, also, 2 Id. § 973. In Freeman on Judgments (1st Ed.) § 132, it is said: "Fraud in procuring a judgment cannot be shown by the parties to such judgment in any collateral proceeding." See, also, U. S. v. Gayle (D. C.) 45 Fed. 107; Van Fleet Collateral Attack, § 550 (page 574), and § 558.

There remains to be considered the question on the motion of Bazil and Ransom Dotson and Robert Hurley to vacate the judgment. The third ground of the motion is: "As to the various defendants who have filed pleas herein, for the reason set forth in the said several pleas." Treating these pleas as sufficiently alleging fraud in the procurement of the judgment, the point of inquiry is, has this (common-law) court jurisdiction to vacate its final judgment of a former term on motion alleging fraud in procuring the judgment? In 1 Black, Judgments (2d Ed.) § 321, it is said that every court has an inherent common-law power, even after the end of the term, to vacate a judgment procured by fraud, at the instance of the party injured. See, also, 15 Ency. Pl. & Pr. 234. But as to the federal common-law courts it seems that this statement is inaccurate. I have not examined the question as to the jurisdiction

of the Virginia common-law courts in this respect. If they have such power, it would not follow that the federal common-law courts in this state have it. This is a question of the power of the court, and not a question of procedure. Dabney, Fed. Juris. § 132; Bronson v. Schulten, 104 U. S. 417, 26 L. Ed. 797. So far as I have had time to examine the federal authorities, I am led to believe that a bill in equity is the only method by which these defendants could properly raise the question they seek to present. Phillips v. Negley, 117 U. S. 675, 6 Sup. Ct. 901, 29 L. Ed. 1013, and authorities there cited; Marshall v. Holmes, 141 U. S. 596, 12 Sup. Ct. 62, 35 L. Ed. 870; Grames v. Hawley (C. C.) 50 Fed. 319; Craven v. Canadian R. R. Co. (C. C.) 62 Fed. 171; City v. German Ins. Co., 107 Fed. 56, 46 C. C. A. 144. This conclusion is fortified by this consideration: Rev. St. U. S. § 723 [U. S. Comp. St. 1901, p. 583], forbids suits in equity where there is an adequate remedy at law. The jurisdiction of the federal equity courts to entertain bills to vacate judgments at law procured by fraud seems unquestioned. If the law court rendering such judgment had the power to vacate it, there would be an adequate remedy at law, and a consequent loss of jurisdiction by the equity court. In this connection I should say that I do not desire to be understood as indicating a belief that the facts stated in these pleas would, if set up in a bill, show sufficient ground for vacating the judgment complained of.

Plea No. 4 of Arch Justus. The facts stated in this plea are as follows: Prior to the suit Justus took possession of a tract of 1,235¼ acres as the tenant at will of H. W. Sibley, of New York, the owner; that Justus did not notify Sibley of the suit, and that on June 10, 1903, the lease was terminated, and on said date Justus surrendered possession of said land to Sibley and removed therefrom; and that the defendant never had any interest in the land except as tenant as aforesaid, and that at the time the suit was instituted he did not own any land in Buchanan county.

In the first place, it seems to me that we should not now consider the effect of any ruling on this plea on the landlord, Sibley. He was not a party to the original action, and is not a party to the scire facias. The suggestion, on the one side, that Sibley might by repeated changes of tenants at will keep the plaintiff recovering fruitless judgments in ejectment for an indefinite period, and the suggestion, on the other hand, that Sibley ought not to be forced into the position of a plaintff in ejectment, are not proper to be considered in determining the question here presented, which is only as to King's right to execution as against Justus. Having now eliminated matters not before us, and which tend to confusion of thought, we are prepared to consider the plea of Justus quoad the respective rights of himself and King. The judgment was that King recover of Justus the possession of the entire tract, so far as it lies in Buchanan county, described in the amended declaration. If the plea is intended to assert, so far as Justus is concerned, that he is not now in possession of any part of the land described in the verdict and judgment, I see no reason why he can be injured by the issue of the writ. If the marshal does not find Justus in

possession of any part of the whole tract, nothing will be done of which Justus can complain.

It may be that Justus is now in possession of some part of the entire tract other than the parcel claimed by Sibley. This surmise raises some interesting questions. But I am not at liberty to pursue such surmise. If such is the case, Justus has not so alleged in his plea. If it be true that a purchase by Justus since the judgment of a parcel of the entire tract, other than the Sibley parcel, from one not a party to the ejectment suit, would be a sufficient reason for disallowing a writ of possession as against Justus, we cannot on the present plea consider such question. A plea to a scire facias, like the pleas to other actions, must allege the facts which constitute a defense, and cannot merely suggest the possibility of the existence of such facts. We must therefore consider that Justus alleges by his plea, so far as he himself is concerned, no more than that he is not in possession of any part of the Sibley tract. He may now be in possession of some other part of the entire tract. If such be the fact, since he has pleaded nothing which makes it proper to withhold the writ of possession as against him, the writ should go, and he should be dispossessed. If, for instance, Justus had, pending the action of ejectment, purchased a part of the entire tract from some other party defendant to that action, or is now on the land as a tenant of some party defendant, he should be dispossessed.

While I express no opinion on some very interesting questions that might have been, but which are not sufficiently, presented by this plea, it seems to me that the writ should be issued as against Justus. In this connection it may be advisable to consider the proper steps to be taken by the marshal in executing the writ of possession in case he finds some person in possession of the Sibley tract who is not named in the writ; for instance, Sibley himself, or some subsequent tenant. In either event such person, treating the plea of Justus as true, has gone into possession since the rendition of the judgment. By section 2756, Code 1887 [Va. Code 1904, p. 1414], a judgment in ejectment is conclusive as to the title or right of possession established in such action upon the party against whom it is rendered, and against all persons claiming from, through, or under such party by title accruing after the commencement of such action. But it does not seem to me that Mr. Sibley, or some subsequent tenant of his, can be considered as claiming from, through, or under Justus. When the tenancy of Justus was terminated, his title or right of possession ceased to exist. If Sibley or some tenant of his (other than Justus) is now in possession, it is by a title or right of possession not in any sense derived from Justus.

Where a landlord is not made, and does not become, a party to the suit, I am satisfied, both on reason and by weight of authority, that he is not bound by the judgment, in the sense that it may be pleaded as an estoppel or res judicata against him. 7 Ency. Pl. & Pr. 307, and note 6; Sedgwick & Wait, Trial of Title (2d Ed.) § 537, p. 393; Tyler, Ejectment, p. 632; Howard v. Kennedy's

Ex'rs (Ala.) 39 Am. Dec. 313, note by Mr. Freeman; Samuel v. Denkins, 12 Rich. Law, 172, 75 Am. Dec. 729; Chirac v. Reinicker, 11 Wheat. 280, 6 L. Ed. 474; Rigney v. De Graw (C. C.) 100 Fed. 214. Where the landlord is actually notified of the suit and aids in the defense, although not a party on the record, there is some conflict of decision (2 Black, Judgments [2d Ed.] § 577); but we have no such case here.

Where the tenant defendant remains in possession after judgment, and until the writ of possession is to be executed, it seems that the marshal should put the plaintiff in possession, and that the landlord would have to bring his action to regain possession. Hanks v. Price, 32 Grat. 113. So, too, in case the tenant assigns his lease, or sublets, to another; and in case some third party enters without title, by collusion with the defendant tenant. But where the lease of the defendant tenant expires or is terminated after judgment and before execution, and the landlord or a new tenant under the landlord takes possession, the case is more difficult of determination.

Hanks v. Price, 32 Grat. 113, cannot be given any considerable weight. The point decided was that the landlords could, before an award was entered as the judgment of the court, be admitted as parties and allowed to defend. It was said, arguendo, that, if not so admitted, the landlords would be ousted by writ of possession, and would have to bring their action to recover possession. And it is at least probable that the reasoning of the court is based upon the supposition that the tenant would remain in possession until the writ of possession was executed. In other words, the court does not appear to have considered what would have been the effect of possession being taken by the landlords prior to execution. I have found no other Virginia case which seems to bear on the question here.

In Herman on Executions, p. 532, it is said:

"But if any other person—one not claiming under the defendant, but by or under a different title—be in possession, the officer cannot remove him from the premises under such writ."

In Mr. Freeman's note to Howard v. Kennedy (Ala.) 39 Am. Dec. 313, it is said:

"While, therefore, as we have seen, the general rule is well settled that the defendant, and all those in privity with him, and who enter under and acquire an interest in the premises from or through him subsequent to the commencement of the action, are bound by the judgment therein, and are liable to be dispossessed thereunder, the converse of this rule is also equally well settled that no person in possession of the premises, claiming title thereto prior to or at the time of the commencement of the action, can be dispossessed unless he was made a party to the suit so as to be bound by the judgment. * * * And the same protection will be afforded to a tenant who enters subsequent to the time of the commencement of the action, but not in privity with the defendant, and not under or through him. Rogers v. Parish, 35 Cal. 127; Mayo v. Sprout, 45 Cal. 99; Smith v. Pretty, 22 Wis. 655; Gelpeke v. R. R. Co., 11 Wis. 462; Clark v. Parkinson, 10 Allen, 133, 87 Am. Dec. 628; Johnson v. Fullerton, 44 Pa. 466; Howard v. Kennedy's Ex'rs, 4 Ala. 592, 39 Am. Dec. 307; Hickman's Lessee v. Dale, 7 Yerg. 149."

In 2 Black on Judgments (2d Ed.) § 577, p. 872, it is said:

"* * * It seems to be conceded that when an action is brought against a tenant by a stranger to recover possession of the premises, without notice to the landlord, and judgment is rendered for the stranger, the possession is adversely and completely changed by virtue of the judgment, and the landlord is so far bound by the judgment notwithstanding his want of notice, although he is not concluded as to the title or future right of possession."

See, also, Sedgwick & Wait, Trial of Title, § 569; Wallen v. Huff, 3 Sneed, 82, 65 Am. Dec. 51; Smith v. Gayle, 58 Ala. 600; Sampson v. Ohleyer, 22 Cal. 200; Wesley v. Tindal (C. C.) 81 Fed. 612; Vance v. Wesley, 85 Fed. 157, 29 C. C. A. 63.

While the foregoing authorities cannot be entirely reconciled, it seems to me that the following view is just, equitable, and supported by sufficient authority: Where the landlord had no knowledge of the action in time to have himself made a party, and especially where the judgment was entered by default, upon petition of the landlord, made before execution of the writ of possession, such judgment should be opened and the landlord allowed to defend. Where the landlord knew of the pendency of the action, and either refused to defend, or defended in the tenant's name, the writ of possession should be executed, notwithstanding the fact that the lease of the tenant defendant has expired or been terminated, and the landlord, or a new tenant, has taken possession. This opinion is already of such length that I shall omit the reasoning leading to this conclusion, and content myself by a reference to some of the authorities supporting the practice of opening a judgment in favor of a landlord. Hanks v. Price, 32 Grat. 112, 113; Adams, Ejectment, pp. 267, 532; Tyler, Ejectment, p. 451; Sedgwick & Wait, § 569; 7 Ency. Pl. & Pr. p. 307, and note 6.

I am therefore of opinion that if the landlord, Sibley, will now, before issue of the writ of possession, petition that the judgment against Archibald Justus quoad the Sibley tract be opened, and that he, Sibley, be allowed to enter his appearance and defend, such motion should be granted. This petition should be accompanied by the affidavit of Mr. Sibley showing that he in fact had no knowledge of the pendency of the action against Justus until after judgment had been rendered. If such petition be filed and the issue thereon be decided in Sibley's favor, the marshal will be directed to leave in undisturbed possession the new tenant on the Sibley tract. The fact that the plaintiff and Mr. Sibley are both citizens of New York will not oust this court of jurisdiction. Phelps v. Oaks, 117 U. S. 241, 6 Sup. Ct. 714, 29 L. Ed. 888; Hardenbergh v. Ray, 151 U. S. 118, 14 Sup. Ct. 305, 38 L. Ed. 93.

Plea No. 4 of Levi Woolford. The facts stated in this plea are: That Woolford was in possession of a tract of land (not described, but a part of the tract claimed by King), at the institution of the suit, as the tenant of S. W. McInturf: that the defendant destroyed the papers served on him by Manns, and did not notify McInturf of the pendency of the action; that defendant surrendered possession of the land to McInturf pending the suit and before judgment; that the land belongs to McInturf, or to his wife,

Cora McInturf; and that the defendant did not, at the institution of the suit or at the time the judgment was rendered, own any land in Buchanan county. From what has been said as to plea No. 4 of Archibald Justus, it follows that, so far as Levi Woolford is himself concerned, the writ of possession should be executed by putting him out of possession if found on any part of the land recovered by the plaintiff.

Neither S. W. McInturf nor his wife was ever served with either the original declaration, or with the notice that leave to file the amended declaration would be asked. Woolford, in this plea, avers that he did not notify S. W. McInturf of the pendency of the action. It may be that the McInturfs had some knowledge of the pendency of an action against some of their neighbors, but as they were not themselves served with any notice, and as this tenant did not notify them, I think it proper to allow McInturf or his wife—if she be the claimant—if so advised, to forthwith petition that the judgment against Woolford, quoad the tract of land formerly leased to Woolford, be opened, and that McInturf or his wife be allowed to defend. This petition should be accompanied by affidavit to the effect that the claimant did not know prior to the judgment that the tenant Woolford had been sued for the recovery of this land.

KING v. DAVIS et al.

(Circuit Court, W. D. Virginia. January 25, 1905.)

1. FEDERAL COURTS—JUDGMENTS—VACATION AFTER TERM—PROCESS—FRAUDULENT SERVICE.

   A federal law court has no power to vacate its judgment of a former term, founded on a false, but apparently valid, return of service of process. Such judgment may be vacated by suit in equity if plaintiff at law joined in the fraud of the process server, or if the latter was not an official. Such judgment not vacated in equity, if plaintiff at law did not join in the fraud, and if process server an official.

2. SAME—CONSTRUCTIVE SERVICE—DEFECTIVE RETURN—AMENDMENT.

   Where, pending a motion to vacate a judgment in ejectment, based on invalid returns of constructive service of process, a motion to amend was made, and the amended return disclosed a valid service, the motion will not be granted if the facts stated in the amended return are true.

3. SAME—SUBSTITUTED SERVICE—AMENDMENT—NOTICE.

   Where substituted service on a defendant in ejectment, made by leaving a copy with his wife, was invalid, for failure of the return to state that the wife was a member of his family, the subsequent personal service on defendant of a notice of an application by plaintiff for leave to amend the declaration was insufficient to confer jurisdiction of such defendant.

4. SAME—AMENDMENT OF PROCESS—NOTICE.

   Where a return of substituted service on a defendant in ejectment was fatally defective, and the court had not otherwise acquired jurisdiction of him, an application to amend such return will not be granted, in the discretion of the court, without notice.

5. SAME—ENTRY OF JUDGMENT.

   Where the original declaration and notice and a notice of application to amend were properly served on a defendant in ejectment instituted

in 1896, but the action was retired from the docket, without judgment against her, in 1900, she is entitled to notice and an opportunity to be heard before judgment can thereafter be properly entered against her.

6. Same—Vacation of Judgment after Term—Power to Control Execution.

While a court of law has no power after the term to vacate a judgment, except for errors available on a writ of error coram vobis or on audita querela, or for want of jurisdiction shown on the face of the record, the court has power to so control the execution of its final process issued on such judgment as to prevent injustice.

7. Same—Ejectment—Judgment—Execution.

Where a petitioner applying to vacate a judgment in ejectment, not a party to the action, is in possession, and would be illegally disturbed by the execution of a writ of possession, she is entitled to an order directing the marshal, in executing the writ, to leave her possession undisturbed.

8. Same—Married Women—Separate Property.

Under Va. Code 1887, § 2284 et seq. [Va. Code 1904, p. 1139], declaring that all real and personal property to which any woman is entitled at the time of her marriage, or which any married woman may acquire during coverture, and the rents, issues, income, profits, etc., therefrom, shall continue her separate estate, the mere prospective right of curtesy held by the husband of a married woman in land conveyed to her by her father did not entitle the husband to possession, nor give him any right to use the land or enjoy the rents and profits during coverture.

9. Same—Rights of Wife.

Where a wife owning a separate estate, and living on it with her husband, was not made a party with him to an ejectment suit by a third person, but her deed was not filed for record until long after judgment in favor of plaintiff, she is only entitled to have the judgment opened and be allowed to defend, and is not entitled to an order restraining the execution of the judgment as against her.

10. Same—Husband and Wife—Judgments—Estoppel.

Where at the time a party was sued in ejectment the property belonged to his wife, who was then living, but was not sued, and after judgment and before execution the wife died, by which the husband acquired a life estate in the land, the judgment recovered against him does not operate as an estoppel with reference to such life estate.

11. Same—Vacation of Judgment.

Where, at the time a husband was sued in ejectment, he was in possession by the mere sufferance of his wife, who held the title and resided on the premises, but was not sued, and the husband acquired a life estate in the land by the death of the wife after judgment and before execution, he is entitled, by reason of his wife's death, to have a judgment by default as to him opened and to be allowed to defend.

12. Same—Purchasers Pendente Lite—Return of Service—Amendment.

Innocent purchasers from defendants in pending ejectment suits in the federal courts in Virginia being bound by the record without the filing of a lis pendens, a return of service, defective in that it did not show that the wife of the person on whom process was served was a member of his family, was amendable as against an innocent purchaser from the defendant so served.

13. Same—Lis Pendens—Federal Courts—State Statutes—Application.

Va. Code 1887, § 3566 [Va. Code 1904, p. 1903] providing that no lis pendens shall bind or affect a bona fide purchaser of real estate for a valuable consideration, without actual notice of such lis pendens, unless and until a memorandum, etc., is filed in the office of the clerk of the court in the county where the land lies, has no application to federal courts

sitting in Virginia; such courts having no power to enforce the registration of such memoranda.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

14. Same—Grantee of Landlord—Enforcement of Judgment—Writ of Possession—Injunction—Petition.

Where ejectment was brought by a third person against a tenant, the landlord not being joined, a petition by a subsequent grantee of the landlord pendente lite, failing to allege that the landlord was ignorant of the institution of the action against the tenant, is insufficient to justify an order directing that the writ of possession on a default judgment in favor of plaintiff in the ejectment suit shall not issue and be executed against such purchaser.

15. Same—Independent Title.

Where the holder of an independent title to land sued for in ejectment, not a party to the suit, acquired possession through purchase from defendants in the action pendente lite, although without actual notice, he is subject to the execution of a writ of possession in favor of plaintiff in such action, notwithstanding his independent title has not been adjudicated.

16. Same—Vacation of Judgment—Assignment of Right.

Where ejectment was brought against a tenant, and the landlord was not joined, and had no notice of the action until after judgment had been rendered in favor of plaintiff, the landlord was entitled to convey her rights in the land, including the right to have such judgment opened and be permitted to defend, to a purchaser, innocent or otherwise.

17. Same—Conveyance of Standing Trees—Possession.

Where a landowner conveys standing trees and a right of entry, retaining the remaining interest in the land, neither the grantor nor the grantee has actual or constructive possession of the trees, until the grantee actually engages in the work of felling the trees; the term "constructive possession" necessarily implying a partial actual possession.

18. Same—Easements.

The fact that ejectment does not lie for a mere easement or other corporeal hereditament does not prevent an officer, in executing a writ of possession under a judgment in ejectment, from ousting from a tract of land persons who are unlawfully using a right of way over the same under purchase from defendants in the ejectment suit pendente lite.

19. Same.

Mere use of a right of way over land sued for in ejectment under a purchase from defendants in ejectment pendente lite, for the purpose of transporting lumber from other tracts, does not constitute possession of the standing trees on the tract over which the right of way is, also conveyed to petitioner's remote grantor by persons not parties to the ejectment suit.

20. Same.

A federal court judgment in favor of plaintiff in ejectment having been rendered in June, 1900, one of the defendants conveyed the surface of a part of the land sued for in October, 1901, after which the grantee conveyed the land to a lumber company which was not in existence at the time of the judgment, and the lumber company thereupon filed a petition to set aside the judgment, and for leave to defend; alleging that its grantor had no knowledge or notice of the judgment "until long after it was rendered." *Held*, that though such judgment, not docketed in the county where the land lay, may not be notice to an innocent purchaser, as provided by Act Aug. 1, 1888, c. 729, 25 Stat. 357 [U. S. Comp. St. 1901, p. 701], and Va. Acts 1889-90, p. 22, c. 23, the petition is insufficient, for failure to show that the corporation's vendor was a bona fide purchaser without notice, and when he became a complete purchaser.

21. SAME—DECLARATIONS—AMENDMENT.

An application for leave to amend a return of service on a notice of intent to apply for leave to amend a declaration in ejectment will be denied, no such notice being required as a condition to plaintiff's right to amend.

M. F. Stiles and Daniel Trigg, for plaintiff.
R. R. Henry and E. M. Fulton, for defendants.

Opinion No. 2.

McDOWELL, District Judge. List of defendants named in the judgment of June 23, 1900:

(1) John Allen.
(2) Cyrus Blankenship.
(3) Reese Davis.
(4) Bazil Dotson.
(5) David Dotson.
(6) Ransom Dotson.
(7) Elijah Estep.
(8) H. M. France.
(9) Montreville Hunt.
(10) Robert Hurley.
(11) Arch. Justus.
(12) Levi Woolford.
(13) S. W. McInturf.
(14) Mary Woolford.
(15) Wm. R. Woolford.

Judgment set aside by order of December 2, 1902.

Original service of original notice and declaration valid as to:

(1) John Allen.
(2) Bazil Dotson.
(3) David Dotson.
(4) Ransom Dotson.
(5) Elijah Estep.
(6) H. M. Francis.
(7) Montreville Hunt.
(8) Robert Hurley.
(9) Archibald Justus.
(10) Levi Woolford.

Insufficient as to:
Cyrus Blankenship
Reese Davis.

Parties defendant now submitting motions:
Same as the first 12 named in judgment.

Parties defendant named in proposed amended return of service of original notice and declaration and amended return of service of notice of July 11, 1898:

Same as first 12 named in the judgment, and, in addition, John Dotson and Jane Mounts.

Some time prior to December 21, 1903, I sent to counsel in this case a written opinion, which was filed on said date, and which, for identification, will hereafter be referred to as opinion No. 1 (137 Fed. 198), which deals with the questions which had been raised up to that time. On December 21, 1903, the plaintiff filed a written motion, with which were tendered two affidavits by A. J. Manns; praying, in effect, that the return of service of the original declaration and notice and the return of service of the notice of July 11, 1898, might be amended. The two affidavits are returns of service of the above papers, made out in the strictest form. As will appear from the order of December 21, 1903, this motion was not then acted on, and time was allowed for sundry interested persons to file petitions—some to show why the amendments should not be allowed, and others to show a right to have

the judgment of June 23, 1900, opened, or a right to have the writ of possession withheld. Sundry petitions were filed January 18, 1904. On February 15, 1904, a written motion on behalf of the plaintiff to strike out these petitions was filed; and on March 27, 1904, plaintiff tendered provisionally (to be filed if the motion to strike out should be overruled) demurrers to these petitions. On June 23, 1904, the petitioners tendered other petitions, which they asked be substituted for the petitions filed January 18, 1904. As these new petitions merely amplify those of January 18th, no objection was made to the substitution. The motion to strike out and the demurrers are, of course, to be treated as applying to the new petitions. On September 29, 1904, the judgment defendants filed an amended motion to vacate the judgment of 1900, and they will be treated as having filed therewith (although the papers have not yet been sent in) amended pleas No. 3.

(I) Amended Motion to Vacate Judgment Filed September 29, 1904.

The questions presented by this amended motion have been, I think, sufficiently discussed in opinion No. 1, except that of the motion to vacate on the grounds set up in the pleas to the scire facias. With this amended motion is an amended plea, No. 3, a sample of which has been sent me. The pleas are now in possession of counsel for defendants in order that these amended pleas may be prepared and verified, but it does not seem necessary to wait for them. The point made is that the pleas No. 3 as thus amended are not inconsistent with pleas No. 2, and that pleas No. 2 are intended as absolute and unequivocal sworn statements that the notice and declaration were never in fact served on these defendants. The defendants in whose behalf this amended motion is made are the 12 defendants named in the judgment of June 23, 1900. I shall for the present leave out of view the rights of Cyrus Blankenship and Reese Davis, as to whom the original return of service is defective. That a return of service of process, valid on its face, cannot, under the circumstances here, be attacked by a plea to the writ of scire facias, is, I think, established by the authorities cited in the former opinion in discussing plea No. 2. In considering the right of a judgment defendant at law to have relief in the federal courts from a judgment rendered at a former term on a false return of service of process, it is advisable to consider, first, the case where the plaintiff shared in the fraud; and, second, where the false return was the act of the process server alone.

(1) Where the Plaintiff at Law Participated in the Fraud.

(A) Under such circumstances, there is, I think, no doubt as to a right to relief from the judgment—the defendant at law being free from laches—by bill in equity. No citation of authority is needed to support this proposition, but see Marshall v. Holmes, 141 U. S. 589, at page 596, 12 Sup. Ct. 62, at page 64 (35 L. Ed. 870), and cases hereinafter cited.

(B) Under such circumstances, I think that in the federal courts relief is obtainable only in equity, and cannot be had on motion to vacate made in the court which rendered the judgment after the end of the term at which it was rendered. Undoubtedly many of the state law courts have and exercise this power. In some states this power is expressly conferred by statute. In others it is considered one of the "inherent powers" of the law courts. But the language used by the Supreme Court in the following cases seems to be capable of no construction other than a denial of such power to the federal law courts. This conclusion seems to follow from what is said in Pickett v. Legerwood, 7 Pet. 144, 8 L. Ed. 638. In stating the grounds for writ of error coram vobis, the only one by possibility to be made applicable to the case at bar is at page 148 of 7 Pet., page 639 of 8 L. Ed., "Error in process, or through default of the clerk." From what is said in later cases (I have not access to Archbold's Practice, from which the quotation is made), it seems probable that this is a misprint (Bronson v. Schulten, 104 U. S. 416, 26 L. Ed. 799; Sibbald v. U. S., 12 Pet. 492, 9 L. Ed. 1169; Bank v. Moss, 6 How. 38, 12 L. Ed. 334) and should have read, "Error in process through default of the clerk." It seems probable, also, that the word "process," as there used, means "proceeding." But in addition, see Sibbald v. U. S., 12 Pet. 488, 492, 9 L. Ed. 1167; Cameron v. McRoberts, 3 Wheat. 591, 4 L. Ed. 467; Bank v. Moss, 6 How. 31, 38, 39, 12 L. Ed. 331; Hall v. Lanning, 91 U. S. 163, 165, 23 L. Ed. 271; Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797; especially Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; Marshall v. Holmes, 141 U. S. 589, 596, 597, 12 Sup. Ct. 62, 35 L. Ed. 870. See, also, Grames v. Hawley (C. C.) 50 Fed. 319, 320; Craven v. Canadian R. Co. (C. C.) 62 Fed. 170, 171; Ins. Co. v. Pelzer Co., 76 Fed. 479, 481, 22 C. C. A. 283; Dick Co. v. Wichelman (C. C.) 106 Fed. 637; City v. Ins. Co., 107 Fed. 52, 46 C. C. A. 144; Sanford v. White (C. C.) 132 Fed. 531, 535.

In Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013, the law trial court entered an order vacating a judgment rendered at a prior term. The ground for so doing was that, after the appearance of the judgment defendant, the plaintiff, by fraud and deceit, led the defendant not to contest the case on its merits. This action was reversed by the Supreme Court.

In Craven v. Canadian Pac. R. Co. (C. C.) 62 Fed. 170, a judgment at law in the United States Circuit Court for the district of Massachusetts had at the May term, 1893, been entered in favor of the plaintiff by agreement of counsel. At the June term, 1894, of the same court, a petition to vacate said judgment was filed, setting up the fact that the counsel who agreed to the judgment was not authorized so to do. The court denied the relief prayed for on the ground that it was without power after the end of the term to vacate a judgment.

Insurance Co. v. Pelzer, 76 Fed. 479, 481, 22 C. C. A. 283, was an action at law in a state court in South Carolina on two insurance policies, in which the verdict was intended to be for the plain-

tiff for the amount of both policies. By clear mistake the foreman of the jury reported a verdict for the plaintiff for only the amount of one of the policies. Judgment in accordance with this verdict was entered. After the end of the term, the mistake being discovered, a bill in equity in the state court was filed by the plaintiff at law against the insurance company to correct the error. This equity case was removed to the federal court. The lower federal equity court granted the relief as prayed, and on appeal this ruling was affirmed. A question considered by the appellate court was whether or not equity had jurisdiction. In deciding this question in the affirmative, Judge Morris said that the law court, after the end of the term, had no power to correct the mistake, and that there was equity jurisdiction, because the complainant was without relief at law.

Sanford v. White (C. C.) 132 Fed. 531, 535, was a bill in equity in the federal court to set aside a judgment at law rendered by that court at a former term. The judgment at law had been rendered in favor of the defendant at law in consequence of the fraud of the attorney for the plaintiff at law. The equity court set aside the judgment at law, saying:

"This court is of the opinion and is satisfied, that the complainant had and has a good cause of action against the defendant, and that the judgment against him was the result of the fraud and collusive conduct alleged in the complaint, and that complainant has no remedy at law. He was misled and deceived by his attorney, who informed him that he had moved for a new trial, when he had not. When a party has lost a right by fraud, accident, or mistake, and has no remedy at law, a court of equity has jurisdiction and power, and it is its duty, to give relief, set aside a judgment so obtained, and grant a new trial."

It is true that I have found no federal case in which the judgment at law was obtained by the fraud of the plaintiff at law in obtaining a false return of service of process. But I can draw no sound distinction in principle between such case and the cases above mentioned.

(2) Where the False Return of Service of Process is the Sole Act of the Person Making the Return.

(A) Where the person making the return is an officer, it seems that there is no relief in equity in the federal courts. Walker v. Robbins, 14 How. 584, 585, 14 L. Ed. 552; Knox County v. Harshman, 133 U. S. 152, 156, 10 Sup. Ct. 257, 33 L. Ed. 586.

Whether or not the federal equity court could properly grant relief where the false return is made by one not an officer, and who is for the time being an agent of the plaintiff at law, need not now be decided. In passing, however, it may be noted that in Kibbe v. Benson, 17 Wall. 624, 21 L. Ed. 741, relief in the federal equity court against a judgment of a former term in ejectment in the federal law court was granted on the ground that the defendant at law had no notice. In this case, by mistake or fraud, a private process server, apparently without connivance of the plaintiff at law, made a false return of service. However, as we are now dis-

cussing the power of the federal law courts over judgments of a former term, it will be well to go further.

(B) From the cases cited supra, it seems to follow that the federal law court has no more power after the end of the term to set aside its final judgment on the ground that there was a false return of service of process, in which fraud the plaintiff at law did not participate, than in the case where the fraudulent return was induced by the plaintiff.

(1) The enumeration of the errors that can be relied on to support a writ of error coram vobis in Pickett v. Legerwood, Bronson v. Schulten; Phillips v. Negley, and other cases cited above, does not embrace this case. And if there is a want of power in the federal law courts in cases where the false service was induced by the plaintiff at law, there must be the same want of power where the false return is the act of the process server alone.

(2) It has been a disputed question for many years whether or not in such cases the sole remedy of a defendant, after the end of the term at which the judgment is rendered, is not against the official process server. While many of the state courts grant relief by vacating after the term the judgment obtained on a false return, some of them take the view that public policy forbids such relief. The latter is the view taken by the Virginia Court of Appeals. Ramsburg v. Kline, 96 Va. 465, 31 S. E. 608. See, also, Preston v. Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777. The position taken by the Supreme Court in Walker v. Robbins, 14 How. 585, 14 L. Ed. 552, and Knox County v. Harshman, 133 U. S. 156, 10 Sup. Ct. 257, 33 L. Ed. 586, is readily explicable on the theory that that court holds as sound the view taken by the Court of Appeals in Virginia. In Walker v. Robbins the following language is used:

"In cases of false returns affecting the defendant, where the plaintiff at law is not in fault, redress can only be had in the court of law where the record was made; and, if relief cannot be had there, the party must seek his remedy against the marshal."

This is not an intimation that relief can be had in the court where the record was made after the end of the term at which the judgment was rendered. On the other hand, this language is either merely used to avoid an obiter dictum, or it expressly recognizes the fact that the court of law rendering the judgment may have lost the power to vacate it.

The same point is to be observed as to the language used in Knox County v. Harshman, 133 U. S. 156, 10 Sup. Ct. 258, 33 L. Ed. 586:

"If that return were false, yet, no fraud being charged or proved against the petitioner, redress can be sought at law only, and not by this bill."

This certainly is not necessarily an intimation that the law court has power after the end of the term to grant relief by vacating the judgment. It is more reasonably explained by supposing that the court had in mind (1) relief at law by a vacation of the judgment by the court that rendered it at the same term; or (2) by action at

law for damages by the judgment defendant against the process server.

The conclusion which seems to be necessarily drawn from the cases above cited is that a federal law court has, after the end of the term, no power to vacate a judgment at law founded on a false, but apparently valid, return of service of process.

Let us now consider the motions to vacate made by Cyrus Blankenship and Reese Davis, the two judgment defendants as to whom the return of service of the original notice and declaration was defective. If no motion by the plaintiff to be allowed to amend these returns had been made, under Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444, and cases following that case, 5 Rose's Notes, p. 254, I think these defendants might be entitled to relief. The power affirmed in Harris v. Hardeman to lie in a federal law court after the end of the term to set aside a judgment is predicated on the fact that the record shows that the service of process was invalid. In the case at bar we have invalid returns of constructive service of process, but, pending the motion to vacate, a motion to amend the return is made. If the amended return be true in fact, this court had jurisdiction of these two defendants at the time judgment was rendered. Hence, conceding that there is no want of power in this court to vacate the judgment as to these two defendants, it would clearly be wrong to do so, so far as the rights of Blankenship and Davis are concerned. Whether or not the right to amend exists as to third persons, purchasers from these defendants, will be discussed later in this opinion.

It follows from what has been said that the motion to vacate the judgment of June 23, 1900, must be overruled as to all the defendants except Davis and Blankenship. As to them the question should be reserved pending a decision as to the truth of the proposed amended return.

It will be well to consider next the right of plaintiff to now amend the return of service as to the two defendants not included in the judgment—John Dotson and Jane Mounts.

(II) John Dotson.

This man was a party defendant named in the original notice. The service of the original declaration and notice was made as to him by leaving a copy with his wife. The original return does not state that his wife was a member of his family. For the reasons stated in opinion No. 1 in discussing the return of constructive service on Reese Davis, I consider this return invalid. The notice of July 11, 1898, was, as appears, personally served on John Dotson on July 15, 1898. But this, I am satisfied, cannot be considered sufficient to have given the court jurisdiction of John Dotson. This man is not mentioned in the scire facias, and he was not served with the scire facias. He has not filed any motion, plea, or petition, and in fact has never in any way appeared. The proposed amendment of return shows that John Dotson's wife was a member of his family at the time of the service. If this amended return be true in

fact, the court did have jurisdiction from the first. The amendment merely perfects the evidence that the court had jurisdiction. But as the allowance of amendments to returns is within the discretion of the court, it seems to me that it should not be allowed to be made after so long an interval without notice to Dotson, and an opportunity given him to be heard. The question as to the right to amend is made more interesting by the fact that John Dotson is not mentioned in the judgment of June 23, 1900. Whether or not the action of ejectment instituted in 1896 is still pending, and the propriety of allowing the proposed amendments, need not now be determined. In any event, John Dotson must be given notice and an opportunity to be heard before anything against his interest can be done.

(III) Jane Mounts.

The case of Jane Mounts, in so far as the motion to amend the return is concerned, need not be considered. She is not a party to the scire facias proceedings; but the original returns of service of the original declaration and notice and of the notice of July 11, 1898, are in correct form. There is no need of amending them as to Jane Mounts. It may not be amiss, however, to say that I am, as at present advised, of opinion that she is entitled to notice and an opportunity to be heard before judgment in the ejectment suit could properly be entered against her. The action was instituted in 1896, and it was retired from the docket, doubtless by mistake, without judgment against her, in 1900.

(IV) Opening Judgments for Landlords.

Before taking up the various petitions, it will be well to set out here as briefly as may be the reasons which led me, while preparing opinion No. 1, to conclude that a judgment of a former term in ejectment against a tenant could under some circumstances be "opened," and the landlord allowed to defend the action.

The expression "opening a judgment" is perhaps not the happiest possible; but it means, as I understand, simply to open up the controversy, let the landlord appear and plead to the declaration, let the plaintiff have the advantage of the pendency (in this respect) of his action since its original institution, and thus to arrive at a decision of the controversy on its merits. In view of the want of power of the federal law courts over their judgments of a former term, it is perhaps advisable to say here that by "opening the judgment" there is no vacation or amendment of the judgment against the tenant defendant. Such judgment stands unaffected. But if the tenant defendant is, when the judgment is to be executed, no longer in possession of the land; and if the landlord, who had no knowledge of the action, is himself in possession, or has a new tenant in possession, at the time the writ of possession is to be executed, an interesting and close question is presented. The writ, of course, directs the marshal to dispossess the tenant defendant. If my views are correct, the marshal would be instructed by the court to return the writ unexecuted if the new occupant is a landlord, or

a new tenant of a landlord, who had no notice of the action, and did not directly or indirectly contest the case. If there be no opening of the case, the result is that the plaintiff has gained nothing by his judgment, and must bring a new action. The plaintiff might in such event be held to be barred by limitation, although he was not barred at the time of the institution of the former action. On the one hand, it may be said that a plaintiff who makes so little use of the means ordinarily available of ascertaining who the real adverse claimant is, should take nothing by a judgment against a tenant who surrenders his possession to his landlord before such judgment is executed. On the other hand, it may be said that the landlord selects the tenant, and, if the latter does not inform the landlord of the pendency of the action, the fault is attributable to the negligence of the landlord in selecting such a tenant, and that a judgment against the tenant should be executed against the landlord, and thus put the landlord to bring an action against the party recovering the judgment in order to secure a trial of the merits of the controversy. Either view may be justified by some authority, and, dependent on some matter of fact, either view may be the right one in some particular case. But in the Justus-Sibley Case—the one now in mind—it seems to me that the most equitable and just decision is to open the judgment and allow Sibley to defend. Inquiry made before the institution of the action in the neighborhood of the tract occupied by Justus could hardly have failed to apprise the plaintiff that Justus was a mere tenant, and as to the name of his landlord. A deed conveying the tract in question to Sibley had been recorded in the clerk's office of Buchanan county in 1889. Consequently the plaintiff cannot occupy the position of one who has been fully diligent. The plaintiff desires that a judgment against a tenant be executed against a landlord who had no notice and whose right has never been presented in court. The position of the plaintiff, from a standpoint of pure justice, does not seem impregnable; and, in the irreconcilable conflict of merely persuasive authorities, and because of the want of any controlling decision, this court has no guide for the decision of this question, other than to adopt the view that seems most just. To direct the marshal to leave undisturbed Sibley's new tenant, without more, would not be entirely just to the plaintiff. He would have to bring a new action, and the adverse possession of the land since 1896 might possibly be counted against him. Sibley should not in strict justice entirely escape the result of the negligence or ignorance of the tenant (Justus) selected by himself, and thus possibly obtain the benefit of an adverse possession after the institution of the action. Neither party is entirely free from the charge of negligence, and opening the case allows a fair trial on its merits of an unadjudicated controversy; both parties thereto being allowed to occupy exactly as strong ground as that which they respectively held in 1896.

The case now under consideration is wholly different from Vance v. Wesley, 85 Fed. 157, 29 C. C. A. 63. There an intruder—"an interloper"—entered after judgment, and before writ of possession

was executed. Even treating Vance as a subsequent tenant, the landlord (the state) had previously contested the title on its merits in the action against Tindal and Boyles.

It should be here stated that while I understand that the law court has no power to vacate its judgment of a former term, except for errors of fact such as can be relied on under writ of error coram vobis, for a fact occurring after judgment such as can be relied on audita querela, or for want of jurisdiction shown on the face of the record, still such court has power, equitable in nature, to so control the execution of its final processes as to prevent a wrong from being done thereby. See 2 Freeman, Executions (2d Ed.) § 472, p. 1479; Sedgwick & Wait (2d Ed.) §§ 564, 566; Newell, Ejectment, p. 816. As incidentally recognizing this power in the federal law courts, see Pickett v. Legerwood, 7 Pet. 144, 8 L. Ed. 638; Amis v. Smith, 16 Pet. 303, 311, 10 L. Ed. 973; Boyle v. Zacharie, 6 Pet. 648, 8 L. Ed. 532; U. S. v. McLemore, 4 How. 286, 288, 11 L. Ed. 977; Humphreys v. Leggett, 9 How. 297, 312, 313, 13 L. Ed. 145; McCargo v. Chapman, 61 U. S. 555, 556, 15 L. Ed. 1021; Ex parte Flippin, 94 U. S. 348, 350, 24 L. Ed. 194; Freeman v. Dawson, 110 U. S. 264, 270, 4 Sup. Ct. 94, 28 L. Ed. 141; The Elmira (C. C.) 16 Fed. 133.

(V) Petition of Mary Estep.

I should say at the outset that the mere fact that a petitioner is not a party defendant presents, as it seems to me, no insuperable obstacle to granting proper relief. There is no doubt that in deciding whether or not to issue the writ of possession, as well as in the matter of amending the returns of service, the court is at liberty to exercise a reasonable discretion, and will be governed by what may be termed equitable principles. Where a petitioner not a party to the action is in possession, and would be disturbed therein illegally by the execution of a writ of possession, such person can surely reach the attention of the court at this stage of the proceeding. Even after execution of the writ of possession, the courts will issue writs of restitution to restore possession to persons who have been put out of possession wrongfully. If any of the petitioners have a right to remain in possession, that right should not be disturbed. A petition showing the facts on which such claim of right rests, and praying that the right be safeguarded, is, I think, the best method of proceeding. The motion to strike out must be overruled as to all the petitions. If in any of them the facts stated do not show the petitioner entitled to relief in this court in this proceeding, the demurrer to such petition will be sustained, and the plaintiff's rights thus as effectually guarded as by striking out.

The facts set up in the petition of Mary Estep are that Elijah Estep, a defendant, who was properly served with notice, is the husband of the petitioner; that he was at the institution of the action living with his wife on a tract of land conveyed to his wife by her father in 1883 (a copy of the deed being exhibited), and which has been ever since her separate estate. It is alleged that Elijah Estep has never owned any land, and that Mary Estep had

no knowledge of the pendency of the action. She was not herself a party to the action. Her prayer is that no writ of possession go against her husband, or that it be so framed as not to interfere with her rights.

Under the act of March 7, 1900 (Acts 1899–1900, p. 1240, c. 1139), as under the Code of 1887, § 2284 et seq. [Va. Code 1904, p. 1139], the land described in the deed to Mary Estep is her separate estate. During her life she has the right to hold, use, and control it as if unmarried. The merely possible and prospective right of curtesy on the part of her husband (Breeding v. Davis, 77 Va. 639, 46 Am. Rep. 740; Campbell v. McBee, 92 Va. 68, 22 S. E. 807; Bankers' Co. v. Blair, 99 Va. 606, 39 S. E. 231, 86 Am. St. Rep. 914) does not entitle him to the possession, or give him any right to use the land, or enjoy the rents, issues, or profits, during the coverture. Elijah Estep, was, therefore, when this action was instituted, not on the land by any marital right. His position was somewhat that of a guest of his wife. Or, if he is to be treated as having been the real party holding possession, his position is perhaps somewhat analogous to that of a tenant. In either event the rights of the wife should not be impaired.

Whether or not the relief asked by Mary Estep can be granted only on condition that she make herself a party defendant to the action of ejectment is not so easy of solution. If she becomes a party to the action instituted in 1896, she loses the benefit of her adversary possession since that date. I think a landlord whose tenant was made a defendant can ask no more than that the judgment against the tenant be opened, and that he (the landlord) be allowed to make himself a defendant and contest the case. But in so doing he loses, I think, the benefit of the adverse possession of himself or of his tenant since the institution of the suit. It seems to me that a wife owning a separate estate, and living on it with her husband, who is not sued with her husband, is in a somewhat stronger position than an absentee landlord. She has herself all the time been in actual possession of the land. But in the case before us the deed to Mary Estep was not recorded until 1902. If it had been on record prior to the institution of the action, I incline to the opinion that she should not be required to become a party to the action. The plaintiff, under such circumstances, would have simply not used the means easily at his disposal to learn the proper party to sue. As the case stands, treating the petition as true in all respects, I am of opinion that the proper course is to open the judgment, allow Mary Estep to plead to the declaration, and withhold the writ of possession against Elijah Estep quoad this tract of land. The demurrer to this petition must be overruled.

(VI) Petition of Mary Hurley et al.

The facts here asserted and essential to be considered are as follows: The petitioners are the infant children of Robert Hurley and Marinda Hurley. The latter died in 1902. Robert Hurley was a defendant, duly served with notice, but at that time he owned and claimed no land. He was living with his wife on land belonging

to her, which had been conveyed to her by her father in 1895 by deed recorded in 1895. Since Marinda Hurley's death, Robert Hurley and these children have been living on the land described in the deed above mentioned. Marinda Hurley was not a party to the ejectment suit. But it is not alleged that she did not have knowledge of the action long before judgment. At the time the suit was instituted, and at the time the judgment was rendered, Robert Hurley was not in possession by any marital right. He is now in possession by right of the life estate by the curtesy acquired since the judgment from one not a party to the action. That the judgment against him is not an estoppel, and that he could, if put out by writ of possession, sue without regard to that judgment, is, I think, settled. Sedgwick & Wait, Trial of Title, § 541, p. 395; 2 Black on Judgments (2d Ed.) §§ 556, 655, 659. While I have found no authority directly in point, it seems to me that the situation as to Robert Hurley is such that his motion to vacate the judgment may, on the facts set up in this petition, be treated as one in lieu of the writ of audita querela, and that the judgment against him should be set aside. His accession to a life estate in the land has transpired since the judgment. Under the Virginia statute law as to the separate estates of married women, I think that Hurley could not have required his wife to make herself a party to the action. He himself before her death had no title, and his possession was under a person not sued. He is not in the position of one now relying on a title on which he could have relied (at least, without the voluntary act and consent of his wife) prior to judgment. He falls within the general rules laid down as to the issue of the writ of audita querela (4 Minor [3d Ed.] p. 1050; 1 Am. & Eng. Ency. [1st Ed.] 1003), and is not barred therefrom by the ruling in Avery v. U. S., 12 Wall. 304, 20 L. Ed. 405. Humphreys v. Leggett, 9 How. 297, 13 L. Ed. 145, is authority for the proposition that either the law court or the equity court can grant the relief asked under such circumstances as we have here. Treating the facts set up in this petition as true, the order should be that the judgment against Robert Hurley be vacated, that he be required within a short time to enter his appearance in the original action, and that no writ of possession issue as to Robert Hurley quoad the 100-acre tract in question. This order may also, if the plaintiff so desires, grant the plaintiff leave to make the Hurley children parties defendant. Acts 1895–96, p. 514, c. 497. It is true that Robert Hurley is not in his own right a party to this petition, but this seems a defect of form rather than of merit. Robert Hurley is the successor in interest of one who could at the most ask that the judgment be opened on condition that she enter her appearance as a defendant. Hurley's right to a vacation of the judgment on audita querela is modified by plaintiff's rights as against Hurley's predecessor in title.

The demurrer to this petition must be overruled.

(VII) Petition of Hiram W. Sibley.

The facts set up here are as foreshadowed in opinion No. 1. If the truth of the facts stated is not contested, the writ may, if

desired, go as against Archibald Justus, but with it will go instructions to the marshal not to disturb the possession of H. W. Sibley or of his new tenant, G. H. Davis, as to the 1235¼ acres described in the deed from N. B. Dotson to Sibley. This relief should be granted, however, on condition that Sibley within a reasonably short time, to be fixed by the order, enters his appearance as a defendant in the ejectment cause.

It was suggested by counsel for the plaintiff that this court has no jurisdiction to consider this petition, as Sibley is a citizen of New York; the plaintiff being also a citizen of that state. If Sibley had intervened and asked to be made a defendant in lieu of his tenant, Archibald Justus, prior to the rendition of the judgment, and an order to such effect had been made, the jurisdiction would not have been ousted. Phelps v. Oaks, 117 U. S. 241, 6 Sup. Ct. 714, 29 L. Ed. 888; Hardenbergh v. Ray, 151 U. S. 118, 14 Sup. Ct. 305, 38 L. Ed. 93. The present proceeding is in some respects a mere continuation of the ejectment cause, and jurisdiction as between King and Sibley is ancillary to that obtained as between King and Justus. The relief now ultimately sought by Sibley is the right to contest King's claim to the land. In other words, it is the same relief he would have sought, and to which he would have been entitled, had he intervened before the judgment was rendered. There is a strong analogy between the case now before us and a petition of intervention in a chancery suit in a federal court, where a citizen of the same state as the complainant intervenes. This does not defeat the jurisdiction. Judge Shiras says:

"The right of the court to grant such leave and to hear and adjudicate upon the rights of such intervener is not defeated by reason of the fact that such intervener and complainant are citizens of the same state." Shiras, Eq. Pr. (2d Ed.) p. 97.

See, also, Krippendorf v. Hyde, 110 U. S. 276, 283, 284, 4 Sup. Ct. 27, 28 L. Ed. 145; Park v. N. Y. R. Co. (C. C.) 70 Fed. 641, 642.

It seems to me, therefore, that this court has jurisdiction to consider Sibley's petition, and to allow him proper relief thereunder.

The demurrer to this petition must be overruled.

(VIII) Petition of A. C. Flood.

The facts now to be considered set up in this petition are: By patent issued in 1876 there was granted to one Lohnert et al. a tract of 2,500 acres of land lying within the lines of plaintiff's claim. By various conveyances one R. L. Brown, Jr., came to be the sole holder of this title by deed dated in 1890. Later—the date not being stated—Brown instituted an action of ejectment at Abingdon against sundry persons, including Reese Davis, H. M. Francis, and S. W. McInturf, who claimed under one Jonathan Hurley, who had a "court right" covering some 2,000 acres of the 2,500 acres. This action was compromised, and by deed dated March 14, 1899 (after the institution of King's action, but before judgment), Brown conveyed what may be conveniently called the "surface" of 362½ acres to Reese Davis, the surface of 503¼ acres to H. M. Francis, and the surface of 134 acres to S. W. McInturf; and said parties

conveyed to Brown the coal under these tracts, certain standing timber, and certain "mining rights." On April 25, 1899, Brown conveyed the coal and mining rights to Flood, the petitioner. The petitioner further alleges that Reese Davis, H. M. Francis, and S. W. McInturf did not claim at the time the King suit was instituted, or at the date of the judgment therein, any land except the three tracts mentioned in the deed between them and Brown. It is alleged that neither Brown nor Flood had any knowledge of the pendency of the King suit. It also alleged that, when the King suit was instituted, Levi Woolford—a defendant properly served with notice—was living on the S. W. McInturf tract, above mentioned, as the tenant of McInturf.

(A) I shall first consider the right to amend the return of service on Reese Davis (treating the proposed amended return as true in fact) quoad Flood's rights as a purchaser under Davis. And in this discussion I shall proceed on the theory that all persons must take notice of the pendency of an action of ejectment in the federal court, without the filing by the plaintiff of a memorandum of lis pendens in the county where the land lies.

The cases of Powers v. Carter Co., 100 Va. 450, 41 S. E. 867, and Shenandoah R. Co. v. Ashby, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898, excellently illustrate when amendments should and when they should not be allowed as against third persons whose rights have intervened. In the Powers Case an examination by the Carter Company (purchaser after judgment from a judgment defendant) of the record of the Dickinson county court would have led to the belief that the original judgment was rendered at a term other than that to which the notice had been given, and that it was therefore void. In the Ashby Case the return of service omitted to state that the director of the defendant corporation on whom service was made lived in the county in which service was made, which the statute requires. In the Powers Case the amendment of the record by nunc pro tunc order was not allowed to affect the rights of the Carter Company. In the Ashby Case the amendment was allowed, with the intent that the judgment should become valid as against subsequent mortgagees of the defendant corporation. I think the true theory is to consider that the third person either did examine or should have actually examined the record. If what he finds there shows the proceeding to be void, he cannot be affected by a subsequent amendment. But if what he finds on the record leaves it open to question whether the proceeding is void or not, he should be bound by a subsequent amendment. For instance, suppose he finds a return of service on a corporation showing that service was made five days prior to the return day; the statute requiring service to be made at least ten days before return day. Now, if in fact the service was made 15 days prior to the return day, while there may be a right to amend the return according to the fact as against the defendant, there should not be such right as against a third person. Such third person has a right to assume the truth of the return. But if the return is imperfect, merely, as in the Ashby Case, and as in the case at bar (being merely silent

as to Davis' wife being a member of his family), I think the return can be amended as against the third person. The inquirer has not been deceived by the record. The return shows him that the service may have been properly made. If, treating a pending suit as being notice, he did not look at the record, he had no actual knowledge of the infirmity of the return, but did have constructive notice of what the record would have revealed. If he did look at the record, he was, in reason, put in possession of knowledge sufficient to inform him that the service may have been strictly regular. He could have made inquiry in pais and learned the truth. If he did not make such inquiry, he should be held to the risk which he took. It follows that if all persons are bound to take notice of a pending suit in ejectment in a federal court in Virginia without a memorandum of lis pendens having been filed—a question to be considered later—the return as to Reese Davis can be amended both as to Davis and as to Flood. If innocent purchasers from defendants in pending ejectment suits in the federal court in Virginia are not bound where no memorandum of lis pendens is filed, it will not be necessary to consider the question of amending the return of service on Reese Davis quoad Flood's rights. If Flood is protected as an innocent purchaser, he is not concerned as to the amendment. It will not affect him.

(B) Let us now consider the question—treating the amended return of service on Davis as true in fact—of Flood's rights as a pendente lite purchaser from Reese Davis. I shall later discuss his rights under the Lohnert patent. Neither he nor Brown had actual notice of the pendency of the King suit. It was after the institution of the King suit and before judgment that Brown took title from Davis to the coal, etc., and that Flood took title from Brown. I understand that it is conceded that no memorandum of lis pendens (section 3566, Code 1887 [Va. Code 1904, p. 1903]) was recorded in Buchanan county.

Section 2756, Code 1887 [Va. Code 1904, p. 1414], which is a part of the chapter relating to ejectment, reads:

"Judgment to be Conclusive. Any such judgment in an action of ejectment * * * shall be conclusive as to the title or right of possession established in such action upon the party against whom it is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action. * * *"

Section 3566, Code 1887 [Va. Code 1904, p. 1903], reads:

"No lis pendens * * * shall bind or affect a bona fide purchaser of real estate, for valuable consideration, without actual notice of such lis pendens, * * * unless and until a memorandum setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the land, and the name of the person whose estate is intended to be affected thereby, shall be left with the clerk of the court of the county or corporation in which the land is situate, who shall forthwith record the said memorandum in the deed book, and index the same in the name of the person aforesaid."

I am inclined to think, so far as the state courts are concerned, that the leaving of a memorandum with the proper clerk is essential in order to bind a pendente lite purchaser from a defendant in

ejectment. I shall not, however, pause to discuss this question, as I have reached the conclusion that the lis pendens statute (section 3566) does not control the effect of a judgment in ejectment in a federal court in Virginia. If this statute were held to apply to suits pending in the federal courts, the strongest argument in support of such conclusion that occurs to me would be as follows:

(1) The thirty-fourth section of the original judiciary act (Act Sept. 24, 1789, c. 20, 1 Stat. 92), now section 721, Rev. St. [U. S. Comp. St. 1901, p. 581], makes the state laws which are rules of property, and are not in contravention of the federal Constitution, laws, or treaties, the rule of decision in trials at common law.

(2) The question now before the court involves judicial action (unlike the case of Wayman v. Southard, 10 Wheat. 1–25, 6 L. Ed. 253), and is a trial at common law.

(3) To hold this statute applicable is analogous to the action of the federal courts in giving effect to state statutes of limitation, which are held to bar actions to enforce federal judgments (Ross v. Duval, 13 Pet. 45, 60, 10 L. Ed. 51, and case following this case), and to those holding judgments of federal courts subject to state exemption statutes (see Lanahan v. Sears, 102 U. S. 318, 322, 26 L. Ed. 180). But the difficulty with this argument is that the judgments of the Virginia federal courts in ejectment may be rendered nugatory unless the state court clerks record memoranda of federal pending suits. To construe section 721, Rev. St. [U. S. Comp. St. 1901, p. 581], as adopting the Virginia lis pendens statute, with the admission that the federal courts have no power to require the state court clerks to record such memoranda, is forbidden by the settled course of decision of the federal courts, which enunciates a fundamental principle vital to the continued existence of the jurisdiction of the federal courts in many important respects. See cases cited infra. On consideration of the question of the power of the federal courts in Virginia to compel the state court clerks to record such memoranda, I fail to find satisfactory reasons for holding that they have such power. It may for present purposes be conceded that the issue by the federal court of a writ of mandamus to compel a state court clerk to record such a memorandum would be, not an exercise of original jurisdiction, but of an ancillary jurisdiction, under section 716, Rev. St. [U. S. Comp. St. 1901, p. 580], necessary for the exercise of or necessary to make effective the jurisdiction of the court already obtained. But the federal court cannot by mandamus compel a state official to perform even a clearly ministerial act, involving no exercise of discretion unless the law makes it the duty of such official to perform such act. It is true that the Virginia Legislature enacted the lis pendens statute with knowledge, actual or implied, of the provisions of the thirty-fourth section of the original federal judiciary act. But it does not necessarily follow that the Legislature intended that the lis pendens statute should make it the implied duty of the state court clerks to record memoranda of suits pending in the federal courts. The argument that such intent did not exist is at least as strong as, and to my mind stronger than, the argument that it did

exist. The form and nature of the statute are such that an express provision therein that no suit pending in the federal courts of this state shall affect innocent purchasers, unless a memorandum be recorded in some state court clerk's office, would have been unbecoming, and an assertion of a power not vested in a state Legislature. Under such circumstances, no rule of construction authorizes us to construe the statute as implying such provision. If there had been enacted contemporaneously with the lis pendens statute an express provision requiring the state court clerks to record memoranda of federal pending suits, a different question would be presented. But as the state law, as it now stands, does not necessarily make it the duty of such officers to record such memoranda, the federal courts have not the power to require them to perform this duty.

In support of the conclusion reached, I have found but one federal decision that seems to be exactly in point. It is Rutherglen v. Wolf, 1 Hughes, 78, Fed. Cas. No. 12,175, in which Judge Bond's reasons for the decision are not given. This case decides that the statute in question does not apply to a suit pending in a federal court in Virginia. Smith v. Gale, 144 U. S. 509, 526, 12 Sup. Ct. 674, 36 L. Ed. 521, does not seem to be in point. Dakota was a territory when the purchase was made. And the application of the Dakota lis pendens statute was not a recognition by a federal court of the power of a state to limit the effect of a federal court judgment. There are many Supreme Court cases enunciating the common-law doctrine that a purchaser pendente lite takes subject to the result of the suit, among which may be mentioned Walden v. Bodley, 9 How. 39, 49, 13 L. Ed. 36; Eyster v. Gaff, 91 U. S. 521, 524, 23 L. Ed. 403; Tilton v. Cofield, 93 U. S. 163, 168, 169, 23 L. Ed. 858; Whiteside v. Haselton, 110 U. S. 296, 301, 4 Sup. Ct. 1, 28 L. Ed. 152; Mellen v. Moline Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; Thompson v. Baker, 141 U. S. 648, 654, 655, 12 Sup. Ct. 89, 35 L. Ed. 889; Lacassagne v. Chapuis, 144 U. S. 119, 124, 125, 12 Sup. Ct. 659, 36 L. Ed. 368. But in no one of these cases was the question now before us considered.

The true ground for holding that the lis pendens statute does not apply to suits pending in the federal courts is that suggested above, and stated in the numerous federal decisions holding that state statutes requiring judgments to be docketed in the county where the land lies do not affect the judgments of the federal courts in such states. It is that Congress does not intend, when adopting state laws, to adopt such as have the effect of limiting or controlling the jurisdiction and power of the federal courts, when such effect can only be obviated by the voluntary act of state officials over whom the federal courts have no power. If the Virginia Legislature were to enact a statute making it the duty of state court clerks to record memoranda of pending suits and attachments in the federal courts, there might possibly be no further difficulty. But until that is done, the situation in respect to federal pending suits and attachments is the same as that which existed in respect to the lien of federal judgments prior to the congressional statute of 1888 (Act

Aug. 1, 1888, c. 729, 25 Stat. 357 [U. S. Comp. St. 1901, p. 701]) and the Virginia statute of 1890 (Acts 1889–90, p. 22, c. 23).

The reasoning leading to this conclusion, as stated by Judge Hughes in U. S. v. Humphries, 3 Hughes, 201, Fed. Cas. No. 15,422, is as follows.

"The decisions of the United States courts have been in nothing more uniform, unvarying, and consistent than in holding that, where rights once attach under laws of Congress adopting laws of the respective states, these rights are not divested by a noncompliance with conditions, restrictions, or limitations contained in those very state laws, where a compliance with the latter would depend upon a resort in any way to state officials or to the machinery of the state judiciary. The provision of the Code of Virginia making a judgment for money a lien upon the real estate of the debtor makes, in the eighth section of chapter 182, an exception in favor of a subsequent purchaser without notice, where the judgment has not been docketed. The process of docketing depends upon the action of an officer of a state court in keeping a docket, and upon that officer's actually docketing the judgment of the United States court when presented. There is no law of Virginia requiring this officer to docket the judgment of a United States court. He acts strictly in a ministerial capacity, and is not required by any express law to enter such a judgment when presented for such a purpose. * * * I think it may be laid down as a rule having few exceptions that in any case of a law of a state conferring rights upon conditions or with exceptions, and adopted by Congress as operative in that state, wherever the exceptions or conditions depend upon the action of state officers, so that the enjoyment of rights thus once conferred could be defeated or divested by the action or refusal to act of a state officer, such a condition or exception in the state law is uniformly held by the United States courts not to limit the rights conferred by the act of Congress adopting the state law. This was decided in Palmer v. Allen, 7 Cranch (11 U. S.) 550–564 [3 L. Ed. 436]; Wagram v. Southard, 10 Wheat. (23 U. S.) 1 [6 L. Ed. 253]; U. S. Bank v. Halstead, 10 Wheat. 51 [6 L. Ed. 264]; Boyle v. Zacharie, 6 Pet. (31 U. S.) 648 [8 L. Ed. 532]; and (more particularly in their bearing upon the question now under consideration) Massingill v. Downs, 7 How. (48 U. S.) 760 [12 L. Ed. 903], and Carroll v. Watkins, Fed. Cas. No. 2,457."

See, in this connection, Cooke v. Avery, 147 U. S. 375, 387, 13 Sup. Ct. 340, 345, 37 L. Ed. 209, where it is said:

"Under this legislation [section 721, Rev. St., U. S. Comp. St. 1901, p. 581, inter alia] judgments recovered in the federal courts were undoubtedly liens in all cases where they were such by the laws of the States. * * * But no right in the states to regulate the operation of federal judgments was thereby recognized."

See, also, note to Blair v. Ostrander (Iowa) 80 N. W. 330, 47 L. R. A. 469, 77 Am. St. Rep. 532.

It follows, as there is no power in the federal court to require the state court clerks to record memoranda of federal pending suits, that the lis pendens statute cannot be treated as a rule of decision in the matter now before us.

From what has been said it follows that Flood's petition, in so far as he claims as a pendente lite purchaser under Reese Davis, presents no ground for refusing to allow the judgment against Reese Davis to be executed quoad Flood's rights under his purchase from Davis.

(C) Let us now consider Flood's rights quoad his pendente lite purchase from S. W. McInturf. The judgment of June 23, 1900, against McInturf was set aside by order of December 2, 1902. But the petition of Flood states that Levi Woolford, a defendant against

whom judgment was rendered, and as to whom the return of service of the original notice and declaration is valid, was living on the said McInturf land as the tenant of McInturf at the time the action was instituted. McInturf was not served with the original notice or declaration or with the notice of July 11, 1898. Flood stands in the shoes of McInturf. But whether or not he is bound by the judgment against Levi Woolford, so far as the right of King to execution of the writ of possession as to the McInturf tract is concerned, seems to me to depend on the knowledge or want of knowledge of McInturf of the institution of the action against McInturf's tenant, Woolford. As stated in opinion No. 1, a landlord who is not a party to the action, and does not in the name of his tenant defend the suit, is not bound by the judgment rendered against his tenant, in the sense that the judgment is an estoppel. But if a landlord knows that an action of ejectment has been instituted against his tenant in time to make defense, and does not intervene, I think the writ of possession in favor of the successful plaintiff should be executed against such landlord, or a successor in interest occupying no higher position, and such landlord or successor put to an action to regain possession. In such action, the landlord, not having aided his tenant in the defense of the former action, is not, I think, estopped by the judgment against his tenant. The petition filed by Flood does not assert that McInturf was ignorant of the institution of the action against his tenant, Woolford. In its present form the petition in this respect seems to me insufficient to show reason why the writ of possession should not issue and be executed, quoad Flood's rights as purchaser from McInturf. To allow a landlord, knowing the institution of an action of ejectment against his tenant in time to make defense, who does not defend, to open the judgment, is to permit such landlord to inequitably trifle with the plaintiff's rights. To so rule would allow a landlord, by repeated changes of tenants, to keep the plaintiff bringing actions and recovering fruitless judgments without limit. If in truth McInturf had no knowledge of the institution of the action by King against Woolford in time to defend, I do not at present think of any reason why Flood may not be allowed now to amend his petition in this respect, if he should desire to do so.

(D) Flood's rights as purchaser from H. M. Francis call for very little discussion. Francis was a party defendant to the action, duly served with the original notice and declaration, against whom judgment was rendered in 1900. The authorities cited in opinion No. 1 in regard to the misspelling of the name Francis (14 Ency. Pl. & Pr. 300–1; 1 Black on Judgments [2d Ed.] § 213), to which may be added 1 Freeman on Judgments (4th Ed.) § 50a, seem sufficient for holding that the judgment is valid as to Francis. If so, I do not now think of any reason why it should not be binding on a pendente lite purchaser from Francis. It follows that the petition of Flood, in so far as he claims rights under Brown's purchase in 1899 from H. M. Francis, presents no sufficient reason for refusing to allow the writ of possession to be executed.

(E) We must now consider Flood's rights to the coal, timber,

etc., as the grantee of Brown under the Lohnert patent. It is clear that the compromise between Brown and Davis, Francis and McInturf, does not deprive Flood of certain rights under his independent title. In any action between King and Flood, the judgment of 1900 would estop Flood from relying on the title derived by Brown pendente lite from Davis, if he was in truth properly served with process, and from Francis and McInturf, but it would not estop him from relying on his own independent title. The question therefore is whether or not Flood's right under the Lohnert grant prevents King from being put into possession of the land, in its entirety, that was claimed by Davis, Francis, and McInturf at the institution of the action. Flood is not now in actual possession of the coal, timber, etc., but I shall discuss the question on the assumption that his position is as strong as if he were in such actual possession.

The question here presented is rather a nice one, because of the fact that Flood has an independent title, and one that has not been adjudicated between him and King. But the decisive point seems to me to be that if Flood is now in possession, or if he should take actual possession prior to the execution of the writ, he obtained or will have obtained such possession as the pendente lite purchaser from Davis, Francis, and McInturf. Does the fact that Flood has an independent claim of title, and that the recognition by Davis, Francis, and McInturf of the strength of this title was the cause for the surrender by them of the coal, etc., sufficiently differentiate this case from one in which the pendente lite purchaser merely pays money to the defendant in possession, and has no title except that of his pendente lite vendor?

Let us now consider some illustrative possible cases:

(1) Suppose A., B., and C. each have an independent claim of title to a tract of land, of which B. is in possession; that A. sues B. in ejectment and recovers judgment. If, pending execution of a writ of possession, B. remaining in possession and defying both A. and C., the latter should petition the court to withhold the writ, open the judgment, and let him (C.) in to defend, I should say that C.'s prayer should be refused. The important question at issue is whether A. or C. has the right to be defendant in the prospective litigation between them. As between them, it seems to me that A. has been the more diligent, and that he is entitled to the fruit of his diligence in successfully suing B. By his judgment A. has acquired a right to the possession as against B. C. has not acquired such right. So far as C. is concerned, B. would rightly remain in possession until C., as plaintiff, sues B. and recovers judgment. The higher position is occupied by A., and he should be put into possession, and C. required to bring his action against A. This conclusion is further fortified by the fact that to hold otherwise would leave B., without right, to continue to hold possession as against A. pending the settlement of the controversy between A. and C.

(2) Now let us take a case—which is the one at bar—where pending suit B. and C. compromise. B. conveys, say, a specified

number of acres of the land to C. in consideration of a release by C. to B. of the remainder, and C. takes possession of his part of the land. Now C. got possession from B. C. could not, in the case supposed, have obtained possession otherwise than by the act of B. No matter what the consideration, it was B., pendente lite, and not at liberty to act without regard to A.'s rights, who gave to C. the possession. C. had and still has a claim of ownership independent of B., but the possession acquired by C. was necessarily derived from B.

(3) Suppose A., B., and C. have each an independent title to a tract of land, and that A. sues B., who is in possession, and recovers judgment against him. If, pending the issue of writ of possession, B., without collusion with C., departs from and leaves the land vacant, and C., finding it vacant, takes possession, I think the weight of authority is that his prayer that the writ be not issued would avail. He would be in possession under an independent claim of ownership. See Mr. Freeman's note to Howard v. Kennedy, 39 Am. Dec. 313; 2 Freeman, Executions (2d Ed.) § 475; Sedgwick & Wait (2d Ed.) § 562. This case differs from the one at bar in this respect: When B. departed and vacated the land, either A. or C. was at liberty to go and take possession. By the vacation of the land by B., A. had secured what he sued for, and his right to take possession has been lost by reason of a want of diligence on his part. Where a defendant pendente lite gives possession to a third party, the plaintiff is not chargeable with any want of diligence. But when a defendant simply retires and leaves the land vacant (always assuming that there is no collusion), the plaintiff can at once take it into his possession. If he does not, and if he loses in the race of diligence with C., he must simply abide the result. In other words, C., having a claim of ownership, has taken peaceable possession of vacant land. B. is an entire stranger to C., and the latter should not be bound by A.'s judgment against such stranger. But in the case at bar Flood has or may get possession by no want of diligence on the part of King. Flood's claim of title under the Lohnert grant remains unadjudicated and unaffected, but Flood's possession has been acquired pendente lite under and by virtue of the possession of Davis, Francis, and McInturf, and this has been adjudged unlawful as against King. If Brown had fought the action of ejectment he brought against Davis, Francis, and McInturf to a conclusion, had obtained judgment, and had thus obtained possession, I think that the writ sought by King should not be executed against Flood. But there is some difference between this supposed case and the case at bar. Under this supposition, Flood would be in possession not under, but in spite of, the former possession of Davis et al. And Flood's vendor, Brown, would have shown himself more diligent in prosecuting his action against Davis et al. than was King in prosecuting his action against them. But when Brown ceased to prosecute his action at Abingdon, and was let into possession, or given leave to go into possession, of the coal, etc., he retired from his race of

diligence with King, and necessarily became, as far as King's rights are concerned, a purchaser pendente lite from the common enemies, Davis et al. As Brown pro tanto surrendered to the parties in possession, and gave to and took from them, Flood's rights ought not to be as high as if Brown had fought out the battle and gained a complete victory.

(F) No discussion of the rights of Davis, Francis, and McInturf under their deeds from Brown seems necessary. They bought and thus secured the Lohnert title before judgment. It was not the fault of the plaintiff that they did not set up and rely on this title in the action.

From what has been said, it follows that the demurrer to Flood's petition would be sustained, except for the fact that the question as to his rights as purchaser under Davis must await the settlement of the truth of the proposed amendment of the return of service of process on Davis.

(IX) Petition of W. M. Ritter.

This petitioner in 1902 purchased a tract of land, embraced within plaintiff's recovery, from Cora McInturf, not a party defendant to King's action. When King's action was instituted, Mrs. McInturf had living on the land as her tenant Levi Woolford, a judgment defendant, as to whom the service of process was validly made. Her tenant gave her no notice of the institution of the action, and she alleges in an affidavit with this petition that she never heard of the action until after the judgment had been rendered. The petitioner is now in possession. It is objected to this petition that Mrs. McInturf denies having heard of an action at Harrisonburg, where the action of King v. Davis et al. was instituted. I do not read her affidavit as thus quibbling. I think she means to state and does state that she was ignorant of the institution or pendency of the action until after judgment. Under this statement, she would herself have a clear right to have the judgment opened, and execution of the writ of possession suspended. And no reason occurs to me why Ritter has not this right as Mrs. McInturf's vendee. He does not allege that he was ignorant that judgment had been rendered against the tenant, Woolford, when he made the purchase, but this seems to me of no import. Mrs. McInturf's right, which she had in 1902, to open the judgment against Woolford, would be of little value if she could not transfer this right to her vendee of the land. Somewhat analogous to this question is the settled principle that an innocent purchaser for value not only gets a good title, but can pass such good title, except back to his vendor, to a noninnocent vendee. And moreover Ritter is not in any sense noninnocent. He had neither the right nor any interest to lead him to defend King's action until after judgment. Being from the date of his purchase quietly in possession, he had a perfect right to remain quiescent until King took steps to disturb his possession. The demurrer to this petition must be overruled.

(X) Petition of G. L. Blankenship.

Every question here raised has been discussed. This petitioner was a pendente lite purchaser from Cyrus Blankenship. The right to amend the return of service of process as to Cyrus Blankenship is here the same as against Flood, as purchaser from Reese Davis. (VIII, A, ante.) It follows that this petition presents no reason why the writ of possession should not be executed as to G. L. Blankenship as to the land purchased by him from Cyrus Blankenship; if the amended return of service of process be true in the one point of fact in which it differs from the original return.

(XI) Petition "A" of Ritter Lumber Company.

(1) Trees on Waters of Elk Creek.

The first question raised is as to the timber on the three tracts on the waters of Upper Elk creek. The facts alleged are that, prior to the institution of the action, Elijah Dotson (David and Ransom Dotson joining) conveyed a number of standing trees, with rights of entry, etc., to Sibley. By a series of conveyances, no one of the successive owners being a party to this action, made after the institution of the action, the title to these trees was vested in the petitioner. After the conveyance of the trees to Sibley, Elijah Dotson made conveyances of parts of the land on which the trees stand, excepting the trees from such conveyances, to John Dotson, Jane Mounts, Marinda Hurley (formerly the wife of Robert Hurley), and to David, Ransom, and Bazil Dotson. Leaving any other question out of view, it may be considered that King is now entitled to have his writ of possession issued and executed as against Bazil, David, and Ransom Dotson. The petitioner prays that no such writ issue, or, if it do issue, that the rights of petitioner be guarded. The petitioner claims by title arising ante litem. It is not alleged that the petitioner is now in possession of these trees, and, considering the economic and practical objections to felling trees in advance of means of transportation to market, I assume that the petitioner does not now intend to take such actual possession if its present position can be saved to it. By judicial decision in this state, standing trees are considered real estate. Stuart v. Pennis, 91 Va. 688, 22 S. E. 509. After a landowner makes a conveyance of standing trees and rights of entry, etc., retaining himself the remaining interest in the land, it seems to me that the grantor cannot be considered as in either actual or constructive possession of the trees. Nor can the grantee of the trees be considered as in either actual or constructive possession until at least he is actually engaged in the work of felling the trees. I should here say that I use the term "constructive possession" as necessarily implying a partial actual possession. For a discussion of the propriety of thus using the term, and for differentiating between constructive possession and mere seisin in law, or right to possession, see 3 Va. Law Reg. 765.

If the petitioner were in possession, or if it were to take possession of the trees prior to the execution of the writ of possession,

there would be no difficulty. The marshal will not, and will be instructed not to, eject the petitioner if found in possession of the trees. Being in possession by title arising ante litem, there is no question in my mind as to the propriety of such instruction to the marshal. To prevent possible wrong to the plaintiff, and in the interest of peace, my present idea is that the agents and employés by whom petitioner takes possession of the trees, if it does take such possession, must not be any of the judgment defendants. In other words, the instructions to the marshal should direct that the judgment defendants are to be put off of the land, even if they be then engaged as servants of the lumber company in felling these trees. But as the petitioner is not in and may not take possession, the question is as to the right of this court in this proceeding to grant the prayer of the petition or to give any relief. What rights, if any, petitioner may have in equity, and what it may accomplish now or hereafter by some independent action at law, are questions not now presented for discussion. But in this proceeding this court, as I think, is without the power to grant any relief to petitioner.

(1) There is surely no reason shown why the plaintiff should not have his writ, and have the judgment defendants ousted, simply because a claimant to these trees (analogous to vacant land) has a title originating ante litem.

(2) The attempt to have put into the writ of possession a proviso to the effect that petitioner's rights shall not be affected is forbidden by several considerations:

(a) So to do is in effect to vacate pro tanto the judgment of a former term. It is true, the court, when rendering that judgment, had no jurisdiction of the owner of the trees. The trees were not "actually occupied" by any one in 1896, and Sibley, the then claimant, was not made a defendant. Acts 1895–96, p. 514, c. 497. But this want of jurisdiction does not appear on the record made up to the time of judgment.

(b) It is an established rule that writs of possession must follow the judgment. 2 Freeman, Executions (2d Ed.) § 471; Roscoe, Real Actions, 609; Sedgwick & Wait (2d Ed.) § 550; Va. Code 1887, § 3584 [Va. Code 1904, p. 1914].

(c) In reality what the petitioner seems to be asking of this court is tantamount to the issue of an injunction. In effect, petitioner asks, if King be put into possession of the land on which these trees stand, that he be enjoined from taking possession of the trees or from treating himself as in possession.

So far as this branch of the petition is concerned, I think the demurrer is well taken.

(2) Trees on and Right of Way over the 169-Acre Tract on Knox Creek.

The facts as stated are that prior to the action one John B. Justus conveyed these trees to petitioner's remote grantor. No one of the successive owners of these trees is a party to the action. Also prior to the action Justus conveyed the remaining interest in the land to the judgment defendant, Cyrus Blankenship. After the ac-

tion was instituted, Cyrus Blankenship conveyed his interest in the land to G. L. Blankenship, who granted a right of way over the 169 acres for the purpose of carrying timber cut from other lands over and across the tract in question. This right of way has been granted to petitioner, and it is now using it; having a tramway constructed across the 169-acre tract, over which timber from other tracts is being carried. No new question is here presented. In so far as petitioner's use and occupancy of the right of way is concerned, the petitioner has title under a pendente lite purchaser, and, subject to ascertainment of the truth of the proposed amended return as to Cyrus Blankenship, is bound by the judgment. It is true that it is laid down that ejectment does not lie for an easement or other incorporeal hereditament. But if so, this is no reason why an actual occupancy and use of the soil secured pendente lite from a judgment defendant should be permitted as against the successful plaintiff. While it may be that the marshal cannot deliver possession of an easement (and I do not commit myself unreservedly as to this doctrine), I see no reason why he cannot eject and oust from a tract of land the people who are unlawfully using such easement, and who have to be on the land in order to use it.

The question as to the trees on this tract does not differ from that discussed above. Mere use of a right of way across the tract on which the trees stand in transporting timber from other tracts is not, to my mind, possession of the standing trees on this tract. In view of the fact that petitioner may take an actual possession of these trees, and be in such possession when the marshal arrives to execute the writ of possession, it will be proper to instruct him not to oust petitioner in such event, as petitioner's title to these trees is in no way affected by the judgment. In this connection, it is not improper for me to express my present opinion that even in such event the petitioner will not have a right, after execution of the writ as to the landowner, to continue to transport timber from other lands across this tract.

So far as this branch of the petition is concerned, the demurrer seems well taken.

(3) Trees on the 1,235-Acre Sibley Tract.

Sibley, not a party to the action, claiming this tract, conveyed these trees to petitioner in 1899. The land here is the same of which Archibald Justus, a judgment defendant, as tenant of Sibley, was in possession at the time the action was brought. Sibley's rights have been discussed. Inasmuch as the writ of possession against Archibald Justus will not be executed as to this tract, and as Sibley's present tenant will be left in undisturbed possession, it does not seem necessary now to take any action as to this branch of the petition, unless it be proper to now let the petitioner in along with Sibley to defend the action. Petitioner is not in possession of these trees. I do not believe that this law court can, on the motion of a mere claimant of real estate (petitioner), who is himself out of possession, require that an adverse claimant (King),

also out of possession, be the plaintiff in ejectment. To allow petitioner to defend the present action is in effect to force King to assume the position of plaintiff as to one not in possession. While King may, if he so desires, bring ejectment for unoccupied land against a mere adverse claimant (Code 1904, p. 1404, § 2726), I do not understand that he can be required so to do by the law court. It may be argued that if petitioner, being so situated that it could take actual possession of the trees without let or hindrance from King, were to file a bill in equity for the purpose, King would be temporarily restrained from cutting the trees, and would be required, as plaintiff in ejectment on the law side, to litigate with petitioner the title to the trees. But assuming the soundness of all this, and without expressing an opinion thereon, the power of the equity court, if it exists, to require King to sue petitioner in ejectment, is strictly an equitable power, which arises as incidental to petitioner's right to an injunction pending the result of such litigation. If the argument above suggested be sound, it is distressingly technical that the petitioner must be turned away from the law court, and required to obtain from the equity side of the court such an order as is above mentioned, merely to get back into the law court. But such seems to be the inevitable result of the want of power of the law court, and of the rigid separation of the equity and law jurisdictions of this court required by the rulings of the Supreme Court. So far as this branch of the petition goes, the demurrer is well taken.

What has just above been said applies also as to the trees standing on the land claimed by Robert Hurley, and the tracts claimed by John Dotson and Jane Mounts.

(XII) Petition "B" of Ritter Lumber Company.

The facts here set out are that Reese Davis, a judgment defendant, on October 24, 1901, after judgment conveyed the surface of a tract of 100 acres to one Riley Lester, who in 1904 conveyed said interest in said land to petitioner; that petitioner is now in actual possession thereof; that the lumber company was not in existence until after the judgment of 1900 was rendered; and that Riley Lester did not have any knowledge or notice of said judgment "until long after it was rendered."

I have not given the question full consideration, but let it be assumed for present purposes that since January 24, 1890, a judgment of a federal court in this state which is not docketed in the county where the land lies is not notice to and does not bind an innocent purchaser who acquires title for value after such judgment is rendered. See Act Aug. 1, 1888, c. 729, 25 Stat. 357 [U. S. Comp. St. 1901, p. 701]; Acts Va. 1889–90, p. 22, c. 23. If this be sound, it rests on the theory that a judgment in ejectment, as well as one for money, falls under section 3570 of the Code [Va. Code 1904, p. 1906], and also on the theory that, when judgment has been rendered, although it may not yet have been carried into execution, the action is no longer pending, in the sense that it imports notice to all persons dealing with the parties to the action

There may be room for discussion as to both these questions, but this petition is not so framed as to raise such questions. There is no sufficient allegation as to Lester's innocence of knowledge at the time when he purchased. "Long after" is entirely too indefinite and ambiguous. The judgment was rendered in June, 1900. Lester purchased in October, 1901. Whether or not he was a bona fide purchaser for value does not appear, nor does it appear when he became a complete purchaser. I may say here that my present opinion is that want of knowledge of the judgment on the part of petitioner need not be alleged, in so far as the questions above suggested are concerned. Where an innocent purchaser for value gets good title, he can pass equally good title, ordinarily, to a non-innocent vendee.

The question as to the right of plaintiff to amend the return of service of process as to Reese Davis need not be here discussed. If petitioner is bound by the judgment, the right to amend seems to me to exist as in Flood's case. If petitioner is not bound by the judgment, the amendment will not affect it.

Subject to an ascertainment of the truth of the proposed amendment as to Reese Davis, the demurrer to this petition will have to be sustained.

If, acting without delay, counsel desire to file an amended petition, I think, perhaps, this should be allowed. But therewith should be filed certified copies of the deed from Davis to Lester, and of the deed from Lester to petitioner. If for no other reason, a description of the tract should be furnished, so that, if petitioner should be held to have a right to have its possession of the surface of this tract left undisturbed, the boundaries of the tract can be specified.

(XIII) The Motion to Amend Return of Service of the Notice of July 11, 1898.

This notice was to the effect that plaintiff would on a day named ask leave to amend his declaration, "giving more specific description of the premises declared for." The return of service made is imperfect as to some of the defendants, and plaintiff moves to be allowed to amend the return. I understand that the defendants resist this motion, and I think that the motion should be overruled. The right to amend the declaration existed, if at all, without giving any notice whatsoever of intent to ask leave to amend. If no such right existed, the giving of the notice did not give the court jurisdiction to render judgment in accordance with the amended declaration. Hence it is, at least on this side of the court, entirely immaterial whether such notice was given or not.

It may be that some of plaintiff's opponents will seek relief in equity, and that plaintiff is of opinion that in such event his position will be stronger if he is here allowed to amend, and show that this notice was validly served on all the judgment defendants. But even if so, and aside from the fact that such evidence can be as well given in such equity proceeding as here, I do not perceive any reason why this court should stay its proceedings

and enter upon an inquiry which can have no possible bearing upon the questions presented in this court. If plaintiff is entitled to execution of the judgment as to any one, such right exists independent of the fact that said notice was or was not served. If any of plaintiff's opponents is entitled to any relief in this court, he is likewise entitled thereto without reference to the service or nonservice of such notice.

(XIV) Issues of Fact as to Proposed Amendment of Original Return.

A question of some interest will arise if any defendant or other interested person desires to contest the truth of the proposed amended return of service of the original notice and declaration. Inasmuch as no one has a right to deny the truth of the original return on the law side of this court, I think the issues of fact should be as clearly defined as possible, and no evidence admitted except such as tends to prove or disprove some fact wherein the amended return differs from the original. Reese Davis and persons claiming under him, for instance, should, I think, be confined to evidence tending to show that Davis' wife was not a member of his family on June 4, 1896.

The motion of plaintiff to be allowed to amend, accompanied by the verified amended return, is, I think, a sufficient pleading to tender the issues of fact as to the truth or untruth of the proposed amended return. The defendants Cyrus Blankenship and Reese Davis, and persons in interest claiming under them, should be allowed to file, if they so desire, jointly or severally, traverses of the truth of the proposed amendment, within the limits above pointed out. The order to be made should fix a reasonable time within which such defensive pleadings must be filed. If no such defensive pleadings are filed within the time fixed, an order should be made allowing the amendment of the return.

(XV) Issues of Fact as to Petitions.

As to those petitions as to which demurrers are not now to be sustained, the plaintiff should be given an opportunity, if desired, to contest any of the essential facts stated. The order should give him a reasonable time within which to file traverses (perhaps best after the form of answers in chancery) to such petitions.

In re ADAMANT PLASTER CO.

(District Court, N. D. New York. May 10, 1905.)

No. 1,792.

1. Corporations—Mortgages—Release—Construction.

A manufacturing corporation owning plants at S. and H. executed a mortgage to secure bonds on its real and personal property in both places, describing it as all factories, structures, docks, appliances, and fixtures on each and all of the premises in any wise appertaining to and con-

nected with the mixing chemical and calcining plant on such premises, and every interest, property, and thing necessary or convenient for the use and enjoyment thereof. The bonds were not sold prior to the corporation's bankruptcy, but were pledged as collateral security for demand notes given by the corporation; and after a sale of the corporation's property at H., with the exception of certain personal property, consisting of furniture, etc., such personal property was removed and stored by the corporation, and the bonds were all stamped with a release of the property at H. *Held*, that such personal property could not be regarded as appliances or as property fairly appertaining to and connected with the plants on the premises, or necessary for the use thereof, and was therefore not covered by the mortgage.

2. SAME—AFTER-ACQUIRED PROPERTY.

Such mortgage did not cover furniture at S., nor raw materials or manufactured products acquired after its execution, as against general creditors of the bankrupt corporation, in favor of bondholders purchasing the bonds with notice from the bankrupt's trustee.

This is an appeal from, and the review of, a decision of C. L. Stone, Esq., referee in bankruptcy, as to the title of certain personal property claimed by Marcus D. Botsford as trustee for certain secured creditors of the Adamant Plaster Company, the above-named bankrupt, as against Charles T. Blanchard, as trustee in bankruptcy of the said Adamant Plaster Company.

Newell, Chapman & Newell, for M. D. Botsford, claimant.
Gannon, Spencer & Michell, for trustee in bankruptcy.

RAY, District Judge. The bankrupt, Adamant Plaster Company, is a domestic manufacturing corporation, and was incorporated in the year 1900. April 26, 1904, a petition in bankruptcy was filed against the said corporation in the United States District Court for the Northern District of New York, and Charles T. Blanchard was appointed receiver of all its property. In August, 1904, the said corporation was duly adjudicated a bankrupt, and the said Charles T. Blanchard was duly elected trustee of the property of such corporation, and is still acting in that capacity. May 1, 1901, the said Adamant Plaster Company duly executed a mortgage upon its real estate and personal property mentioned therein in the language hereinafter quoted, in and by which one Manning C. Palmer was named as trustee. This mortgage was given to secure an issue of bonds amounting in the aggregate to the par value of $50,000, each bond of the denomination of $500. Attached to each of the bonds were 20 coupons, for $15 each, payable at the American Exchange National Bank, Syracuse, N. Y., on the 1st day of May and the 1st day of November of each year. This mortgage was duly recorded July 18, 1901. The bonds issued under this mortgage were not sold prior to the bankruptcy of the company, but were pledged to different parties at different times as collateral security for the payment of demand notes given by the Adamant Plaster Company. No interest was ever paid upon either the mortgage or the bonds, nor were any coupons ever presented for payment or paid. After the bankruptcy of the corporation and the appointment of a trustee, one Botsford, as trustee for the parties holding the bonds as collateral then to the extent of $18,500, purchased the

bonds for $10,000, free and clear of all liens, and paid that sum therefor. The circumstances are such as to show he knew all the facts. In November, 1903, $332 of interest was paid upon the notes above mentioned, and no interest was paid thereon thereafter. The mortgage covered real estate owned by the Adamant Plaster Company situated in Syracuse, N. Y., and also the real estate of said corporation located at Hastings upon Hudson, N. Y., and such mortgage also, in its granting clause, contained the following language:

"All and singular the following real and personal property and franchises and rights of the said party of the first part, viz.:" (Here follows the description of several parcels of real estate.)

Then follows the following:

"All factories, structures, docks, appliances and fixtures upon each and all of the said premises hereinbefore described in any wise appertaining to and connected with the mixing chemical and calcining plant upon such premises, and every other right, title and interest, property and thing which is necessary or convenient for the use and enjoyment thereof, and all additions and betterments thereto, whether the same be now held or shall hereafter be acquired by the party of the first part."

On the 12th day of December, 1903, the said Palmer, as trustee named in said mortgage, duly executed and delivered a release from the mortgage of the real estate at Hastings upon the Hudson, which release recited that it included the engine, boiler, main line of shafting, main building, freight elevator, and the buildings on said lands. On each of the bonds, when finally pledged, and when purchased by Botsford, trustee for certain parties, and a claimant here, was stamped the following: "This bond is not a lien upon the Hastings upon the Hudson, N. Y. property it being released. Adamant Plaster Company, by N. F. Sholes." Said Palmer never took possession or attempted to take possession of the property described in the mortgage, or of any part of it, as, by a specific clause in the mortgage, he had the right to do after default in payment of interest on such bonds.

None of the personal property in question here falls within the description of the property enumerated in the granting clause of the mortgage, and above quoted, unless it be a portion of the property stored at the Hastings plant and the office furniture. The personal property at that plant not sold with it was stored after the real estate at that place was released from the mortgage and disposed of. It is insisted that the personal property in store at the Hastings plant, if originally included in the mortgage, was released and discharged from the lien of the mortgage, if it ever was a lien, by reason of the fact that it was severed, separated, and detached from the plant and property (real estate) with which it was connected, and in connection with which it was used, and set apart and stored as personal property belonging to the Adamant Company. The personal property in question here cannot be considered as fixtures or as part of the plant at Syracuse. None of it now in dispute had or has that character. The referee finds as a fact, and this court agrees with the finding, that, if any of the property may

be considered as included within and termed "appliances," it cannot be considered fairly as "appertaining to and connected with the plants upon said premises," or as property "necessary or convenient for the use and enjoyment thereof," or as "additions or betterments thereto." The referee finds, and this court agrees with the finding, that the language of the mortgage was intended to cover appliances, fixtures, property, and plant used for manufacturing the product known as adamant, and such replacement, additions, and betterments thereof as might be thereafter made, and that the language does not include either the product manufactured or the raw materials to be manufactured by the use of the machinery and plant. The referee also finds that the words "necessary or convenient for the use and enjoyment thereof" mean the tools and appliances to be used as a part of the machinery and plant in connection with the manufacturing processes. The referee finds that these words do not include, and were not intended to include, the articles of personal property in question in this proceeding.

Nearly all of the property in question here was acquired by the bankrupt subsequent to the giving and recording of the mortgage. It is purely personal property, and was never attached to the real estate, and never in any sense or under any construction became fixtures. It is described in two schedules, A and B, attached to the affidavit of one Michell. "A" describes the property at Syracuse, and it consists of certain office furniture of the value of $325, and of certain bags and raw material to be used in the manufacture of adamant. Schedule B describes the property in store at Hastings. When the real estate and part of the personal property at Hastings were sold, the proceeds went to release the bonds issued and pledged as before mentioned.

The claim is, on the one hand, that the lien of this mortgage attached to all after-acquired property used by the Adamant Company in connection with these plants, and manufactured therein, while, on the other hand, it is contended that the mortgage never attached as a lien in behalf of these bondholders against after-acquired personal property.

When the real estate at Hastings upon the Hudson was sold, with the plant connected therewith, there was excepted from the sale the property described in Schedule B, valued at $1,300. This was thereafter stored as personal property, and held as such. It never was connected with the property or plant at Syracuse, or taken there. When the Adamant Company was adjudged a bankrupt, it owned all these bonds with the words stamped thereon: "This bond is not a lien upon the Hastings upon the Hudson, N. Y. property it being released. [Signed] Adamant Plaster Company, by N. F. Sholes." Sholes was the president of the company. Botsford, as trustee, took them with notice of that fact. True, they had been pledged to various parties before that, but no party through whom Botsford got title took or held any of such bonds, except with that notice thereon, and with full knowledge that such bonds were not a lien on the property at Hastings upon the Hudson, or any part of that property or plant. It is clear that the mortgage and

bonds had ceased to be a lien (if ever they were) on the property described in Schedule B. So far as the mortgage ever covered this property (Schedule B), it was, as a part and parcel of the property and plant at Hastings, mortgaged as such, as a whole, and by general language; and when that was sold to other parties, and these particular articles were reserved and stored, and separated and severed from the main thing of which they had formed a part, and notice was given to the subsequent purchasers of the bonds that such bonds were not a lien thereon, and such purchasers took with full notice of that fact, they are estopped from claiming a lien thereon.

The property described in Schedule A is all after-acquired property (that is, property acquired after the execution of the mortgage), unless it be the furniture. While certain corporations may give mortgages on after-acquired property, real and personal, and the lien of such mortgage will attach thereto the moment such property comes into the possession of the mortgagor, such rule as to personal property does not extend to all corporations. Railroad corporations are within the rule, but the reasons for the rule exclude from its operation such a manufacturing corporation as this. Well may the rule extend to every corporation serving the general public, and compelled so to do by its character and the nature of its business; and here we might include all common carriers, waterworks companies, electric light and telephone companies, and all quasi public and public utility corporations; but there is no more reason for extending the rule to general manufacturing and mercantile companies doing a general business than for extending it to individuals engaged in the same kind of business. In this case the reason of the rule wholly fails. Again, when Botsford, as trustee for certain creditors, took title, he took it from the trustee in bankruptcy, and took no greater title than he had—no greater title than the Adamant Company had at the time of its bankruptcy, as against its general creditors, to appropriate this after-acquired property to the payment of the particular notes for which these bonds were pledged as collateral.

Cook on Corporations (volume 3, p. 2322, § 857) says:

"A corporation mortgage may cover property which is acquired by the corporation after the mortgage is given. This is now the well-established rule. It seems to be contrary to the common law, or at least is a wide extension of common-law rules. It is due, however, to the necessity or public policy of preserving intact and holding together the whole of a railroad or system of railroads and other quasi public properties."

It will be noticed that this language confines this class of mortgages to quasi public corporations, or to that class of corporations sometimes called "public utility corporations."

The corporation here, the Adamant Plaster Company, was engaged in the manufacture of a certain article for general sale as an article of merchandise. It necessarily purchased and had on hand for purposes of manufacture certain articles such as are described in Schedule A, excepting the furniture. When manufactured, the manufactured article was to be sold, not kept for use or consumption on the premises in connection with the conduct of the business.

Taking the whole mortgage together, it is evident that it was no intended to create a lien in favor of these bondholders upon th materials on hand to be used in the manufacture of adamant. It equally clear that it was not the purpose to mortgage the manufac tured article. To so hold, and give validity to a mortgage made b a manufacturing company upon materials purchased to be manu factured, and upon the manufactured article, would deny the ge eral creditors selling materials to the company all remedy, or a least would subordinate them entirely to the claims of the bond holders, who by taking possession would cut off the general cred itors entirely. Railroad corporations and the public utility corpo rations referred to are not engaged in purchasing materials fo manufacturing purposes and in manufacturing articles for sal The source of revenue of such companies is not the sale of manu factured and finished products.

Again, there is a provision in this mortgage made by the Adamar Plaster Company under which the trustee named in the mortgag might have taken possession on default. Had he done so, it ma be that the lien of the mortgage would have attached to this afte acquired property from the time such possession was taken, unde the well-recognized principle that a mortgage upon property t come into existence or upon after-acquired property may, in equit be regarded as an agreement to give a mortgage when the propert comes into existence or when it is acquired by the mortgagor, an that equity in such cases will not require, as preliminary, an actio to compel the giving of a mortgage, but will treat the agreemen to give the mortgage as a mortgage, and enforce it as such. Mi chell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673. See, also, Ho royd v. Marshall, 10 H. L. Cas. 191; 5 Com. on the Law of Co porations, Thompson, § 6141. This rule, however, has no applic tion here.

Again:

"That a mortgage may cover future-acquired property of the mortgago an unmistakable intention to that effect must appear from the face of th instrument." Maxwell v. Wilmington Dental Mfg. Co. (C. C.) 77 Fed. 938.

Again, the trustee, Palmer, did not take possession on defaul Bankruptcy intervened, and a trustee in bankruptcy was appointe who took possession of all this personal property. Such truste then sold the bonds to the trustee for the bondholders, and, unde all the circumstances of the case, it would be inequitable and un just to attempt to assert a lien upon this after-acquired property o this particular nature in favor of these bondholders.

This case is within the principle enunciated in New York Se curity & Trust Company v. Saratoga Gas & Electric Light Com pany et al., 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132. It wa there held that:

"Where a mortgage by a corporation to secure the payment of the princip and interest of its bonds, such as this is, is made, although in terms purpor ing to include future earnings and products, it does not, as against gener creditors, operate as a lien upon such earnings until actual entry and posse sion under the mortgage by the mortgagee. This results from the stipulatio

in the instrument that until default the mortgagor shall have the use of the earnings in the conduct of its business, and that upon default the mortgagee may go into possession, exercise the corporate franchises, and appropriate the earnings to the payment of the debt secured by the mortgage. The right of the mortgagor in the meantime to the use of the earnings amounts practically to absolute ownership, and hence the mortgage cannot operate as a lien upon such earnings, to the prejudice of the general creditors, until actual entry and possession taken, and then only upon what is earned after that time. The lien of the mortgage upon future earnings is consummated, as against other creditors, only by the fact of the possession of the property, and cannot have any retroactive operation, since it would then deprive the unsecured creditor of the fund, upon the faith of which he may have given credit to the mortgagor during the time when the latter was permitted to deal with and use it as his own. The lien upon the earnings, in favor of the bondholders, attaches only upon what is earned after the time when the lien is perfected by entry and possession. This is the construction which has been given to corporate mortgages, expressed in substantially the same terms, by the Supreme Court of the United States, by the English courts, and by the highest courts of many of our sister states."

Here the trustee in bankruptcy represents the general creditors. The Adamant Plaster Company was purchasing materials to use in the manufacture of adamant, and was selling the manufactured article as its source of revenue with which to pay its help, running expenses, and for materials purchased. This class of property mentioned and described in Schedule A, aside from the furniture, answers well to the earnings in the case of gas and electric light company, as specified in New York Security & Trust Company v. Saratoga Gas & Electric Light Company, supra.

Again, it is well settled that, in mortgages purporting to cover after-acquired property, "the words of the mortgage are strictly construed, and no land or personal property is included, unless clearly within the meaning of the words of the mortgage." Cook on Corporations (5th Ed.) § 856, p. 2316. In the case now before the court the personal property claimed is not clearly within the meaning of the words of the mortgage. On this general subject, see, also, 5 Thompson's Com. on the Law of Corporations, § 6145.

These views are not at all in conflict with the general doctrine applicable to real estate, that if a person gives a deed of, or a mortgage upon, real estate which he does not at the time own, describing it with certainty, the deed or mortgage, as the case may be, if given for a valuable consideration, will take effect when the person executing the instrument becomes the owner of the land, or of any substantial interest therein. In such case there is no reason for the rule as to possession, but the holder of such a deed or of such a mortgage would take the land or acquire his lien subject, of course, to any intervening rights.

As to the furniture described in Schedule A, the proof is not clear that it formed a part of the property belonging to the Adamant Plaster Company at the time the mortgage was given. Clearly it is not a factory, a structure, a dock, an appliance, or a fixture in any wise appertaining to or connected with the plants mentioned in the mortgage. Is it property, or a thing either necessary or convenient for the use and enjoyment of the factories, structures, etc., on the premises described, or necessary or convenient for the

use and enjoyment of such premises, or of the plants on such prem ises? I think not, within the meaning of the mortgage. Th company never intended to mortgage its tables, chairs, stools, etc in its office, and deprive itself of the right to dispose of the sam or change the same at will. Had it intended to mortgage thi furniture, it would have been mentioned in more apt terms.

The order of the referee under review is affirmed.

UNITED STATES v. CITY OF SAULT STE. MARIE.

(Circuit Court, W. D. Michigan, N. D. March 23, 1905.)

1. MUNICIPAL CORPORATIONS — WATERWORKS — FURNISHING WATER — NEGLI GENCE—LIABILITY OF CITY.

Pub. Acts Mich. 1875, p. 57, No. 62, c. 11, § 1, as amended by Pub Acts 1879, p. 247, No. 245, gave to cities and villages within the state th right to establish public waterworks to supply water to the inhabitant and for fire protection, but created no liability for injuries occasioned b negligence of the municipality or its officers in the maintenance and us of its system. *Held*, that the providing of a water supply by a municipali ty under such acts was a governmental function, and carried with it n liability for negligence in its exercise.

2. SAME—CONTRACTS—POWER.

The city, acting under such acts, had no power to contract with th United States to maintain a specified pressure for fire protection on military reservation within the municipality's corporate limits, for th purpose of creating a liability to indemnify the United States for los sustained by the city's failure to maintain such pressure.

On Demurrer to Plaintiff's Declaration.

George G. Covell, U. S. Dist. Atty.

Geo. B. Holden, City Atty. (Warner & Sullivan, of counsel), fo defendant.

WANTY, District Judge. This is an action brought by th United States on a contract entered into with the defendant city on July 1, 1902, whereby the defendant agreed to furnish all th water required by the post of Ft. Brady, a military reservation o the United States established within the corporate limits of th defendant, until June 30, 1903, for 15 cents per 1,000 gallons, an at all times to maintain, by direct and continuous pressure at th pumps, or an equivalent pressure from the standpipe, a pressure o from 85 to 90 pounds. On January 3, 1903, while this contract wa in force, fire broke out in the barracks at Ft. Brady, which coul have been easily extinguished had there been water pressure of be tween 85 and 90 pounds, as provided by the contract, but there wa no water furnished by the defendant during the first two hours o the fire, and after that no sufficient force as provided by the con tract, and for that reason the property of the plaintiff, to the valu of $65,503.21, was destroyed. The declaration, after alleging th violation of the contract and the loss, states that the claim wa duly presented to the city, and payment refused.

The defendant demurs to the declaration, claiming that the defendant city, which is a municipal corporation, owning and maintaining as part of its municipal property a waterworks system, cannot, under the circumstances set out in the declaration, be liable for the loss by fire sustained by the plaintiff for failure to furnish water under the contract. Section 1 of chapter 11 of Act No. 62, p. 57, of the Public Acts of Michigan of 1875, as amended (Pub. Acts 1879, p. 247, No. 245), gave cities and villages within the state the right to establish a public system of waterworks for the purpose of supplying water to the inhabitants and for fire protection. The city of Sault Ste. Marie, then a village, in 1885 took advantage of this act, and established a system of waterworks. As no liability is created by statute for injuries occasioned by the negligence of municipal corporations in the maintenance and use of its waterworks system, in the absence of the contract relied upon by the plaintiff, no action could be maintained for the failure of the defendant to furnish a sufficient amount of water for fire protection. The providing a water supply as authorized by the Legislature under this statute is a function of government requiring the exercise of judgment and discretion, and carries with it no liability for negligence in its exercise. This is the doctrine of many authorities. Dillon on Municipal Corporations (4th Ed.) § 976; Springfield Fire & Marine Ins. Co. v. Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90; Vanhorn v. Des Moines, 63 Iowa, 447, 19 N. W. 293, 50 Am. Rep. 750; Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 665; Black v. Columbia, 19 S. C. 412–445, 45 Am. Rep. 785; Edgerly v. Concord, 62 N. H. 8, 13 Am. St. Rep. 533; Patch v. Covington, 17 B. Mon. 722, 66 Am. Dec. 186; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Brinkmeyer v. Evansville, 29 Ind. 187; Foster v. Lookout Water Co., 3 Lea, 42; Sievers v. San Francisco, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153. It is contended, however, that in this case there was an express contract, supported by a valuable consideration, by which the city undertook to insure the plaintiff an adequate supply of water, and that this contract was binding upon the city. The acts above referred to, under which the defendant was authorized to construct and maintain a system of waterworks, are applicable to all incorporated villages in Michigan. They impose no duty, and the erection and maintenance of such a system is entirely discretionary. Under the authorities above cited, the grant of such power must be regarded as exclusively for public purposes, and political in its character. The making of such a contract, with the obligation alleged to exist in this case, would be an attempt on the part of the officers of the city to create a liability which, in the absence of such a contract, cannot exist. It would seem clear that the officers of the city cannot impose upon the municipality any such burden. The city had no power to assume a liability by contract which is not imposed by law, and this contract of indemnity, if it existed, must be regarded as having reference to existing grounds of liability, and not as creating new ones, and to the extent it was attempted

to create a liability greater than was imposed by law the contract was ultra vires and void.

Dermont v. Mayor, 4 Mich. 435, was an action for injury done to merchandise stored in plaintiff's cellar by reason of the water from one of the public sewers of the city of Detroit, through negligence of the city, flowing back through his private drain into the cellar. This private drain was connected with the city sewer under an arrangement with the city by which the plaintiff paid annually the assessment fixed by the ordinance for the privilege. It was contended on the part of the plaintiff: First, that the city would have been liable in any event; second, that payment for the privilege of connecting with the sewer created liability on the part of the city, if none before existed. The court, in disposing of the case, after holding that no liability existed in the absence of a contract, said:

"Does the payment of the sum required by the ordinance create a liability if none before existed? If the payment by plaintiff imposed any legal obligation on the part of the defendants, it must be on the ground of an express or implied undertaking of the defendants to furnish ample drainage for his premises. From the case presented, such an undertaking was manifestly not contemplated by the parties; but that the sum paid was for the license or permission, and not for any express or implied obligation assumed by the defendants. No express contract is claimed, and we are at a loss to know upon what principle the court could imply one. * * * But, even suppose the defendants had made an express contract with the plaintiff to guaranty to him perfect drainage for the sum paid, it would not avail the plaintiff in this or any other action brought for its breach, because it would clearly exceed the powers of the common council, and therefore would not be binding on the defendants. The common council would manifestly have as much right to insure against damages by fire as against damages by water. Their acts and contracts are only binding on the city when they keep within the scope of their authority, and no such authority is conferred by the charter. A corporation and an individual, in regard to the power of making contracts, stand upon a very different footing. The latter, existing for the general good of society, may do all acts, and make all contracts which are not, in the eye of the law, inconsistent with the great purpose of his creation; whereas, the former, having been created for the specific purpose, not only can make no contract forbidden by its charter, which is, as it were, the law of its nature, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose."

In Vanhorn v. City of Des Moines, 63 Iowa, 447, 19 N. W. 293, 50 Am. Rep. 750, the court says:

"Indemnification against liability must always be regarded as having reference to existing grounds of liability, and not as serving to create new ones. Besides, the city cannot assume liability for negligence in cases where the law did not already impose liability."

Nashville v. Sutherland & Co., 92 Tenn. 335, 21 S. W. 674, 19 L. R. A. 619, 36 Am. St. Rep. 88, was an action brought by the plaintiffs to recover damages for breach of contract between the plaintiffs and the city. The plaintiffs conveyed to the city the right of way through their lumber yard for a sewer pipe to drain into the river a pond lying near plaintiffs' property, for the consideration of $150. The clause in the deed out of which the controversy arose is as follows:

"It is further agreed, and the city of Nashville binds itself, to have said sewer so constructed with a suitable valve as will prevent, in case of high

rise in the river, the flowing of water from the river back through the said pipe or sewer into the lot or premises of said Sutherland and Graves to their injury or damage."

The court says that the effect of this clause, if valid, "is to make the city an insurer of the property of the conveyors against injury or damage by reason of overflow through this valve and pipe." The city laid the pipe and constructed the valve in the fall of 1888. In 1890 an unusually high rise in the river caused an overflow through the valve and pipe, and submerged the property of Sutherland & Co., doing them much damage. The action was instituted by them to recover damages arising from breach of this contract. The court below charged the jury:

"That, if the board of public works and affairs accepted for the city this contract, and in pursuance of it entered upon the plaintiff's premises, and occupied the same by the construction of said drain or sewer, then the city will be bound by all the covenants and stipulations of the contract."

He refused to charge, as requested by the plaintiff in error, that:

"The city is only liable for such negligence as is imposed by law, and the officers of the city cannot bind it to a higher degree of care and skill and diligence than the law imposes. Before the city can be bound by guaranty of its officers, they must have the power, under the charter of the city, to bind the city by such guaranty."

The appellate court says:

"In both respects his honor the circuit judge was in error. It was within the power of the officers of the city to agree to put in any given kind of a sewer and valve (had they done so) as part consideration for the grant of right of way; but they could not, in the absence of charter power, bind the city by a guaranty that they or it would put in such pipe or valve as would prevent overflow to the injury or damage of defendants, and thus make the city insurers of property against such injury. The city is only liable for absence of reasonable care and skill in the execution of such work, and its officers cannot lawfully contract to bind it beyond this without express charter power not claimed or shown in this record to exist."

This case reviews the text of Judge Dillon, and cites a number of cases, and holds "that the board of public works and affairs could bind the city by contract so far, and no further, than it would have been bound by law."

The above cases have been selected from many which hold that officers of a city can bind the corporation by contract so far, and no further, than it would have been bound by law, and that no contract can be made by the officers of the city to increase its liability beyond what the laws under which it is created impose. There is no conflict between the holding of these cases and those cited by the plaintiff, which hold that a city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereign, and governs its people; the other proprietary, quasi private, conferred upon it not for the purpose of governing its people but for the private advantage of the inhabitants of the city itself as a legal personality. In the exercise of the powers of the former class it is bound to transmit its powers to govern to its successive sets of officers unimpaired. But, in the exercise of the powers of the latter class it is controlled by no such rule, because

it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules, that govern a private individual or corporation.

The case most strongly urged by counsel at the hearing was Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1, 44 C. C. A. 333, in which the above principles are quoted from the case of the Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518. In the case of Pikes Peak Power Co. v. City of Colorado Springs it was held that the purpose of the city making the contract under consideration was to enlarge its waterworks and increase its supply of water, and to furnish itself and its inhabitants with electric light, and that it was made in the exercise of its proprietary or business powers, and was controlled by the same rules that govern private corporations. This and the other cases cited by counsel, it seems to me, do not apply to the question in hand. As was said in the case of Nashville v. Sutherland & Co., supra, it was within the power of the officers of the city to agree to put in any given kind of a sewer and valve as part consideration for the grant of right of way, and such a contract would be binding. So in the case of the Pikes Peak Power Co. v. City of Colorado Springs the contract which was made for the enlargement of its waterworks by the city of Colorado Springs would bind the city as it would an individual, but when that contract is sought to be construed as one of indemnity for loss by water or fire it comes under a different rule, and its stipulations in that regard can have no binding force on the municipality, as such a contract is beyond the power of the officers to make.

The demurrer to the plaintiff's declaration should be sustained.

AMERICAN MUTOSCOPE & BIOGRAPH CO. v. EDISON MFG. CO.

(Circuit Court, D. New Jersey. May 6, 1905.)

1. COPYRIGHT—SUIT FOR INFRINGEMENT—DEMURRER.

In a suit for infringement of a copyright, where the bill makes profert of the copyrighted publication, it may be considered a part of the bill and examined on demurrer.

2. SAME—SUBJECTS OF PROTECTION—PHOTOGRAPHS.

A photograph which is not only a light-written picture of some object, but also an expression of an idea, or thought, or conception of the one who takes it, is a "writing" within the constitutional sense, and a proper subject of copyright.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 7.

Matter subject to copyright, see note to Cleland v. Thayer, 58 C. C. A. 273.]

3. SAME.

A series of separate pictures printed on a positive film from a number of negatives taken by a camera, and designed for use in a moving picture machine, and which, taken together, tell a connected story, constitute a photograph, within the meaning of Rev. St. § 4952 [U. S. Comp. St. 1901, p. 3406] and may be the subject of a copyright, although in taking the negatives the camera was placed in different locations.

4. Same—Infringement—Preliminary Injunction.

A preliminary injunction against infringement of a copyrighted photograph will not be granted where the proofs leave it in doubt whether defendant has in fact used or sold any copies of complainant's photograph, or has merely borrowed complainant's idea, and made other similar, but not identical, photographs of its own; so that an injunction following the allegations of the bill would have no operative effect.

In Equity.

The complainant applies for a preliminary injunction to restrain the defendant from an alleged infringement of a copyright of a photograph. The application is made upon the bill of complaint and ex parte affidavits taken by the complainant and the defendant. The defendant has also filed a demurrer to the bill. Obviously, the demurrer must be first disposed of, for, if it be good, there is no need of considering the application for a preliminary injunction. In its bill the complainant sets forth that Wallace McCutcheon and Frank J. Marion are the authors, and that by contract with them the complainant is the proprietor, of a photograph duly copyrighted June 24, 1904, made "upon a certain negative film, which said film was subsequently developed, and the photograph taken thereon printed on certain positive films." The manner of taking and using the so-called photograph is thus described in paragraphs 8 and 9 of the bill of complaint:

"(8) That the said photograph was taken by means of a camera owned by your orator, whereby successive views of the same object are taken from the same point of view, so that when the said views are successively thrown upon a screen by means of a projecting apparatus similar to a magic lantern, or otherwise caused to appear in rapid succession within the range of vision of the observer, the impression of actual motion is thereby given; and that the successive views were taken on one negative consisting of a strip of film of about 370 feet long, and that from said negative film positive films have been made by your orator in the course of its regular business, and sold or rented for the purpose of having them reproduced as above described to give the effect to the observer of actual motion, and that each view is not sold or rented by itself, but that the views are sold in numbers together, being printed on one strip of film for the said purpose, and constituting one photograph.

"(9) That the scene prominently depicted in said photograph occurred largely at Grant's Tomb on Riverside Drive in New York City, and represents a French gentleman, who, having inserted an advertisement stating his desire to meet a handsome girl at Grant's Tomb at a certain time, with the ultimate object of matrimony, appears at Grant's Tomb, and is beset first by one woman, soon by another, then by several in succession, who are so importunate in their attentions that he is forced to flee, and does run away from them, with the women in close pursuit. In successive scenes the chase is depicted across the country in various situations, until at last the Frenchman is overtaken by one of the pursuers who discovers him in hiding, and, at the point of a pistol, compels him to yield. That in order to produce the effect above described it was necessary for your orator to employ skilled artists to prepare the apparatus for taking the photographs, and for the manipulation of such apparatus skilled pantomimists were drilled for the performance of the action portrayed, who were rehearsed in their parts. That the manipulation of the camera and film, the cutting of the film, the reconstruction of the same in such manner as to produce most perfectly the illusion sought to be made, required high skill and involved much expense. That the positive film printed from the negative so produced, when thrown upon a screen by means of an appliance similar to a magic lantern, gives to the observer an amusing and entertaining picture of the scene described above."

The complainant also alleges that the defendant, "well knowing the premises, and knowing of your orator's copyright, and willfully disregarding your orator's rights in the premises, did, subsequent to the 29th day of June, 1904, and prior to the commencement of this suit, without your orator's consent and against your orator's wishes, wrongfully and fraudulently prepare, publish, and print for sale, and did sell at its place of business at said West Orange, in the county of Essex and state of New Jersey, and elsewhere within the United

States, copies of said photograph copyrighted as set forth by your orator, under the title of 'How a French Nobleman Got a Wife Through the New York Herald Personal Columns,' or other title or titles of like meaning, and threatens to continue such sale and publication of the said copyrighted photograph—all of which acts were, and still are, being done by the said Edison Manufacturing Company with intent to deceive and defraud the public and the buyers and users of the said photograph, and to deprive your orator of its just rights and profits under the said copyright; and the said defendant has published and sold, and is still publishing and offering for sale, the said photograph entitled 'How a French Nobleman Got a Wife Through the New York Herald Personal Columns,' or a like title, which is a substantial copy of and identical with your orator's said copyrighted photograph, and said defendant threatens and intends to continue such publication and sale."

The complainant further sets forth that it presents to the court as exhibits in connection with the bill one of the complainant's copyrighted photographs and also one of the defendant's photographs. The complainant prays, inter alia: (1) That the defendant "be compelled by an order of this court to deliver up to your orator all the copies of the said copyrighted photograph and all negative films thereof in the possession of the defendant or its representatives"; (2) for a perpetual injunction restraining the defendant from "making or causing to be made, using or causing to be used, selling or causing to be sold, any copies of your orator's said copyrighted photograph not purchased from your orator"; and (3) for an injunction pendente lite "to the same effect as heretofore prayed for in regard to a perpetual injunction."

There are two grounds of demurrer: First. "That it appears from said bill of complaint that said alleged photograph claimed to have been copyrighted by complainant is a positive photograph, printed, not from a single negative, but from a series of separate and distinct negatives, and is not, therefore, protectable as a photograph under the copyright statutes." Second. "That said bill of complaint is wholly without equity."

Kerr, Page & Cooper, for complainant.

Frank L. Dyer, Delos Holden, and Melville Church, for defendant.

LANNING, District Judge (after stating the facts as above). In Fowler v. City of New York, 121 Fed. 747, 58 C. C. A. 113, it was held that in an infringement suit, where profert of a patent is made in the bill, the patent will be regarded as a part of the bill, and will be examined on demurrer. There is no reason why the same rule should not be observed in the case of an alleged infringement of a copyright. Indeed, a comparison of exhibits in a copyright case on demurrer to a bill was made in Mott Iron Works v. Clow (C. C.) 72 Fed. 168. An examination of the complainant's positive film, of which profert is made by the bill, shows that it contains several hundred pictures, and that the camera in which were produced the negatives from which the positive film was printed occupied no less than seven or eight different positions, the first two or three of which, it is clear from the statements of the bill of complaint, were at or near to Gen. Grant's Tomb in New York City, the others being evidently in some country district. The defendant's photograph is also a positive film, evidently printed from negatives taken by a camera located at seven or eight different places, the first two or three of which were taken near to Gen. Grant's Tomb, or to a structure strongly resembling it; the remaining places being also in some country district. That the complainant's photograph is a reproduction upon a positive film of pictures on negatives taken

by a camera located at different points is confirmed by the language of the ninth paragraph of the bill, which states that "the scene prominently depicted in said photograph occurred largely at Grant's Tomb, on Riverside Drive, in New York City," and in the subsequent statement in the same paragraph that "in successive scenes the chase is depicted across the country in various situations." The title of the complainant's copyrighted photograph consists simply of the word "Personal." There is nothing in the proceedings for securing the copyright, as they are set forth in the bill, indicating that the scene depicted in the photograph "represents a French gentleman," or any other person who had "inserted an advertisement stating his desire to meet a handsome girl at Grant's Tomb." Consequently, there is nothing in the complainant's photograph, or in the title to its copyright, or in the proceedings for securing its copyright, in any wise suggestive of the title of the defendant's photograph, which is "How a French Nobleman Got a Wife Through the New York Herald Personal Columns." Still the allegation of the bill is that the defendant has published and sold, and is now publishing and offering for sale, copies of the complainant's copyrighted photograph, to which copies it has given the title above quoted. That allegation must, on the demurrer, be accepted as true, and, if the other allegations of the bill are sufficient to present a prima facie case of a valid copyright, the demurrer must be overruled.

The provision of the Constitution is that Congress shall have power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The word "writings" is not limited to the actual script of the author, but includes his printed books, and all forms of writing, printing, engraving, etching, etc., by which the ideas in his mind are given visible expression. A photograph may therefore be the subject of copyright, for it may give visible expression to an author's idea or conception. Whether a photograph of a building or any other object, which is a mere mechanical reproduction of the physical features or outlines of the object, involving no originality or novelty on the part of him who takes it, is the subject of copyright, may well be doubted. But if a photograph be not only a light-written picture of some object, but also an expression of an idea, or thought, or conception of the one who takes it, it is a writing within the Constitutional sense, and the proper subject of copyright. In this statement, I think, I am clearly within the reasoning of the Supreme Court in the case of Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349. In Falk v. Brett Lithographing Co. (C. C.) 48 Fed. 678, Judge Wheeler held that the complainant in that case, who had brought suit for infringement of a copyright of a photograph of a lady and her child, by placing the persons in position and using the position assumed by the child at the proper time to produce the photograph, had done that which entitled him to the benefits of the copyright law. In Falk v. Donaldson (C. C.) 57 Fed. 32, a photographer's copyright was declared to be valid in a case where

he had posed an actress, and arranged the curtains, screens, and lights so as to secure the expression and effect he desired. In Falk v. City Item Printing Co. (C. C.) 79 Fed. 321, the reasonable inference to be drawn from Judge Pardee's language is that a photograph which expresses on the part of the photographer originality and intellectual effort is the proper subject of copyright. From these authorities it must be concluded that a photograph which is the expression of an author's ideas or conceptions may be copyrighted to the same extent that any literary composition expressive of an author's ideas or conceptions may be copyrighted.

But in the case now considered the complainant's photograph consists of hundreds of separate pictures on a positive film printed from a number of negatives taken by a camera placed in several different locations. Can the positive film in such a case be regarded as a photograph? Section 4952 of the Revised Statutes [U. S. Comp. St. 1901, p. 3406] provides that "the author, inventor, designer or proprietor of any * * * photograph or negative thereof, * * * and the executors, administrators or assigns of any such person, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same." In Edison v. Lubin, 122 Fed. 240, 58 C. C. A. 604, in an opinion by the Circuit Court of Appeals of this circuit, it appears that a series of pictures representing the launching of a vessel were taken by means of a camera on a negative film, and that from such film a positive film was reproduced to be used in representing a moving picture. The camera in that case occupied but one position, though it was placed on a pivot on which it could be moved so as to keep the vessel, as it left its stays and moved into the water, within the field of the camera's lenses. It was held that the positive film reproduced from the negative thus taken was a photograph of one act or event, and therefore the proper subject of a copyright. In that case the defendant, who had secured a part of one of these positive films, but, without knowledge that it had been copyrighted, reproduced it on celluloid sheets, and sold them to exhibitors. Having held that the complainant's picture constituted a photograph, the defendant was of course enjoined from further infringement of the complainant's copyright. I am unable to see why, if a series of pictures of a moving object taken by a pivoted camera may be copyrighted as a photograph, a series of pictures telling a single story like that of the complainant in this case, even though the camera be placed at different points, may not also be copyrighted as a photograph. Though taken at different points, the pictures express the author's ideas and conceptions embodied in the one story. In that story, it is true, there are different scenes. But no one has ever suggested that a story told in written words may not be copyrighted merely because, in unfolding its incidents, the reader is carried from one scene to another. The recent advance in the art of photography now enables an author to tell the story of the launching of a ship in a series of pictures printed upon a single positive film in such manner that by throwing the pictures in rapid

succession upon a screen there is produced the representation of the moving ship. Such a series of pictures, so printed, the Circuit Court of Appeals of this circuit has said is a photograph within the meaning of section 4952 of the Revised Statutes. So here, the complainant's positive film contains a series of pictures that may be thrown in rapid succession upon a screen telling a single connected story of a man fleeing from a crowd of women. On the authority of Edison v. Lubin, as I understand that case, my conclusion is that the complainant's positive film is a photograph. By its bill the complainant alleges that Wallace McCutcheon and Frank J. Marion are the authors of the photograph; that by contract with the authors it has become the proprietor of the photograph; that it has had the photograph copyrighted; and that the defendant has made copies of the photograph, and is selling those copies to exhibitors. These allegations seem to establish a prima facie case for the exercise of the injunctive power of the court. Accordingly, the demurrer must be overruled as to both of the grounds on which it rests.

We are brought, therefore, to the consideration of the question as to whether a preliminary injunction should be allowed. The affidavits show that the defendant also has had its series of pictures duly copyrighted, and that they were taken by placing its camera at two or three points near Gen. Grant's Tomb and at other places in a country district in New Jersey. The defendant's pictures were taken at times different from those of the complainant, and by securing a different set of actors, dressed in different costumes. In the first scene of each photograph Gen. Grant's Tomb is visible, and before it appears a man, who is soon met by several women, who crowd about him, and from whom he attempts to run away. In each of the photographs are successive scenes showing the man and the women running down the roadway leading from the tomb, and across fields and through hedges, and jumping over fences and down banks. The two photographs possess many similar and many dissimilar features. The defendant denies having copied any part of the complainant's photograph. Its photographer says:

"The negative prepared by me did not and does not contain a single copy of any of the pictures of complainant's films. Each impression is a photograph of a pantomime arranged by me, and enacted for me at the expense of the owner of the film which I produced. My photograph is not a copy, but an original. It carries out my own idea or conception of how the characters, especially the French nobleman, should appear as to costume, expression, figure, bearing, posing, gestures, postures, and action."

In Munro v. Smith (C. C.) 42 Fed. 266, the question was whether the defendants should be enjoined from publishing a picture of "Old Sleuth" on the ground that they were infringing the complainant's copyright. Judge Shipman said:

"That the defendants got the idea from the plaintiff of having a picture to represent the common hero of all the stories, an apparently old countryman, dressed in an old-fashioned garb and style, and having a shrewd face, is probably true. But the two pictures are dissimilar. The attitude, the general expression, and the general appearance of the two figures are unlike; and

not only unlike, but very different. The variations are more than colorable. The defendants' picture is not an imitation, but their designer took the plaintiff's idea, and worked it out in a different way. I do not find an infringement, and the bill should be dismissed."

I am not prepared to say, on the evidence now before me, that the defendant has appropriated the substance of any part of the complainant's copyright. The copying of the complainant's photograph is asserted on the one side and denied on the other. There has been no cross-examination of witnesses. One of the best means of eliciting the truth concerning the contested question has therefore not yet been applied. It is not now clear that an order that the defendant deliver to the complainant "all the copies of the said copyrighted photograph and all negative films thereon in the possession of the defendant or its representatives" would secure the delivery to the complainant of anything, or that an injunction restraining the defendant from "making or causing to be made, using or causing to be used, selling or causing to be sold, any copies of your orator's said copyrighted photograph not purchased from your orator" would enjoin it from doing anything described in the bill of complaint. The burden of proof is on the complainant. It must establish by clear proof that the defendant is violating its rights. As the proofs now stand, there is doubt upon the question of its right to any relief whatever. Full proofs on final hearing may remove that doubt, and show it entitled to the relief which it seeks, but until such proof is had the court can do nothing.

The conclusion is that the preliminary injunction must be denied.

IVERSEN et al. v. MINNESOTA MUT. LIFE INS. CO. et al.

(Circuit Court, D. Minnesota, Third Division. August 11, 1902.)

1. INSURANCE—ASSOCIATIONS—CHANGE OF PLAN—DISSATISFIED POLICY HOLDERS—REMEDIES—ELECTION.

Where, on an insurance association's change of plan, a dissatisfied policy holder elected, in writing, to cancel his certificate and demand a return of the money he had paid, he was bound to pursue that remedy, and was not thereafter entitled to file a bill to compel the society to continue operations under its original plan.

2. SAME—CHARTER—AMENDMENT.

Where the charter of an insurance association specifically reserved to the officers the power of amendment in all save one particular, not affecting the association's plan of operations, the association had power to so amend such charter as to change from the assessment to the old-line plan, also expressly authorized by statute, over the protest of a minority of policy holders.

3. SAME—OBLIGATION CONTRACT.

A change from the assessment to the old-line plan of insurance by an insurance association did not constitute an impairment of the obligation of the contracts of members previously insured under the assessment plan, where no attempt was made by the association to repudiate contracts of such members, and the assessments levied thereon were not unreasonable.

[Ed. Note.—Mutual benefit insurance contracts, as affected by subsequent provisions and amendments of charter, constitution, or by-laws, see note to Supreme Council A. L. H. v. Champe, 63 C. C. A. 285.]

AMIDON, District Judge (orally). If it were not for the fact that I am closely pressed with work, I should be glad to formulate my views in this case in a written opinion. That, however, is impossible. I am confident that further study would in no way modify my judgment as to the correct disposition of the case. The only advantage it could have would be to furnish a more orderly statement of the grounds of the decision than is possible in an oral opinion.

At the outset, the charges of fraud and insolvency which are made in the bill must be put aside. They are wholly unsupported by the evidence. On the contrary, this record furnishes entirely satisfactory proof that the officers of the corporation have throughout acted with perfect good faith and in the exercise of an enlightened judgment. They have been actuated at all times by an honest desire to promote the interests of all the members of the association, and to secure their common welfare. What they have done has been justified not only by the condition of this particular company, but by the general experience of a large number of other like enterprises. Nor is there the slightest foundation for the charge that the defendant is insolvent. On the contrary, the record shows that its condition under the changes which have been made has steadily improved. This has not only been established by the statements of the company, but by the testimony of eminent actuaries, who are entitled to speak with authority on such a subject. Furthermore, it appears from the record that this company is licensed to do business in nearly all of the leading states of the Union, after a careful investigation of its affairs by the Insurance Departments of the several states. These considerations leave not the slightest ground for the charges of insolvency.

Before proceeding further with the merits of this case, it may be proper to consider who the complainant in the suit is. The complainant Wright is without any standing in court. When the changes in the company's method of doing business were adopted, he elected, with full knowledge of those changes, to cancel his certificate and demand return of the money which he had paid. This he did in writing, so that there is no chance to question the character of his action. Having elected to cancel his policy and demand back his money, that is the remedy he was bound to pursue. If he is entitled to any relief, it is to be found in an action at law for the recovery of the money which he demanded at the time of the rescission. His claim is therefore simply a money demand which has not been reduced to judgment. For this reason he has no standing in court to maintain a suit like the present. No other policy holders have in fact joined with the complainant in asking the relief demanded in the bill. My decision of the case, however, would be in no way changed if every person whom the complainant claims to represent were in fact a party upon the record. There remain for consideration two questions: First. Has the company departed from the fundamental law of its being, in a manner forbidden either expressly or by implication by its arti-

cles of association? Second. Has the company done anything to impair the vested rights of the holders of its certificates of insurance? It is not claimed by counsel for the complainant that the association has violated any express provision of its charter. He claims that the changes which were made in its method of doing business are so radical as to be forbidden by implication. In determining the force of that contention, one must look carefully to the charter itself. Many of the authorities which are cited by counsel for complainant in support of his contention are based upon charters which in themselves contain no express reservation of the right of amendment. The charter of the defendant company specifically reserves to the officers the power of amendment in every particular except one, and it is not claimed that they have made any amendment in that particular. The fact that the power to amend was restricted in one particular throws additional weight upon the scope of the power to amend in other respects. Of course, the power to amend did not invest the officers with authority to launch this association into an entirely new business. For example, it could give them no authority to engage in the business of fire insurance. It did, I think, however, reserve to them the power to make any amendment which was reasonably calculated to accomplish the purpose which the association had in view at the time of its formation. Nothing has been done by the officers which violates this principle. The changes which have been made relate entirely to the manner of doing the business, and not to its character. Under the old plan of assessment insurance, the members were required to make contributions from time to time sufficient to meet the death losses. In the early stages of the association that was found to be adequate, but as the average age of the members increased, and the death rate accordingly increased, the company was confronted with the impossibility of getting in new members. This is the history of all assessment insurance. As soon as the assessments become sufficient in amount to make the charge for the insurance approximately the same as is necessary to secure old-line insurance, persons seeking insurance will choose the certainty of an old-line policy in preference to the uncertainty of assessment insurance. An assessment company can only be kept going by steady increase of its membership, and, under the law that I have just adverted to, it becomes impossible to keep up the increase in membership. The defendant was required to meet this emergency. Three alternatives were presented: First, it could frankly admit that the plan of doing business upon which it entered must result in failure, and ask that its affairs be wound up and its assets distributed; second, it could pursue the original plan until bankruptcy actually occurred; or, third, it could adopt such a method of doing business as would perpetuate the life of the association. The complainant frankly says that the association was bound to know the probable result of its methods of doing business when it started, and that every member is entitled to have that plan of operation either carried out until insolvency ensues, or wholly abandon it and have the effects of the association distributed.

This contention wholly disregards the power of amendment that was reserved to the association. The whole question is, simply, how shall the members be required to make such contributions as will be adequate to meet the death losses and continue the company as a going concern? Under the assessment plan, the payments were made after the loss occurred. Under the new method, contributions are made in advance, sufficient, under the established rules of mortuary tables, to provide for losses as they shall occur in the future. The change simply relates to the manner of doing the business. It is in no way a change of the essential character of the business upon which the corporation entered at the beginning. The complainant virtually contends that he has a right to have this business carried on in a manner that will, in the light of a very large experience, result in insolvency, in order that he may take the desperate chance of dying before the insolvency actually occurs. The changes that were made have been approved by an overwhelming majority of the association. It would be remarkable, to say the least, if a minority of the members could insist that either the enterprise should be wholly abandoned, or that it should be carried on in a manner which would result in its ultimate failure, and force this course upon a majority of the members, who simply desired to make such changes as, in the light of a very large experience, were necessary to carry on the business of the company permanently, and accomplish the purpose which every member had in view at the time the association was formed. What has been said in regard to the change that was made in 1898 is equally applicable to the further change that was made in 1901. The latter change was simply a carrying out to completion of the first modification. It was authorized by express provision of the statute. The course marked out by the statute has been carefully pursued by the company. Complaint is made that proper notice of the meeting at which the change was adopted was not given to the members. The statute, however, expressly provided that in case the change was made at a special meeting a special notice should be given to the members; but it also contained power to make the change at any regular or annual meeting, and no requirement is contained in the statute on the subject of notice if the change was made at such a meeting. Upon general principles, the company was authorized to do at its annual meeting, without special notice, whatever it had power to do under the law. The meeting was very largely attended, and the vote was almost unanimous in favor of the change; there being only a single vote in opposition. The meeting was therefore legally held, and its action was legal, unless it is open to objection upon the second ground which I have already mentioned.

This brings us to a consideration of the question whether the changes which were made in 1898 and in 1901 impaired the obligation of those contracts which were executed before the changes were made. It is not claimed that there has been any repudiation of those contracts, or that the company was authorized by those changes to alter in any way the terms of the contract then in force. Nor has the

company attempted to make any such change. On the contrary, the evidence shows that it has carried out all those contracts fully, in accordance with their terms, and that every death loss has been promptly met. Complainants aver, however, that the amount of assessments has been increased. This, however, was exactly what was to be anticipated from the very nature of the association, and it cannot justly be claimed that the increase in the assessments is attributable to the change in the method of doing business. At the present time there is no complaint that these assessments are unreasonable. On the contrary, the evidence plainly shows that they are in themselves insufficient to pay the cost of the insurance granted under the old contracts. Complainant, however, contends that he was entitled to have the company go forward soliciting members under the old plan of assessment insurance, and that its failure to do so is an impairment of its contract. This contention has already been disposed of. A member had no right to insist that the association should continue its business upon a basis which would in all probability result in bankruptcy. The officers of the company assert that there is no intention of permitting the assessments upon the old members to become unreasonable. There is a large fund on hand pledged as a security for the payment of those early members. If by reason of lapses the assessments should at any time in the future become unreasonable, it will then be time for the injured party to complain. At the present time no such injury has been suffered. No contract has in fact been in any way impaired. It would be remarkable if the complainant were entitled to have this association wound up and its purposes defeated by reason, not of injuries suffered, but of injuries anticipated. There is nothing whatever in this case to bring it within the terms of the constitutional provision which forbids the passing of any law impairing the obligation of contracts. Neither the power nor the duty of the association to perform its contracts has been in any way lessened.

I ought not to conclude what I have to say in this case without making some reference to the forces that were behind this litigation at the time of its institution. Before the suit was brought, it was promoted for months by a man by the name of Carter. It is not necessary to review here the various incidents of his rascally persecution of this defendant.

Counsel for the complainant says that he is a crank. His conduct, however, cannot be covered by any such charitable mantle. He has not acted under a delusion. He is a dishonest rascal.

The evidence leaves no doubt that his conduct in this whole matter has been actuated by no delusion, but by what, if it had been carried to its ultimate purpose, would have been fundamentally criminal. He has not been seeking to rectify anybody's wrongs. His purpose has been to line his own pockets. The court cannot overlook the fact that he was the person in the outset who instigated this proceeding. I wish it understood, however, that these remarks cast no reflection whatever upon Mr. Byers. I have been impressed throughout this trial by his entire candor and fairness, and I believe that he has had no other purpose than to assert a right in

which he had entire confidence. I think the young attorneys, Messrs. Dillon & Goetz, were imposed upon by this man Carter. The case was one in which such imposition could easily be practiced. It was quite out of the ordinary line of experience. It was easy for him to juggle with the affairs of the company, and present them in such a way as would convince a person that the company had been mismanaged, and the frequent failures of assessment insurance companies would give additional ground for confidence in such a charge. The utmost that can be said about these young men, so far as the record shows, is that they lent a too easy credence to this man. The record shows that the complainant himself, Mr. Trubey, is engaged in promoting personal injury litigation, and, looking at the entire case, that seems to be the general nature of this suit.

This case is a striking justification of the wisdom of those statutes which are now in force in nearly all of the older states, which forbid the institution of any such a suit as this except by the Attorney General, at the instance of the Insurance Commissioner.

It ought not to be open to every disgruntled member to file a bill charging an association of this character with fraud and insolvency, and asking for the appointment of a receiver of its affairs. This is a gross wrong to the credit of the association and to those members who are interested in its promotion.

Suits of this kind led to the passage of the statutes to which I have referred, and at the present time in nearly all of the older commonwealths there are laws forbidding that any such action should be brought by a private individual. Every private person having a grievance of this character is compelled to submit his case to an officer who by experience and special knowledge can judge of its substantial merits, having before him a full knowledge of the affairs of the association. In no other way can the credit of such enterprises be protected from the most damaging assaults.

This case is wholly without merit. It ought never to have been instituted. A decree will be entered dismissing the bill upon the merits, with costs in favor of the defendants.

POLK et al. v. MUTUAL RESERVE FUND LIFE ASS'N et al.

(Circuit Court, S. D. New York. January 18, 1905.)

No. 8,155.

1. INSURANCE—POLICY HOLDERS—RIGHTS—DETERMINATION.

Rights of policy holders and the insurer must be ascertained and determined in connection with constitution and by-laws of the society, and the certificates of insurance constituting the contract between the parties.

2. SAME—FEDERAL COURTS—RULES OF DECISION.

In a suit in the federal courts to determine the rights of policy holders and the insurer, the decisions of the highest courts of the state are of controlling authority.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

3. Same—Contract Provisions—Construction—Validity.
A stipulation in an insurance policy that the place of the contract was agreed to be the home office of the insurer, and that the policy should be governed by, and construed only according to, the laws of New York, was binding on both parties, unless such stipulations or express provisions of the contract impaired the obligations of a contract, or conflicted with the laws of the state where the contract was made.

4. Same—Reorganization—Effect.
The act of reincorporating an insurance association in conformity with New York Insurance Law, § 52 (Laws 1892, p. 1955, c. 690, as amended by Laws 1901, p. 1779, c. 722), authorizing such reincorporation, did not operate to create a new corporation, though a different name was assumed, and a new policy of insurance adopted.

5. Same—Change of Plan—Obligation of Contract.
Where complainants became members of an insurance association, and received certificates which in terms provided that they should be construed and be subject to the laws of New York, the reorganization of such association and a change of its plan of operations, as authorized by New York Insurance Law, § 52 (Laws 1892, p. 1955, c. 690, as amended by Laws 1901, p. 1779, c. 722), did not constitute an impairment of complainants' contract rights.

6. Same—Dissolution of Association—Adequate Remedy at Law.
Members of an assessment insurance association, who become dissatisfied with a change of the plan of operation adopted by the society, having no vested interest in the assets of the corporation, are bound to seek redress at law, and not by a suit in equity to dissolve the association, unless it is shown that the association's affairs are grossly mismanaged.

7. Same—Insolvency.
In a suit to dissolve an assessment insurance association, evidence *held* insufficient to establish the association's insolvency.

8. Same—Pleading—Bill—"Fraudulent Mismanagement."
The mere use of the words "fraudulent mismanagement," etc., in a bill by dissatisfied members of an insurance association to dissolve the same on that ground unsupported by any averment of specific facts, cannot be considered as an admission of fraudulent mismanagement by a demurrer to the bill.

In Equity.
See 128 Fed. 524.

Russell & Winslow (Wm. Hepburn Russell, Wm. Beverly Winslow, D. L. Snodgrass, Caruthers Ewing, and R. F. Jackson, of counsel), for complainants.

George Burnham (Frank R. Lawrence, Frank H. Platt, George Burnham, and Gordon T. Hughes, of counsel), for respondents.

HAZEL, District Judge. The complainants, 13 in number, citizens of Tennessee, suing in behalf of themselves and of others similarly situated, are dissatisfied members and holders of insurance policies in the respondent Mutual Reserve Fund Life Association, a domestic corporation. The applications for membership therein (except that of complainant Hastings) were made during the years 1886 to 1900. A decree is sought for a dissolution of said association, an accounting, injunction, appointment of receiver, and distribution of corporate assets, with the object of winding up its affairs. Respondents have interposed a demurrer on general and special grounds, viz., want of jurisdiction, in that the statutory amount is not in controversy; that complainants are not entitled

to the relief prayed for; that an adequate remedy exists at law; legal incapacity to sue, the action not being instituted by the Attorney General of the state, nor by a judgment creditor; and that the bill is uncertain, the terms and conditions upon which complainants became members of said association not being set forth.

The Mutual Reserve Fund Life Association (for brevity called the "Association") was incorporated in January, 1881, under chapter 267, p. 264, Laws N. Y. 1875, for the general purpose, as ascertained from the declaration, of securing to its members benefits in a mutual co-operative or assessment life insurance society. In December, 1883, an amended certificate was filed, reincorporating the association under chapter 175, p. 172, Laws N. Y. 1883, for the purpose of transacting life insurance upon the co-operative or assessment plan. Thereafter, on April 17, 1902, the association again reincorporated under chapter 690, p. 1930, Laws N. Y. 1892, and acts amendatory thereof, as the Mutual Reserve Life Insurance Company (for brevity, called the "Company").

The bill broadly alleges that the respondent association has no rights, powers, duties, or legal status other than those conferred by the original and amended certificates of 1881 and 1883; that the reorganization under the Laws of 1892, which authorized the association to transact life insurance without being limited to the assessment plan, was effected by its officers and directors without authority from, and without the knowledge and consent of, complainants or its members and policy holders; that the association is insolvent; that the change of plan of insurance was a scheme on the part of its officers and directors to secretly deprive the complainants of their rights (i. e., to cause a forfeiture of their policies), to perpetrate a fraud on the members and policy holders, and generally a gross mismanagement of its business affairs. Wrongful acts committed by the officers of the association are charged in general terms. The bill further substantially alleges that, after the charter of the association was amended, increased assessments were levied upon its members and policy holders; that the amendment in contravention and violation of section 10, art. 1, of the Constitution of the United States, impairs the obligations of contracts; that the association does not carry out its original purposes; that, by its attempt to transact the business under the certificate of reincorporation, the assets are dissipated, and the members and policy holders deprived of their rights and benefits secured by the charter and by-laws. In addition to the allegations mentioned, the officers are charged with having fraudulently withdrawn from the depository of the association, Central Trust Company, the reserve funds, amounting to $2,287,476.51, and with having wasted the same by improvident management of the business prior to the transfer of the assets of the company. The refusal of the association to accept complainants' tender of their premiums or assessments is also set forth. The bill, in its entirety, insists upon the present corporate existence of the association, and ignores its reincorporation. In brief, an examination of the bill as a whole, aside from the allegations of insolvency, discloses that complainants have not ac-

quiesced in the altered plan of insurance, as provided in the amended charter, and strenuously object to paying premiums or assessments on a basis or plan different from that originally adopted.

Assuming the allegations of the bill well pleaded, which, with the exception of the conclusions of law, are admitted by the demurrer, it becomes essential to determine whether the life insurance plan latterly adopted is lawful. The question presented is important. The court is not, however, without direct precedent for holding that, in the circumstances appearing from the face of the bill, it was within the reserved power of the Legislature to alter and modify the plan for conducting the business for which the association was originally organized. That the rights of the policy holders and the insurer must be ascertained and determined in connection with the constitution and by-laws of the company and the certificates of insurance, which constitute the contract between the parties, will not admit of serious dispute. Matter of Equitable Reserve Fund Life Ass'n, 131 N. Y. 354, 30 N. E. 114; C. H. Venner Co. v. United States Steel Corp. et al. (C. C.) 116 Fed. 1012; Uhlman v. N. Y. Life Ins. Co., 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; Everson v. Equitable Life Assur. Soc., 71 Fed. 570, 18 C. C. A. 251; Hunton v. Equitable Life Assur. Soc. of the U. S. (C. C.) 45 Fed. 661; Cohen v. N. Y. Mutual Life Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522. The decisions of the highest courts of the state upon this question are of controlling authority. Schurz v. Cook, 148 U. S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498. The contract determines the rights and liabilities of the members thereof, and the fact of membership in a mutual insurance corporation does not alter the relations thus created. People ex rel. Meyers v. M. G. & B. Ass'n, 126 N. Y. 615, 27 N. E. 1037. The constitution and by-laws of the association, composing a material part of the contract, are not produced or pleaded. For the purpose of discussing other questions involved in this controversy, their absence will be disregarded. Certain policies of insurance or certificates of membership were filed by complainants with the clerk of the court. Such of the policies as are before the court contain, in substance, the following provision: "In consideration of the application for this certificate of membership or policy of insurance, which is hereby referred to and made a part of this contract, and of each of the statements made therein," the applicant is received as a member, upon condition of the payments to be made, and the further provision that "This contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said Association in the City of New York." It will be presumed that all of the certificates of membership, except that of Hastings, contain similar provisions.

The policy of Hastings was assigned to the association by another insurance company, but was expressly taken subject to the Constitution and by-laws and of the statutes of this state. The record does not disclose that any of the certificates or policies were issued pursuant to any other understanding. In the circumstances, no

question of inapplicability of the New York laws can arise. Hence the stipulation as to the place of contracts of insurance, and the provisions by which they shall be governed and construed, are controlling on both parties. A different principle applies only where the stipulations of the parties or the express provisions of the contract impair the obligations of a contract, or conflict with the laws of the state where the contract was made. Such is the legal effect of cases recently considered by the Supreme Court of the United States. Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788; Wright v. Minnesota Mutual Life Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832.

Article 8, § 1, of the Constitution of the state of New York, expressly reserves to the Legislature the power to alter, amend, annul, or repeal all general or special laws. This power being reserved to the Legislature by the organic law of the state, it is obviously immaterial that no right of amendment was expressly reserved under chapter 175, p. 172, of the Laws of 1883. Looker v. Maynard, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79; Grobe v. Erie Co. Mutual Ins. Co., 39 App. Div. 183, 57 N. Y. Supp. 290, affirmed 169 N. Y. 613, 62 N. E. 1096; McKee v. Chatauqua Assembly (C. C. A.) 130 Fed. 536. The act of reincorporating the association in conformity with section 52 of the insurance law of New York of 1892 (Laws 1892, p. 1955, c. 690), as amended by chapter 722, p. 1779, Laws 1901, by which a different name was assumed and a new plan of insurance adopted, as heretofore indicated, was not in the ordinary sense a creation of a new corporation. By the general law of New York, any existing domestic insurance corporation was authorized by vote of a majority of its directors to amend its charter, in whole or in part, to conform to the provisions of such law. It is not controverted that the association rigidly complied with the provisions thereof. Nor is the application of section 52 of the insurance law, and supplementary provisions, under which the scope of the association was broadened, and a different plan of insurance adopted, denied. Moreover, neither the statute nor the charter of the association required the consent of the members or policy holders to the proposed change. The complainants became members of the association pursuant to a contract which in terms was controlled by the laws of this state. Presumably, such members had full knowledge of the provisions of the Constitution and laws under which the association was incorporated, and its right to change its plan of operations. Hence there was no impairment of contract rights, which this court, sitting in equity, is bound to protect. This point had been squarely decided by the Court of Appeals in the cases already cited. To the same effect are the adjudications in the Supreme Court of the United States to which attention has been directed.

The next point for consideration is whether the association, now the company, is insolvent, and whether there was such gross mismanagement by the directors and officers that this court should interfere by administering the assets of the association as a trust for the benefit of creditors. Respondents contend for the proposition

that complainants are merely contract creditors, and, not having exhausted their legal remedy, have no standing in a court of equity to sequester the property of their debt in satisfaction of their demands. Upon this point complainants suggest that, inasmuch as the rights of the association and its members are purely reciprocal, there are no creditors except the members, and accordingly the assets may be followed into the possession of the company and distributed pro rata as a trust fund. Whatever view may be taken of the questions relating to the members as contract creditors, their decision is not thought essential to this controversy.

Complainants, in their brief, practically concede that the dissatisfied members and policy holders may treat the contract as rescinded, and recover the premiums and assets paid. At first blush, it would seem indeed a peculiarly anomalous proceeding to invest the officers of a life insurance corporation with power to alter or amend its charter, and thus materially change its plan of operations and conduct of business. When the association started in business on the mutual assessment plan of life insurance, the co-operating members undoubtedly believed that plan would prove economical, convenient, and inexpensive. Undoubtedly the later plan of insurance has increased the premiums or carrying expenses. Nevertheless, as indicated, the insured assumed obligations of membership with a knowledge of the right of the corporation to alter the manner of conducting its business, without, however, changing the nature or character of the same. In this connection, it may be presumed that the officers and directors of the association appreciated that future conditions were liable to arise which manifestly demanded the adoption of a firmer plan of insurance to perpetuate the principal object of its organization. See Iversen v. Minnesota Mutual Ins. Co. (C. C.) 137 Fed. 268. In Swan v. Mutual Reserve Fund Life Association, 155 N. Y. 9, 49 N. E. 258—an action brought by a member against the respondent association—the court, considering the question of enforcing the provisions of a contract of insurance in relation to the reserve fund, said:

"Where, as in this case, the complainant is a member of an association formed for the purpose of transacting the business of life insurance upon the co-operative or assessment plan, he is to be regarded as an integral part of the corporation. His position is similar to that of a corporator in a corporation, and whether such an action as this, in behalf of himself and all others having a like interest in the subject of the action, could be maintained against the corporation of which he is a constituent part, in the absence of other difficulties, is, in my judgment, a very serious question."

Such members, therefore, who continue dissatisfied with the change, having no vested interest in the assets of the corporation, must evidently seek redress at law, unless it be shown that the affairs of the corporation are grossly mismanaged by those charged with the responsibilities of a proper conservation of its assets. In Wright v. Minnesota Mutual Life Ins. Co., supra, the court used this language, which may be appropriately quoted:

"There was no contract that the plan of insurance should never be changed. On the contrary, it was recognized that amendments might be necessary. There was no vested right to a continuation of a plan of insurance which

experience might demonstrate would result disastrously to the company and its members. * * * The courts are slow to interfere with the management of societies such as this mutual insurance company. While the rights of members will be protected against arbitrary action, such organizations will ordinarily be left to their own methods of action and management."

The allegations upon the question of insolvency, owing to the asserted frauds or mismanagement of the affairs of the association, are not entirely harmonious. For illustration, the amended bill, after alleging the insolvency of the association, states:

"In this connection, complainants say that the properties and assets of the respondent association are sufficient to pay off and discharge all accrued claims against respondent association arising out of the deaths of its members holding policies issued by it, and that after the payment of all such accrued claims in force there may remain a sum of money for distribution among these complainants and other members and policy holders of respondent association as their interests may severally appear; but no sum that can be realized, if any such there be, will be sufficient to pay and discharge the debts of said association, and the death claims accrued against it, upon its policies, and repay to the complainants and other members the sums severally invested and paid in by them under their membership obligations."

As respondents have no creditors except policy holders, the allegation of insolvency quoted would seem to imply that the assets should at all times be sufficient to pay all debts, and, in addition thereto, to return to the policy holders the entire amount paid in by them.

Irrespective, however, of mere unsupported assertions of insolvency and inconsistent allegations, respondents' insolvency is predicated upon a financial statement issued by the company in and about April, 1902, and filed in the office of the State Superintendent of Insurance. Such statement, it is claimed by the complainants, gave fictitious values, in that $2,020,048.02, charged as an asset, does not represent any available property, but merely an unauthorized and illegal charge upon the books of the respondents. The amount comprises a charge for "liens allowed not exceeding statutory reserve charged as a liability against each policy, respectively." This item was treated as a credit by the examiner and by the Insurance Department to reduce a liability of $4,057,135.50, which the Superintendent of Insurance at the time of reincorporation of the association charged on the basis of its being "net present value of all outstanding policies in force Dec. 31, 1901, as per certificate of New York Insurance Department." This reduction and method of recapitulation of assets and liabilities of life insurance companies seems authorized by statute. Other specific averments of insolvency are thought to relate to matters of management upon which the judgment of men may differ. Giving due weight to the approval of the Superintendent of Insurance, I am of the opinion that the record sufficiently shows that the respondent company is in possession of sufficient assets and resources to meet its just obligations after paying its debts. This was also the conclusion of Judge Coxe when the question was presented to him for decision. Polk v. Mutual Reserve Fund Life Ass'n (C. C.) 119 Fed. 491. Moreover, respondent company has not abandoned the business for which it was incorporated, but, on the contrary, continues the same.

The allegations of fraud and mismanagement are not supported by any averment of specific facts, except as relied upon by the general theory of the bill. The mere use of the words "fraudulent mismanagement," etc., is not entitled to be considered as an admission of the facts by the demurrer.

The right of the complainants to the relief sought is also challenged on the ground that the action is not brought by the Attorney General of the state, nor by a judgment creditor. This question, however, because of the conclusions reached on the primary questions, need not be decided.

The demurrer is sustained, and accordingly the bill is dismissed with costs.

THE FANNIE HAYDEN.

(District Court, D. Maine. May 2, 1905.)

No. 33.

1. COLLISION—SCHOONERS CROSSING AT NIGHT—FAILURE TO KEEP LOOKOUT.
Where the only two men on the deck of a schooner navigating in the night were engaged in taking down sail, neither one nor both constituted a proper lookout, and she is in fault for a collision with another schooner having the right of way, and which should have been seen from a quarter to half a mile distant, but was not seen until immediately before the collision.

2. SAME—CONTRIBUTING FAULT.
When the privileged one of two schooners kept her course until collision, as she was bound to do, it is not material to inquire whether or not there was any incompetency on the part of her lookout, since, if so, it was not a fault which contributed to the collision.

In Admiralty. Suit for collision.

George E. Bird and William M. Bradley, for libelants.
Benjamin Thompson, for claimant.

HALE, District Judge. On the 18th day of January, 1904, between 4 and 5 o'clock in the morning, at a point to the southward and westward of outer Green Island, in Casco Bay, the libelant's schooner Lettie May was sunk through a collision with the schooner Fannie Hayden. This libel is filed to recover for the damages to the Lettie May and for the loss of her outfits and catch on board, and also for the loss of the personal effects of her crew.

The Lettie May was a two-masted schooner of the burden of about 27 tons, 50 feet long, 16 feet beam, and 9 feet draft, and at the time of the collision was engaged in fishing. About 3 o'clock in the morning of the day of the collision she got under way at Coleman's Cove, Chebeague Island, for the fishing grounds. She had on board a crew of eight men all told. The weather was clear, the wind about a five or six knot breeze, blowing about north. Her mainsail, foresail, forestay sail, and jib were set. The side lights were lighted and in place. After leaving Chebeague Island she proceeded southwesterly about a mile, until she was off the western end of Hope Island, when she was on a course about south-south-

west. She continued upon that course until she was off the southern and western end of the Green Islands, when her course was changed to about south. She ran about a mile or a mile and a half on that course, when the master, Capt. Dyer, concluded that, as the wind was unfavorable, he would have her hove to until it moderated. She was accordingly hove to on the starboard tack, the outer jib was hauled down, the fore sheet was trimmed flat, the main sheet was slacked about two feet, the jumbo was hauled to windward, and the wheel was put hard down. The schooner was then lying within three or four points of the wind, and was making about a northwest course. The wind was about north. The captain was standing in the companionway. William Ross was the only person on deck from the time the schooner left Hope Island until about five minutes before the collision, when Walter Calder relieved Ross, and Ross went below. Calder remained on deck until the collision occurred. He did not see the Fannie Hayden approaching, and did not know of her approach until the two schooners came together.

The Fannie Hayden is a two-masted schooner of the burden of about 20 tons. She is 58 feet long, 19 feet beam, and of about 9 feet draft. At the time of the collision she was in use as a pilot boat by the pilots of the English steamers entering the port of Portland. She left Portland about 3 o'clock in the morning on the day of the collision, with four men on board, for the purpose of going to the pilot grounds in the vicinity of Half Way Rock, to meet an English steamship then due in port. Capt. McVane, a licensed pilot, having charge of the bringing in of English steamers, was in command. After leaving her berth, the Fannie Hayden proceeded out through the ship channel under a two-reef mainsail, a whole foresail, and jumbo, but she did not have her jib set. She continued in this way until a short time before the collision, the time being estimated by the captain to have been about five minutes before the collision, when the jumbo was hauled down, the fore sheet was hauled aft, and the main sheet lifted about four points. Natvig, one of the crew, who had been on the lookout, came aft about two minutes before the collision, and went into the cabin to rake the stove. Capt. McVane continued in charge of the vessel, walking quickly back and forth in front of the wheel, within a quarter of a minute each side, and walking about six feet each way, according to his testimony, looking first to one side and then to the other. The first knowledge he had that he was approaching the Lettie May was when she appeared about half her length ahead. He started to heave the wheel up, and when she struck he says he ran forward as far as the gangway and hollered, and then ran aft and hove the wheel clear up. The Fannie Hayden struck the Lettie May on the port side between the fore and main rigging, cutting into her. The Lettie May shortly after sank. Her crew were brought into Portland by the Fannie Hayden.

At the time of the collision the wind was north. The night was clear and cold. The Lettie May was on the starboard tack, lying within three or four points of the wind, making very little headway.

She had the right of way. The Fannie Hayden was on the port tack, making about five knots. The evidence is somewhat contradictory as to how far the sails of a vessel could be seen on that night, but the testimony of disinterested witnesses leads me to believe that such sails could be seen from a quarter to a half mile. The weight of the evidence compels the conclusion that for at least five minutes before the collision there had been no proper lookout on the Fannie Hayden, and that, if there had been such lookout, he must have seen the Lettie May, and avoided the collision. The master of the St. Paul, a schooner sailing near by, saw the Lettie May after she was hove to. At the precise time of the collision there was no one on deck except McVane, the captain and wheelsman. For at least five minutes before the collision the captain and Natvig had been engaged in taking down the jumbo and making it fast; and after that, and at least two minutes before the schooners came together, Natvig went aft into the cabin to rake the stove. When the only two men on deck are engaged in taking down sail, in the nighttime, neither one of them nor both can, in my opinion, constitute a proper watch. A seaman whose duty is to watch, but who goes aft into the cabin to rake the stove, is not at the time a proper and competent watch. It is clearly the duty of the court to find that there was no proper lookout on the Fannie Hayden, and that the want of a lookout caused the collision. In coming to this conclusion we do not and need not go further than to consider the evidence of the captain and crew of the Fannie Hayden as to what happened on their vessel on the night of the collision.

Was the Lettie May at fault? The claimant contends that the Lettie May was in fault in that she was a vessel being overtaken by another, and that she should have shown a white or flare-up light to the Fannie Hayden as she was approaching. The court cannot come to this conclusion. The evidence in the case does not convince me that the vessel was being overtaken. The general course of the Fannie Hayden that night was a little south of east. The Lettie May was at the time hove to, and heading about northwest. There is not enough in the evidence as to the manner in which the vessels came together to induce the conclusion that the Fannie Hayden was approaching the Lettie May at least two points abaft the beam; but the whole testimony tends to the conclusion that the contrary is true.

The claimant insists further that the Lettie May did not have a red light on her port side at the time of the collision. On this point Miller, the cook, testifies that he filled, trimmed, and cleaned the lights the night before; that the supply of oil was ample; that he lighted the lights, and placed them on deck when the schooner got away. There was further testimony on the part of the crew that the lights were put in their proper places at the proper time. They were seen burning brightly after being put up, shortly before the collision. The testimony of Keating, master of the St. Paul, a schooner in the vicinity just before the collision, tends to show that the red light of the Lettie May was burning after she was

hove to. After the collision it is undoubtedly true that the red light was not burning, but the force of the impact of the colliding vessels was clearly sufficient to account for the putting out of the light. The most that can be said to the contrary is that a light might possibly have remained lighted in spite of the force of the collision. The green light did so remain. But it is not difficult to believe that a force which was sufficient to throw down the steps in the forecastle, to throw the covers from the stove and the dishes from the shelves, to put out the light in the forecastle, was also sufficient to put out the red light. The court is constrained to come to the conclusion that the port light was burning at the time of the collision.

But it is insisted on behalf of the claimant that there was an absence of a proper lookout on the part of the Lettie May. In considering this branch of the case we must give due weight to the fact that the Lettie May had the right of way at the time the two vessels came together. Whether she had a proper lookout or not, it was her duty to keep her course, and it was the duty of the Fannie Hayden to keep out of her way. I must hold, as was held in the case of The Fannie, 11 Wall. 243, 20 L. Ed. 114, that if the privileged schooner held her course it was all the burdened vessel had a right to require, and that, whether the privileged vessel had a proper lookout or not, it was her duty to do precisely what she did. It is true that the federal courts have repeatedly held that the burden rests on the ship to show, whenever it disregards any statutory regulations, not merely that such a disregard might not have been one of the causes of the collision, or that it probably was not, but that it could not have been. That rule does not apply in this case. We have not found that the Lettie May had violated or disregarded any statutory regulations. It is not material to inquire whether or not there was any incompetency on the part of the lookout at the time of the collision. We must come to the same conclusion in this regard as did Judge Putnam in the case of The H. F. Dimock, 77 Fed. 226, 23 C. C. A. 123, that, "where it appears that the vessel has only neglected the usual and proper measures of precaution, and has not violated any statutory regulations, the burden resting on her to show that the collision was not owing to her neglect, as the efficient cause, is only the ordinary one." In The Devonian (D. C.) 110 Fed. 588, Judge Lowell held that in the case before him the privileged vessel had a further duty upon her than merely keeping her course with her eyes shut; that a privileged vessel is to hold to her course, but must be constantly observing the burdened vessel, in order to notice if the latter fails in her duty. But this decision was based upon a peculiar state of facts. A schooner saw a steamer approaching, and knew that the steamer was large, and would have difficulty in maneuvering in the narrow passage into which it must shortly enter. Judge Lowell held that the schooner, knowing this, and considering her own slight maneuvering power, was under the duty not to lose sight of the steamer while tacking in narrow quarters. I cannot think that there is anything in

that case which should lead me to disregard the ordinary rule, announced in the case of The Fannie, supra, and followed in The Havana (D. C.) 54 Fed. 411. In The Columbian, 100 Fed. 991, 41 C. C. A. 150, the Circuit Court of Appeals for this circuit, Judge Putnam speaking for the court, held that the fact that a schooner had no one at the helm, which was lashed, or that she was insufficiently manned, cannot be held a fault contributing to a collision with a steamship in a fog at night, when in any event it would have been her duty to keep her course, and she did this. Judge Putnam says:

"Even if the schooner's helm had been free, and she had had a helmsman, and her deck had been manned to the satisfaction of the Columbian, nothing would have come therefrom, because the schooner would not have been justified in availing herself of all these things for the only purpose for which she could have availed herself of them under the circumstances; that is, making a change of course."

Judge Putnam further says:

"If the Ella M. Doughty [the privileged vessel] had changed her course, she would prima facie have violated the statutory rules, and under the decision of the Supreme Court she would have been required to show not merely that such violation was probably not one of the causes of the collision, but that it could not have been."

After giving regard to all the testimony in the case at bar, I am of the opinion that the Lettie May was not guilty of any fault which contributed to the collision. I find the collision was the fault of the Fannie Hayden.

A decree may be entered in favor of the libelants. A master may be appointed to assess damages.

GROTON BRIDGE & MANUFACTURING CO. v. AMERICAN BRIDGE CO.

(Circuit Court, N. D. New York. May 6, 1905.)

1. FEDERAL COURTS—REMOVAL OF CAUSES—PETITION—PRESENTATION.
   Under Removal Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], requiring the party entitled to remove the cause to make and file a petition in the suit in the state court, and make and file therewith a bond, with good and sufficient surety, conditioned as named, etc., it is not necessary that the petition be presented to a judge of the state court holding or sitting in open court, or to a court in session, or that an order be made by the court permitting the filing of the petition or directing the removal; but it is sufficient if the petition is presented to a judge in chambers, with the bond, and, after approval of the bond, the petition and bond are filed with the clerk of the court of the county where the venue was laid.

2. SAME—BOND—PRESENTATION.
   While a removal bond should be presented to the judge of the state court for approval of the surety, the arbitrary refusal of the judge to approve a surety will not prevent the removal, the removing party then being entitled to file the bond and petition, procure the filing of the record on removal, and proceed in the federal Circuit Court, subject to a motion to remand for insufficiency of the surety.

3. SAME—PETITION—VERIFICATION.
A petition for the removal of a cause to the federal court is not fatally defective for want of a verification where the ground of removal is not prejudice or local influence, or the denial of equal civil rights, and the case is not a suit or prosecution against revenue officers.

4. SAME—SIGNING.
Where the petitioner for the removal of a cause to the federal court signed the petition, it was not necessary that he should sign the verification, certified by the notary public as having been sworn to before him.

5. SAME—REMOVAL BOND.
Where a removal bond was signed by a surety, it was not defective because it was not signed by the defendant, and because the penalty thereof was limited to $500; Removal Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], not requiring such signature, nor that the bond shall be for an unlimited penalty.

6. SAME—RIGHT OF REMOVAL—TIME—PLEADING.
Removal Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], authorizes the removal of a suit from a state to a federal court on the filing of a petition in the state court at any time before defendant is required by the laws of the state or a rule of the state court to answer or plead to the declaration or complaint of the plaintiff Code Civ. Proc. N. Y. § 487, declares that the only pleading on the part of the defendant is either a demurrer (to the complaint or reply) or an answer. *Held*, that where defendant filed a removal petition in a state court before expiration of the time within which it was entitled to file either a demurrer or answer it was in time, though the time prescribed by N. Y. Sup. Ct. Gen. Prac. Rule 22, within which he could have attacked plaintiff's pleading by motion, etc., had expired.

7. SAME—TIME TO PLEAD—STATE COURT RULES—CONSTRUCTION.
N. Y. Gen. Prac. Rule 24, providing that no order extending defendant's time to answer or demur shall be granted unless the party applying therefor shall present to the judge an affidavit of merits or proof that it has been filed, etc., and when time to serve the pleading has been extended by stipulation or order for twenty days no further time shall be granted by order except on two days' notice, applies only to an application to the court for an order extending the time to plead, made on affidavits, and does not prevent the extension of time to plead by stipulation without order of court.

8. SAME.
Where defendant was granted an extension of time to plead by stipulation as authorized by the New York Supreme Court rules, and within the time as extended defendant filed a petition and bond for removal of the cause to the Circuit Court of the United States, the proceedings for removal were in time.

9. SAME—APPEARANCE IN STATE COURT.
The general appearance of a defendant, entitled to remove a cause to the federal court, in the state court, did not operate as a waiver of its right to remove.

Motion to Remand Cause to the Supreme Court of the State of New York.

Jones, McKinney & Steinbrink, for the motion.

Stetson, Jennings & Russell (Chas. MacVeigh and Raynal C. Rolling, of counsel), opposed.

RAY, District Judge. This action, venue laid in Tompkins county, was commenced in the Supreme Court of the state of New York by the personal service of the summons and complaint upon

the secretary of the defendant on the 11th day of November, 1904. Jones, McKinney & Steinbrink, as attorneys for the plaintiff, brought the action. November 29, 1904, and within 20 days thereafter, the defendant appeared generally by Stetson, Jennings & Russell, its attorneys, and, before the expiration of the time given by section 520 of the Code of Civil Procedure of the state of New York to plead to the complaint had expired, obtained from the plaintiff's attorneys a written extension of time to plead to the complaint, viz.:

"Supreme Court, Tompkins County. Groton Bridge and Manufacturing Company vs. American Bridge Company. It is hereby consented that the time of defendant, American Bridge Company, to plead to the complaint herein be extended twenty days from December 1, 1904, to and including December 21, 1904. Jones, McKinney & Steinbrink, Attorneys for Plaintiff."

December 21, 1904, plaintiff's attorneys gave to defendant's attorneys a second written extension of time to plead, which, aside from title and signature, reads as follows:

"It is hereby consented that the time of the defendant to plead to the complaint in this action be extended to and including January 10th, 1905."

December 27, 1904, the defendant, a business corporation organized under the laws of the state of New Jersey, the plaintiff being a business corporation of the state of New York, and the amount demanded, exclusive of interest and costs, being over $35,000, made its petition, duly signed by it, by Joshua A. Hatfield, the vice president of the defendant, for the removal of the suit to the Circuit Court of the United States for the Northern District of New York. Following the petition, and constituting a part of it, is the usual affidavit of verification required by the Code of Civil Procedure of the State of New York for verified pleadings, etc. This affidavit reads as follows:

"State of New York, County of New York—ss. Joshua A. Hatfield, being duly sworn, deposes and says that he is an officer, to wit, the vice president, of the American Bridge Company, the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

"Sworn to before me December 27th, 1904.

"[Seal.] James Henderson, Notary Public, Richmond County.

"Certificate filed in New York County."

It was not signed by Hatfield, but, as appears, was certified to have been sworn to by him as follows:

"Sworn to before me December 27, 1904.

"James Henderson, Notary Public, Richmond County.

"Certificate filed in New York County."

The petition was accompanied by a bond or undertaking in the penal sum of $500, duly signed and executed by the American Bonding Company of Baltimore, and conditioned as follows:

"Upon these conditions: American Bridge Company having petitioned the Supreme Court of the state of New York held in and for the county of Tompkins for the removal of a certain cause therein pending, wherein the said Groton Bridge & Manufacturing Company is the plaintiff and the said Ameri-

can Bridge Company is the defendant to the Circuit Court of the United States for the Northern District of New York.

"Now, if the said American Bridge Company shall enter in said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue."

The petition and this bond were presented to the judge hereafter named, and filed with the clerk as hereafter stated. This bond or undertaking was not signed by the defendant, or by any of its officers. It bears the following indorsement:

"The within undertaking is approved as to form and as to the sufficiency of the surety.

"Dec. 28, 1904. William D. Dickey, J. S. C."

William D. Dickey was one of the justices of the Supreme Court of the state of New York at this time. The petition, bond, etc., were duly filed in the office of the proper clerk of the Supreme Court of the state, the county clerk of Tompkins county, N. Y., on the 30th day of December, 1904, and a copy of the same and of the record on removal were served on the plaintiff's said attorneys on the same day. The defendant filed a copy of the record in such suit in the Circuit Court of the United States, Northern District of New York, on the first day of its next session, viz., February 14, 1905, as required by law and the condition of such bond or undertaking. The petition on removal bears no indorsement of the judge, but the bond recites that the defendant has petitioned, etc., and that bears the indorsement and approval of the judge. February 14, 1905, the plaintiff moved to remand. The plaintiff concedes and says in his brief on this motion:

"On December 28, 1904, it [defendant] presented to Mr. Justice William D. Dickey, then sitting in chambers, at Brooklyn, Kings county, in the Second Judicial District, the undertaking by a surety company, subsequently filed in this proceeding."

The county of Tompkins, in which the venue of this action was laid in the Supreme Court, is in the Sixth Judicial District. The plaintiff's counsel also says in his brief:

"Mr. Justice William D. Dickey is a justice of the Supreme Court in and for the Second Judicial District. On December 28, 1904, he was sitting in Kings county, in that judicial district."

The plaintiff appears in this court specially for the purposes of this motion only. It bases its motion to remand on five alleged grounds, viz.: (1) Because the petition for removal and alleged bond were never presented to the state court. (2) Because no bond whatever has been filed by the defendant; that is, the one filed is not a bond satisfying the removal act, because not signed by the defendant. (3) Because the liability on the bond filed (if it is a bond) is limited to $500. (4) Because the defendant elected to submit itself to the jurisdiction of the state court at the time when it was required to plead in that court to the jurisdiction or in abatement by entering a formal voluntary appearance and thereafter pro-

curing extensions of time to plead—that is, time to demur or answer on the merits—in the state court. (5) Because the time of the defendant to remove the cause to the state court had expired prior to the filing of the petition and alleged bond.

The removal act, first part of section 3 of the act of August 13, 1888, c. 866, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], provides:

"That whenever any party entitled to remove any suit * * * may desire to remove such suit from a state court to the Circuit Court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

As to the first objection—that the petition and alleged undertaking were never presented to the state court—it clearly and sufficiently appears that the petition and undertaking were presented to the state court. The plaintiff admits in his brief, as we have seen, that Judge Dickey was sitting in chambers when he approved the bond or undertaking; and, as the bond recites that the defendant had petitioned for a removal of the cause to the Circuit Court of the United States, and as the bond was given and its approval sought as a necessary step in such removal, the fair presumption is that both the petition and undertaking were before the judge when he indorsed his approval on the bond. A judge sitting in chambers constitutes a court when doing ex parte business certainly, and a presentation of a petition and bond for removal to a judge of the Supreme Court sitting in chambers must be sufficient within the intent and meaning of the removal act. Were it otherwise it would be within the power of parties bringing actions in the state court to defeat removal entirely. It frequently happens that during the month of August the Supreme Court of the state of New York has no regular appointed term or adjourned term of the court running. However, judges may be found in some parts of the state sitting in chambers. Should a suit be brought at such time in the state court (one removable to the Circuit Court of the United States), and should the defendant be unable to secure an extension of time to answer either by a stipulation or order, can it be possible that the right of removal is lost because the petition and bond has not been presented to the Supreme Court, when in fact presented to a judge of the Supreme Court sitting in chambers, and the bond is approved by such judge, and the petition and bond are then filed in the Supreme Court; that is, with the clerk of the Supreme Court

in the county where the venue of the action was laid? All that the removal act requires is that the party entitled to remove the cause shall make and file a petition in such suit in such state court, and make and file therewith a bond with good and sufficient surety conditioned as named. It is not required that the petition be presented to any judge or to a court in session, or that an order be made by the court permitting the filing of the petition or directing the removal. But if the proper construction of the statute is that the petition and bond must first be presented to the court before they are filed in the court, it is clear that they have been presented to the court and in the court when presented to a judge of the court sitting in chambers, for a judge of the Supreme Court sitting in chambers is authorized to grant ex parte orders and transact any business not requiring notice to the other party. No notice to the other party is required in these removal proceedings. And it is settled that "the presenting of the petition to a judge in chambers and the filing of it in the state court satisfies the statute." Remington v. Central Pac. R. Co. (U. S. S. C., not yet reported, but decided April 17, 1905, No. 460) 25 Sup. Ct. 577, 49 L. Ed. —; Noble v. M. B. Ass'n (C. C.) 48 Fed. 337; Loop v. Winter's Est. (C. C.) 115 Fed. 362. If the petition filed makes a proper case, and the bond is sufficient and in accordance with the statute, the cause is removed from the state court to the Circuit Court of the United States when such petition and bond are filed in the state court, even if that court makes an order refusing the application for removal. Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870. In that case Mrs. Marshall filed a petition accompanied by a proper bond for the removal of her suit from the state court into the Circuit Court of the United States upon the grounds that she was a citizen of New York and the defendants, respectively, were citizens of Mississippi and Louisiana, and that the controversy was wholly between citizens of different states, and that it could be fully tried and determined between them. The state court made an order refusing the application for removal. The Supreme Court of the United States held and decided:

"Upon the filing of a proper petition and bond for the removal of a cause pending in a state court, such cause, if removable under the act of Congress, is, in law, removed so as to be docketed in the Circuit Court of the United States, notwithstanding the state court may refuse to recognize the right of removal."

In the opinion, Justice Harlan, speaking for the court, said:

"After the filing of the petition for removal, accompanied by a sufficient bond, and alleging that the controversy was wholly between citizens of different states, the state court was without authority to proceed further if the suit, in its nature, is one of which the Circuit Court of the United States could rightfully take jurisdiction. If, under the act of Congress, the cause was removable, then, upon the filing of the above petition and bond it was in law removed so as to be docketed in that court, notwithstanding the order of the state court refusing to recognize the right of removal."

It is not questioned that on the approval of the bond by a judge of the state court sitting in chambers both the petition and bond

were filed with the clerk of the court; that is, with the county clerk of the county of Tompkins, N. Y., who, by the Constitution of the state of New York (article 6, § 19), is made the clerk of the Supreme Court in the county of Tompkins. The filing of these papers with the clerk of the court was clearly a filing in and with the court. To hold otherwise would be to hold that papers cannot be filed in the Supreme Court only when the Supreme Court is in session in the county where the filing is required to be made. In Tompkins county a term of the Supreme Court is held but three or four times in the course of a year, and these sessions last from two to three weeks, so that at least eight months in the year the Supreme Court is not in session in Tompkins county, and hence, under the construction of the statute claimed by the plaintiff, it would be impossible to make and file a petition in a removable cause in the state court, venue laid in the county of Tompkins, for about eight months in the year. In this case the bond and petition were filed December 30, 1904, and on the 5th day of January, 1905, a copy of the record on removal, including such petition and bond, was served on the plaintiff's attorneys, and the record on removal so shows. See, on this subject, Fisk v. Union Pacific R. Co., 9 Fed. Cas. 149, 6 Blatchf. 362. These cases were under a prior statute, but the statute was substantially that of the act as it now reads. See, also, Removal Cases, 100 U. S. 457, 25 L. Ed. 593; U. S. Supreme Court Practice, May, page 203.

Of course, a bond or undertaking should be presented to a judge of the Supreme Court, and approval of the sufficiency of the surety obtained. But should the court arbitrarily refuse to approve a surety, it cannot be doubted that the removing party would have the right to file the bond and petition, procure the filing of the record on removal, and proceed in the Circuit Court of the United States. The remedy of the plaintiff in such a case would be to move to remand and show the insufficiency of the surety, and that the judge of the state court was justified in refusing to approve the bond.

But the whole question is met in other ways. It does not appear that Judge Dickey was not sitting in special term of the Supreme Court when the petition and bond were presented, and it does not appear that the petition was not presented in open court. The affidavit of Paul Eugene Jones, on which this motion to remand is based, raises and refers only to the question of the sufficiency of the stipulations extending the time to plead to extend the time to file the petition and bond on removal. The affidavit of P. A. Nolan filed in opposition to this motion explicitly states that he presented the petition and bond in open court December 28, 1904, Justice Dickey presiding, and that such bond was then and there approved. He says the court was in session in special term.

On the argument it was urged that the petition was insufficient because not properly verified—that the affidavit of verification was not signed by the affiant. The answer to this is twofold. In such a case as this the petition is not required by the statute to be verified. Therefore verification is unnecessary. Hughes' Federal Prac-

tice, 323. Where the ground of removal is prejudice or local influence, or the denial of equal civil rights, or the case is one for the removal of suits, and prosecutions against revenue officers, the statute requires that the petition be verified. But even if the petition should be sworn to by the one signing it, that was done in this case. Bonnell v. Griswold et al., 80 N. Y. 133. There the law required that the report be "verified by the oath" of a certain person. The report was signed, and it was certified as follows: "Sworn to before me this 13th day of January, 1870. Chas. W. Anderson, Notary Public, N. Y. County." Held sufficient, and that the makers of the report could be punished for perjury if the report was false. Here the petition is signed, and the oath taken is certified to have been taken by an officer authorized to take and certify to oaths. See, also, Haff v. Spicer, 3 Caines, 190; Jackson v. Virgil, 3 Johns. 540; Millius v. Shafer, 3 Denio, 60; People v. Campbell, 88 Hun, 544, 34 N. Y. Supp. 801. In People v. Campbell, supra, a petition was made to the Comptroller of the State, and signed by the petitioner. He did not sign the affidavit of verification following, but same was certified by a notary public as having been sworn to before him. Held "that, Campbell having signed the petition and being named in the affidavit of verification, it was not necessary for him to sign the verification."

The second and third grounds of the motion to remand will be considered together. They relate to the sufficiency of the bond filed. This bond says: "Know all men by these presents, that the American Bonding Company of Baltimore [describing its office and place of business in the city of New York, N. Y.] is held and firmly bound unto Groton Bridge and Manufacturing Company in the penal sum of five hundred dollars for the payment whereof well and truly to be made unto the said Groton Bridge and Manufacturing Company, its representatives and assigns, it binds itself, its representatives, successors and assigns, firmly by these presents." Then follow the conditions before given. Then, "In witness whereof," etc., the signature and attestation, and all the other formalities required. This is clearly a bond, but it is not signed by the defendant, and the liability of the bonding company is limited to $500. These are the objections presented. The removal act does not in terms require that the bond be signed by the removing party. He is to make and file with the petition a bond with good and sufficient surety. It was held that it is unnecessary for the removing party to sign the bond under section 3 of the act of 1875, 18 Stat. 471, c. 137. Stevens v. Richardson (C. C.) 9 Fed. 191; P. G. & S. Exc. v. W. U. Tel. Co. (C. C.) 16 Fed. 289; People's Bank of G. v. Ætna L. Ins. Co. (C. C.) 53 Fed. 161. In Stevens v. Richardson, supra, Blatchford, J., said:

"The plaintiff contends that, as section 3 of the act of 1875 says that the petitioner for removal is to 'make and file' the bond, the bond is void and the removal invalid. This objection is not tenable. The statute is satisfied, as to the bond, if a bond with sufficient surety is filed. The petitioner for removal makes the bond, in the sense of the statute, if he offers it to the court as the bond required. By section 639 of the Revised Statutes he was required to offer good and sufficient surety. The act of 1875 means no more."

The other cases cited, one in the Northern District of Illinois and the other in the District of South Carolina, hold the same.

The objection that the bond names a penal sum is equally untenable. It is true that the statute says nothing of a penal sum, but that the bond is to be "for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein." It has been held more than once that it is proper to insert a penal sum in the bond, and the forms prescribed by writers are uniform in inserting a penal sum. Com. of Kentucky v. Louisville Bridge Co. (C. C.) 42 Fed. 242; Johnson v. F. C. Austin Mfg. Co. (C. C.) 76 Fed. 616; Foster's Fed. Practice (3d Ed.) p. 931, § 385b; Desty's Federal Proc. (Tebbs, 1899) p. 808; Field, Fed. Courts, 767; Bump's Fed. Proc. 909; Hughes' Fed. Proc. 332. Foster says, "The bond should name a specific sum as the penalty." Clearly, this bond will cover all costs and damages that, in any event, can be awarded. The record on removal has been filed, and in this case no special bail is required. The bond was accepted by the state court, and this court deems it ample.

In Commonwealth of Kentucky v. Louisville Bridge Co., supra, the court said, page 242:

"The bonds which were executed by the defendants and accepted by the state court are each in the penalty of $500, and are in conformity with the provisions of the statute in every respect, unless a penalty is improper. It is claimed that the third section of the act of March 3, 1875 [18 Stat. 471, c. 137], as amended by the act of March 3, 1887 [24 Stat. 552, c. 373], provides for a bond unlimited in extent, and one not to be limited by a fixed penalty, and therefore these bonds are fatally defective, and, as the execution of a proper bond is jurisdictional, this case should be remanded for that reason. Whether the execution of a valid and proper bond under this act and the act of March 3, 1875, is jurisdictional, has been much discussed; and the Circuit Courts have differed in opinion. See Burdick v. Hale, 7 Biss. 96, Fed. Cas. No. 2,147; Torrey v. Locomotive Works, 14 Blatchf. 269, Fed. Cas. No. 14,105; Deford v. Mehaffy (C. C.) 13 Fed. 481; Harris v. Railroad Co. (C. C.) 18 Fed. 833. But that question does not arise in this case, as I think the bonds which were executed by defendants, and accepted by the state court, are valid bonds to the extent of the penalty, and the penalties are sufficient to cover the cost likely to accrue in this case. It may be that a bond without a penalty would be good under the statute; but the act does not prohibit a bond with a penalty, although it does prescribe the obligations under which the obligor must come. I therefore think the state court properly accepted these bonds with a penalty, as the obligations conformed to the provisions of the act. Both Field and Bump give forms of removal bonds with a penalty. See Field, Fed. Courts, 767; Bump, Fed. Proc. 909."

In Hughes' Fed. Proc. p. 332, the author says:

"It will be observed that the statute does not name any fixed amount as a penalty. There is some difference of opinion among the courts whether a bond should name a penalty or not. It would seem to be the correct practice to name a penalty, but the penalty named should be sufficiently large to cover all possible costs in the event of a remand; and, if it is, the better opinion is that the bond would be in proper form."

In Overman Wheel Co. et al. v. Pope Mfg. Co. (C. C.) 46 Fed. 577, it was held, following the authority of Ayers v. Watson, 113 U. S. 598, 5 Sup. Ct. 641, 28 L. Ed. 1093, that the giving of the bond is not jurisdictional, and that defects may be cured by amendment. It is held here that the bond filed is ample and properly conditioned.

It is contended that the defendant "elected to submit itself to the jurisdiction of the state court at the time when it was required to plead in that court to the jurisdiction or in abatement by entering a formal voluntary appearance and thereafter procuring extensions of time only to demur or answer to the merits in that court." The plaintiff's counsel in his points says:

"The point made is, not that the service of a general appearance in and of itself constitutes a waiver of the right to remove a cause. The point is, rather, that, if a defendant does anything by which it loses the right to oppose or answer the declaration or complaint by any or all pleas whatever, then it waives the right to remove the cause."

The plaintiff's counsel cites in support of this proposition Martin v. B. & O. R. R. Co., 151 U. S. 686, 14 Sup. Ct. 533, 38 L. Ed. 311. This court is not inclined to dispute the proposition actually decided in that case, which was that the defendant's petition for removal was filed in the state court (West Virginia) at or before the time within which the defendant was required by the laws of the state to answer or plead to the merits of the case, but after the time at which he was required to plead to the jurisdiction of the court or in abatement of the writ. The court said:

"Was this a compliance with the provision of the act of Congress of 1887, which defines the time of filing a petition for removal in the state court? We are of opinion that it was not, for more than one reason. This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court "to answer or plead to the declaration or complaint." These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, to 'oppose or answer' the declaration or complaint which the defendant is summoned to meet."

The questions in that case arose under the laws of the state of West Virginia, and, as pointed out, certain pleas could be filed and entered at one time and other pleas at other times. But in New York we have the following pleadings only: a complaint, a demurrer, an answer, and a reply. Code Civ. Proc. c. 6, tit. 1, §§ 478, 487, 500, 514. The complaint, the demurrer to the answer, and the reply are pleadings of the plaintiff. "The only pleading on the part of the defendant is either a demurrer [to the complaint or reply] or an answer" (section 487), or both, as he may answer one alleged cause of action and demur to the other. "The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof:" that the court has not jurisdiction of the person of the defendant, or of the subject of the action, or when the plaintiff has not legal capacity to sue, or there is another action pending between the same parties for the

same cause, or there is a misjoinder of parties plaintiff, or a defect of parties plaintiff or defendant, or that causes of action have been improperly united, or that the complaint does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 488. The demurrer must specify the objections to the complaint (section 490), and (section 492) defendant may demur to the whole complaint or to any separate cause of action. The defendant may also demur to the reply, or to a separate traverse to or avoidance of a defense or counterclaim contained in the reply, on the ground that it is insufficient in law, upon the face thereof. "Where any of the matters enumerated in section four hundred and eighty-eight of this act as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer." Code Civ. Proc. § 498. "If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it; except the objection to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action." Code Civ. Proc. § 499. These are the "pleas" and pleadings, and the only "pleas" and pleadings, on the part of the defendant. Where time is obtained, either by order or stipulation, "to plead to a complaint" it covers every pleading and plea known to the law in the practice of the state courts of the state of New York. This is so because the defendant has only these pleadings, and in the one or the other he must insert his every plea either in abatement or to the jurisdiction or otherwise. The time to answer and to demur is the same—20 days in case of personal service, double time when service is made by mail. "A pleading must be subscribed by the attorney for the party. A copy of each pleading, subsequent to the complaint, must be served on the attorney for the adverse party, within twenty days after service of a copy of the preceding pleading." Code Civ. Proc. § 520. It is not necessary to call attention to the provisions when service is made by mail, and extensions of time to plead will be subsequently considered.

The Code of Civil Procedure has also provided modes for correcting pleas and pleadings, but these provisions having nothing to do with the time for serving the pleadings themselves or the time for interposing pleas. And the removal statute has nothing to do with or reference to remedies provided in the Code of Civil Procedure for correcting pleadings. By section 537 a party may move for judgment on a frivolous demurrer, answer, or reply. By section 538 a sham answer or a sham defense may be stricken out. By section 545, irrelevant, redundant, or scandalous matter may be stricken from any pleading. By section 546 denials or allegations in a pleading may be made more definite and certain. So the pleader may be required to separately state and number causes of action or defenses if intermingled or not separately stated and numbered. Rule 22 of the general rules of practice in the Supreme Court is as follows:

"Motions to strike out of any pleading matter alleged to be irrelevant, redundant or scandalous, and motions to correct a pleading on the ground of

its being 'so indefinite or uncertain that the precise meaning or application is not apparent,' must be noticed before demurring or answering the pleading and within twenty days from the service thereof. The time to make such motion shall not be extended unless notice of an application for such extension, stating the time and place thereof, of at least two days, shall be given to the adverse party."

But this has nothing to do with the time within which a pleading must be served, or with fixing or determining "the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." The defendant has but two pleadings, his answer or demurrer, and special pleas are unknown except as raised by the one or the other of these, as we have seen. A motion to strike out objectionable matter or to make definite and certain, etc., are proceedings to correct the pleading, the plea made, and such motions are not pleas to the jurisdiction or in abatement. "A plea in abatement is a defense to a pending action, and is properly so termed." Bliss, Code Pl. § 345; Bergkofski v. Ruzofski, 74 Conn. 204, 50 Atl. 565. "What was known under the old practice as a plea in abatement went to some defect or error which merely defeated the present proceeding, but did not show that the plaintiff was forever concluded from maintaining the action." Baylies, Code Pleading and Prac. (2d Ed.) p. 385. And he further says (page 386): "All this has been changed by the Code. That act contemplates but one answer, which shall embrace matter in abatement as well as matter in bar; and the defendant may now unite matter in abatement and matter in bar, and have both tried and determined at the same time." See, also, Mayhew v. Robinson, 10 How. Prac. 164; Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267; Vol. 6, Words and Phrases Judicially Defined, 5406–5409. In any event, the removal act never contemplated or intended, by using the words, "to answer or plead to the declaration or complaint of the plaintiff," to require the removing party to file his petition and bond of removal at or before his time to move by motion to correct his adversary's pleading had expired. The defendant is not "required" by any rule of law or of practice to make any of the motions to correct pleadings to which attention has been called. If he makes either of them, he must move within the time fixed by the rule; but he may waive any of the defects, and plead by answer or demurrer. This he must do—this he is "required" to do—or suffer judgment to go against him. This court is aware of the holding of the Supreme Court of the United States in Goldey v. Morning News, 156 U. S. 524, 15 Sup. Ct. 562, 39 L. Ed. 517, viz.:

"It has been held by this court, upon full consideration, that the provision of this act that the petition for removal shall be filed in the state court at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint,' requires the petition to be there filed at or before the time when the defendant is so required to file any kind of plea or answer, 'whether in matter of law, by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court, or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action,' because, as the court said: 'Construing the provision now in question, having regard to the natural meaning of its language, and to

the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court; so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States.' Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 686, 687, 14 Sup. Ct. 503, 38 L. Ed. 311."

This court is prepared to hold, and holds, that this language has no reference to the motions authorized by the Code of Civil Procedure, state of New York, or rule 22 of general practice. It is clear that the defendant did not elect to submit itself to the jurisdiction of the state court, or waive its right of removal because it did not obtain extensions of time to make the motions referred to. It follows that the time of the defendant to remove the cause to the state court had not expired prior to the filing of the petition and bond of removal, unless it be the law that the written consents or stipulations signed by plaintiff's attorneys extending the defendant's time to plead to the complaint were of no force or effect because no order of court was entered so extending the time to plead, or because, while operating to extend the time to plead, the last extension did not, within the meaning of the removal act, extend the time to remove because of the provisions of rule 24, general rules of practice, which reads as follows:

"No order extending a defendant's time to answer or demur shall be granted unless the party applying for such order shall present to the judge to whom the application shall be made an affidavit of merits, or proof that it has been filed, or an affidavit of the attorney or counsel retained to defend the action that from the statement of the case in the action made to him by the defendant he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof. The affidavit shall also state the cause of action and the relief demanded in the complaint, and whether any and what extension or extensions of time to answer or demur have been granted by stipulation or order, and where any extension has been had, the date of issue shall be the same as though the answer had been served when the time to answer first expired. When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order, except upon two days' notice to the adverse party of the application for such order."

That rule applies to applications to the court for an order extending the time to plead made on affidavits. In such cases, if an extension has been had by order or stipulation, the motion is on notice, and the issue remains as of the date when the pleading was first due. If no extension has been had, no notice is given. The provision as to the date of issue is made to prevent the case taking a low place on the calendar because of favors granted to the defendant. Rule 11 of the general rules of practice recognizes stipulations and written consents when in writing and duly signed. That rule is as follows:

"No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel."

This rule is a declaration that the stipulations signed by the plaintiff's attorneys in this case were and are valid and binding. If valid and binding, they extend the time of the defendant to plead to the complaint—to answer or demur thereto, to plead in abatement, or to the issue or to the jurisdiction; in short, to make any authorized plea. In the courts of the state written stipulations are always enforced and held binding, subject, of course, to the power of the court to relieve the party therefrom for cause. Clason v. Baldwin, 152 N. Y. 204–210, 46 N. E. 322; Hine v. N. Y. El. R. R. Co., 149 N. Y. 154, 43 N. E. 414; Matter of Pet. of N. Y. L. & W. R. R. Co., 98 N. Y. 452, 453. In this last case cited the court said:

"Parties, by their stipulations, may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional, rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced; and, generally, all stipulations made by parties for the government of their conduct, or the control of their rights in the trial of a cause, or the conduct of a litigation, are enforced by the courts. Buel v. Trustees of Lockport, 3 N. Y. 197; Embury v. Conner, 3 N. Y. 511 [53 Am. Dec. 325]; Sherman v. McKeon, 38 N. Y. 266; Allen v. Commissioners, etc., 38 N. Y. 312; Vose v. Cockroft, 44 N. Y. 415; Phyfe v. Eimer, 45 N. Y. 102; De Grove v. Insurance Co., 61 N. Y. 594 [19 Am. Rep. 305]; O. & L. C. R. R. Co. v. V. & C. R. R. Co., 63 N. Y. 176; Wilkinson v. Insurance Co., 72 N. Y. 499 [28 Am. Rep. 166]; Baird v. Mayor, etc., 74 N. Y. 382; Hilton v. Fonda, 86 N. Y. 339; Steen v. Insurance Co., 89 N. Y. 315 [42 Am. Rep. 297]; In re Cooper, 93 N. Y. 507; Stedeker v. Bernard, Id. 589."

The time within which the removal proceedings shall be taken is not jurisdictional, and may be waived. Powers v. Chesapeake & Ohio Railway, 169 U. S. 98, 18 Sup. Ct. 266, 42 L. Ed. 673. The court there says:

"But the time of filing a petition for removal is not essential to the jurisdiction. The provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel. Ayers v. Watson, 113 U. S. 594, 597, 599, 5 Sup. Ct. 641, 28 L. Ed. 1093; Northern Pacific Railroad v. Austin, 135 U. S. 315, 318, 10 Sup. Ct. 758, 34 L. Ed. 218; Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 688–691, 14 Sup. Ct. 533, 38 L. Ed. 311; Connell v. Smiley, 156 U. S. 335, 15 Sup. Ct. 353, 39 L. Ed. 443."

In Hughes' Federal Procedure, p. 331, it is said:

"At the same time the question of the time of filing the petition is not one of jurisdiction, but is, as has been said more than once, merely modal and formal. Hence it is a requirement which may be waived either by direct consent or by conduct."

The plaintiff in this action stipulated and consented in the state court deliberately and in writing that the time of defendant, American Bridge Company, to plead to the complaint herein be extended to and including January 10, 1905. Upon these stipulations and consents the defendant acted, and evidently relied. Within the time, and on the 28th day of December, 1904, the defendant took

due proceedings to remove the case to the Circuit Court of the United States, as it had the legal right to do. It presented its petition, which is sufficient, and in due form, and a bond which is sufficient and in due form and duly approved, to a justice of the Supreme Court sitting in chambers, as the plaintiff asserts, or in Special Term, as the defendant asserts, and then and there procured the approval of the bond. The bond and petition were then filed in the Supreme Court by filing them with the clerk of the Supreme Court and in his office in Tompkins county, the county where the venue was laid, and where all papers in the action in the state court were by the Code of Civil Procedure and the rules of practice required to be filed. Section 825, Code Civ. Proc. The Supreme Court of the United States has just decided (April 17, 1905), in Remington v. Central Pacific Railroad Co., 25 Sup. Ct. 577, 49 L. Ed. ——, that "the presenting of the petition to a judge in chambers and the filing of it in the state court satisfies the statute." The court cites and approves Noble v. Mass. Benefit Association (C. C.) 48 Fed. 337, and Loop v. Winter's Estate (C. C.) 115 Fed. 362. Section 772 of the Code of Civil Procedure of the state of New York provides:

"Where an order, in an action, may be made by a judge of the court, out of court, and without notice, and the particular judge is not specially designated by law, it may be made by any judge of the court, in any part of the state."

It necessarily follows that the presentation of these papers to Judge Dickey was a presentation to the Supreme Court, and, while no order was made, as an order was unnecessary, he had the right to make one, and in effect, did make one by approving the bond, and thereby presumably directing that they be filed in the Supreme Court; that is, in the office of the clerk of that court in Tompkins county.

Baylies' Code Pleading and Practice (2d Ed.) p. 470, says:

"The time within which a party is required by statute to serve a pleading may always be extended by the attorney upon whom the pleading is to be served, or by the party for whom he is acting. Consent to an extension of time to plead is frequently granted in practice, as a refusal of a request for further time merely compels the adverse party to apply for an order granting such relief which is seldom refused."

See, also, Braisted v. Johnson, 5 Sandf. 671.

It seems clear to this court that the entry of an order by the court extending the time of the defendant to plead to the complaint of the plaintiff was entirely unnecessary. The stipulation under the decisions of the New York courts was just as effective and binding as an order would have been. Orders extending the time to plead are only made on affidavits and where the court directs the extension of time. If the parties consent and agree in writing that the time be extended, it is extended, and the party signing the stipulation can only escape from the effect of the stipulation by showing fraud or collusion, and then the court must act. 1 Rumsey's Practice, 221, 222. It is well settled in the Second Circuit that an extension of time to answer by an order entered in the state court ex-

tends the time for filing a petition for removal. Lord v. Lehigh Val. R. Co. (C. C.) 104 Fed. 929. See the numerous cases there cited. In Chiatovich v. Hanchett et al. (C. C.) 78 Fed. 193, it was held:

"Where a stipulation, signed by a party or his attorney or counsel, is of binding force, a cause may be removed from a state to a federal court within the period to which the defendant's time to answer is extended by a written stipulation, though no order of court is entered thereon."

In that case the court said (page 195):

"It is the settled law and practice of the United States Circuit Courts that an extension of time to answer by order of court, whether made on stipulation or not, extends the time for removal. * * * [Citing cases.] This point is conceded by the plaintiff; but his contention is that a mere stipulation of counsel, without any order of the court, is insufficient to extend the time for a removal, and cites authorities in support of this proposition. Martin v. Carter (C. C.) 48 Fed. 596; Schipper v. Cordage Co. (C. C.) 72 Fed. 803. But the question depends solely upon what 'is required by the laws of the state or the rule of the state court in which such suit is brought.' This court must be governed in its decision upon this point by the laws and rules of the court of the state of Nevada. By the laws of this state the Supreme Court is authorized to 'make rules not inconsistent with the Constitution and laws of the state for its own government and the government of the district courts.' Gen. St. Nev. 1885, § 3612. In pursuance of that authority the Supreme Court adopted certain rules for the government of the district courts; among others, that no agreement or stipulation of counsel should be regarded 'unless the same shall be entered in the minutes in the form of an order by consent or unless the same shall be in writing subscribed by the party against whom the same shall be alleged or by his attorney or counsel.' * * * No default could have been entered in the state court. The time for defendants to plead had not expired. The petition for removal was filed in time. People's Bank v. Ætna Ins. Co. (C. C.) 53 Fed. 161."

To the same effect is Allmark v. Platte S. S. Co. (C. C.) 76 Fed. 614.

The Code of Civil Procedure of the state of New York authorizes the making of rules by the Supreme Court, and these rules have all the force of statute. Section 17, Code Civ. Proc. These rules recognize stipulations, as we have seen, and, as the stipulations referred to were made, and the defendant's time to plead to the complaint was thereby extended to and including the 10th day of January, 1905, and the removal papers in due form were filed in the Supreme Court on the 30th day of December, 1904, after having been presented to that court, and after the court had approved the bond, the proceeding for removal was in time, and the cause was properly removed to the Circuit Court of the United States. It seems clear to this court that the written stipulation, extending the time of the defendant to plead to a certain day, estopped the plaintiff from saying in the proceeding to remove the cause that the time in which defendant was required to answer or plead to the complaint had expired before the arrival of the day named in such stipulation.

The general appearance of the defendant did not operate as a waiver of its right to remove. Stevens v. Richardson et al. (C. C.) 9 Fed. 195; Gavin v. Vance (C. C.) 33 Fed. 84; Conner v. Skagit

Cumberland Coal Co. (C. C.) 45 Fed. 802; Duncan v. Associated Press (C. C.) 81 Fed. 417; Whiteley M. C. Co. v. Sterlingworth Ry. Supply Co. (C. C.) 83 Fed. 853; Champlain Const. Co. v. O'Brien (C. C.) 104 Fed. 930; Atlanta K. & N. Ry. Co. v. Southern Ry. Co. (C. C. A.) 131 Fed. 657. Indeed, the plaintiff's attorney does not claim the contrary.

The motion to remand is denied.

BARKER & STEWART LUMBER CO. v. EDWARD HINES LUMBER CO.

(Circuit Court, W. D. Wisconsin. March 13, 1905.)

No. 102.

1. CONTRACT FOR SAWING LOGS—CONSTRUCTION—BREACH.

Defendant purchased a large quantity of logs to be delivered to it at a rate not exceeding 40,000,000 feet each year. It then entered into a contract with plaintiff to receive and saw such logs at a rate not to exceed 35,000,000 feet per year until all should be sawed; the contract providing that, should more than that quantity be delivered to it under its prior contract of purchase, it should have the right to saw the excess at other mills. Subsequently, defendant having purchased additional timber, and contracted to have the same logged by the same firm which was logging the first, a supplemental contract was entered into between the parties, extending the first sawing contract to such logs. *Held*, that such contract could not be construed to permit defendant, while 35,000,000 feet were being delivered to and sawed by plaintiff under the original contract, to itself cut and saw the timber of its second purchase, on the theory that the same was "excess," within the meaning of the first contract, which would give it the option to render the second contract wholly nugatory, but that it must be construed with reference to the fact, known to both parties, that it had been arranged that both tracts should be logged by the same firm, and of the practical limitation on the quantity which they could cut and deliver at plaintiff's mill in a season.

2. SAME—PARTIAL BREACH—RIGHT TO SUE BEFORE FULL PERFORMANCE.

Plaintiff contracted to saw the logs from certain lands, delivered at its mill by defendant—a stated quantity each year. Defendant having purchased other timber, by a supplemental agreement the contract was extended to such timber. Defendant thereafter, and while plaintiff was engaged in sawing logs from the land covered by the original contract, and before the time had come for delivering logs from the second purchase, caused the same to be cut and sawed elsewhere; acting however, in good faith, upon an erroneous construction of the contract. *Held*, that while such action was an absolute breach of a part of the contract, by rendering its performance impossible, such part was an independent one, and, its breach not having been intentional, did not go to the full scope and consideration of the contract, so as to excuse plaintiff from further performance, nor give it a right of action until it had performed up to the time when it became the duty of defendant to deliver the additional logs, and the breach became actual and effective, instead of merely anticipatory.

At Law. On motion for direction of verdict.

Richard Sleight and John M. Olin, for plaintiff.

Herrick, Allen, Boyesen & Martin and R. M. Bashford, for defendant.

SANBORN, District Judge. The defendant at the close of the plaintiff's testimony moves to strike out all evidence relating to profits claimed by plaintiff, and further to exclude all evidence given on behalf of the plaintiff, and to direct a verdict in favor of the defendant, as to the first cause of action.

The most important question relates to the construction of the contracts made between the defendant and the assignors of the plaintiff, a copartnership known as Barker & Stewart. The claim of the plaintiff is for damages based upon the act of the defendant in withdrawing from the contract between the parties certain timber known as the Bigelow timber, and some 7,000,000 additional known as the Hines Lumber Company timber, and sawing it at the defendant's mill. It is claimed by the plaintiff that this timber was brought within the contract by the last written agreement made between them, while the defendant claims that it had the option under that agreement to so withdraw such timber.

On June 14, 1898, a contract was made between Weyerhaeuser & Rutledge and the defendant, providing that Weyerhaeuser & Rutledge would, from lands owned by them in townships 48 and 49, ranges 7 and 8 west, cut into saw logs all the merchantable pine on such lands, estimated at 187,000,000 feet, and would deliver said logs to the Hines Company at certain booms on Chequamegon Bay. Such logs were to be delivered in quantities of not less than 20,000,000 feet or more than 40,000,000 feet annually until all such timber was delivered. The defendant company was to give notice in writing to Weyerhaeuser & Rutledge prior to November 1st each year of the amount it desired to have delivered during the ensuing year. Such notices requiring the delivery of the full amount of 40,000,000 feet have been given for each year, including the year 1905. Deliveries of logs under this contract were to begin after January 1, 1899, so as to permit the manufacture of the logs by March 1, 1899, and Weyerhaeuser & Rutledge agreed to make annual deliveries thereafter until all the logs were cut. The defendant company was to accept all such logs, and pay for the same within 90 days after the end of the month of delivery. On the 19th day of June, 1900, and in each year thereafter during the existence of the contract, defendant was to pay Weyerhaeuser & Rutledge interest from June 14, 1899, on the stumpage value of the logs delivered during the preceding year, but on June 14th in each year there was to be credited to the defendant company interest on all cash payments made by it for logs received during the preceding year. After further provision in respect to a contract made by Weyerhaeuser & Rutledge with the Standard Construction Company for the cutting of the logs, the lands are described upon which the logs are situated, and certain other agreements were made, not material to this controversy.

On October 6, 1898, the first contract between Barker & Stewart and the defendant company was made. It recites that the defendant has made the Weyerhaeuser & Rutledge contract, and in general its provisions, and that the Hines Company was desirous

of having said logs manufactured into lumber at or near the point of delivery, and Barker & Stewart desired to secure a contract to manufacture a portion of said logs into lumber, and were familiar with the terms of the Weyerhaeuser & Rutledge contract. It was therefore agreed that Barker & Stewart should prior to March 1, 1899, build, erect, and fully equip a sawmill capable of sawing at least 35,000,000 feet of lumber during each sawing season, working both night and day, and that they would build the mill and have it ready to commence manufacture on or before March 1, 1899. It was further agreed by Barker & Stewart that between March 1st and December 1st of each year thereafter, until all the said logs were manufactured into lumber, they would at their sawmill manufacture into merchantable lumber, in a proper manner, not less than 25,000,000 or more than 35,000,000 feet of the Weyerhaeuser & Rutledge logs. The quantity to be manufactured each year, within the limits so specified, was to be fixed by the defendant company giving notice in writing to Barker & Stewart on or before November 1st each year of the quantity which it desired to have manufactured into lumber during the next sawing season. Such notices have been given for each year at the full amount of 35,000,000. Barker & Stewart further agreed to continue the manufacture at the full capacity of the mill until the close of the sawing season each year, and manufacture all logs delivered to them by defendant within the specified limits, and would not manufacture for others at any time when there were sufficient of defendant's logs available to keep the mill running to its full capacity for a week unless the defendant should, in writing, consent thereto. It was further provided that the lumber should be sorted and piled into 35 sorts or piles. They further agreed to manufacture lath which would grade No. 1. Various other provisions are contained for the manufacture, sorting, and piling of the lumber. Barker & Stewart further agreed to accept all the logs so to be manufactured as delivered by Weyerhaeuser & Rutledge, and such delivery should be considered a complete delivery under the contract of October 6, 1898. Defendant, on its part, agreed to deliver such logs up to the amount to be manufactured in each year. Then comes the following provision:

"But it is understood that if under the said contract of June 14, 1898, or by other agreement with the said Weyerhaeuser and Rutledge the said second party [Hines Lumber Company] shall have more than 35,000,000 feet, board measure, of logs covered by said contract of June 14, 1898, cut and delivered as aforesaid in any one or more years, then the second party shall have the right to have such excess manufactured at mill selected by it other than the one owned by the first party [Barker & Stewart]."

Defendant should only be required to deliver to Barker & Stewart such logs as were delivered by Weyerhaeuser & Rutledge under their said contract, and no damage was to accrue to or be recovered by Barker & Stewart on account of nondelivery of logs for any reason specifically mentioned in the Weyerhaeuser & Rutledge contract, or because of the nonperformance of that contract for any other reason not the fault of the defendant. Barker & Stewart were to

receive for sawing $1.85 per thousand for lumber, and 85 cents for lath. It is further provided that, if the mill should be accidentally destroyed by fire or otherwise, Barker & Stewart will rebuild within 90 days after such destruction, and will then proceed with the performance of the contract. No damage was to accrue to defendant for the suspension of operations during the 90 days, provided it should have the right, if it so desired, to have logs delivered under the Weyerhaeuser & Rutledge contract manufactured during said period at some other convenient mill in the vicinity; Barker & Stewart to pay any excess over the contract price for such manufacture. If Barker & Stewart should default in the performance of the contract, defendant might stop further manufacture, and cause the Weyerhaeuser & Rutledge logs to be manufactured at other mills, and Barker & Stewart were to pay any damages which defendant might thereby suffer. Provision was made for the assignment of the contract.

On February 19, 1902, the second or modifying contract was made between Barker & Stewart and defendant, the first provision of which is as follows:

"Second party agrees in addition to the timber contracted under the said above named contracts to be furnished the first party for sawing to also give and furnish the first party for sawing all of the timber which the second party now owns, or which it may acquire during the life of said contracts as hereunder modified, in the townships and ranges covered by the descriptions mentioned in the above contract of October 6th, 1898, such logs to be delivered at the place specified under said contract. First party agrees to receive said logs at such place, and manufacture same as provided in last mentioned contract as hereby modified. It is agreed that all of the provisions of said contract of October 6th, 1898, as hereby modified, shall apply on all additional logs herein mentioned as though such logs had been specifically mentioned in said three contracts as hereby modified."

This provision applies to the Bigelow and Hines timber in question, amounting to about 71,000,000 feet.

This contract provided that, instead of 35 sortings or piles, there should be 75; and certain other provisions were made for more particular care of the lumber to be sawed and loaded, and also that defendant was to take all of the lumber manufactured from its logs, including 4-foot lumber, and that all offal, including trimmings, sawdust, and what remains of the slabs and edgings after making Nos. 1, 2, and short lath, should belong to "second party" (that is, the defendant), but, if second party should consider that any portion of the product was not worth the saw bill, then such portion should become the property of Barker & Stewart, without charge; defendant agreeing to take all of Nos. 1, 2, and short lath and 4-foot lumber, and pay the saw bill. The price for sawing was increased from $1.85 to $2.02½ for lumber, and from 85 cents to $1.20 for lath per thousand pieces and $1 per thousand pieces for the short lath. Also $1.25 per thousand feet for kiln-drying lumber, and 18¾ cents per thousand pieces for kiln-drying lath.

By the tenth provision of this contract it is provided that Barker & Stewart would do winter sawing under the modified contract,

provided it should give notice not later than December 1st of any year that it would require the same, and defendant was in that case to request Weyerhaeuser & Rutledge to do winter logging, and furnish enough logs to Barker & Stewart for three months' winter sawing, and that it would use all reasonable endeavors to have Weyerhaeuser & Rutledge do so. It appears in evidence that Weyerhaeuser & Rutledge had a logging railroad from the lands in question to Ashland. Then follows the provision for the prices for winter sawing.

The thirteenth provision is to the effect that, except as therein specifically modified, the contract of October 6, 1898, and all its terms, conditions, and provisions, should remain in full force and effect, and that this contract and prior contracts thereby modified might be assigned by second party to a corporation of the same name to be organized by the second party.

Prior to the making of the second contract, and on November 13, 1900, the defendant made another contract with Weyerhaeuser & Rutledge, by which the latter agreed to cut all the merchantable pine, spruce, and tamarack timber owned by defendant for which it then had an option to purchase or might purchase within three years, amounting to about 100,000,000, and located in the same townships described in the first Weyerhaeuser & Rutledge contract, except six sections in said townships and ranges, and that it would cut, haul, and deliver said timber at the rate of from 5,000,000 to 15,000,000 during the first year, and after the first year from 15,000,000 to 25,000,000, until all the timber was cut, commencing January 1, 1901. The manner of cutting was provided, the price, and various provisions in relation to scaling, etc.

The two contracts between Barker & Stewart and defendant were duly assigned to the plaintiff company.

Either prior to the time when the second contract was made, or shortly thereafter, the defendant company acquired timber in said townships and ranges, 7,000,000 feet of which is described generally as the Hines Lumber Company timber, and 64,000,000 of which was the Bigelow timber, so called; and in 1902 and 1903 the defendant company, in good faith claiming the right to do so under its interpretation of the contract, and without any intention to interrupt the performance of the contracts in other respects, logged 71,000,000 feet of the timber so acquired, and sawed the same at a mill at Ashland known as the Bigelow Mill, which the defendant had purchased from the Bigelows. It is claimed by the plaintiff that this act of the defendant was in breach of the first provision of the second contract, that by sawing said timber at its own mill the defendant thereby destroyed the subject-matter of the contract, and that that part of the contract was thereby broken, giving rise to a cause of action for damages in favor of Barker & Stewart, which it is claimed has been assigned to the plaintiff, and it is for this breach that this action is brought.

The defendant claims that under the contracts in question it had the right to manufacture such timber at its own mill, and that at all

events this action is premature, inasmuch as the plaintiff has not elected to treat such alleged breach by the defendant of this part of the contract as putting an end to the contract, but, on the other hand, that the plaintiff has gone on and is still going on in performance of the contract so far as it relates to the Weyerhaeuser & Rutledge timber, and that it will take at least two years longer to manufacture that timber, so that the time of performance of that part of the contract relating to the additional timber will not arrive before the season of 1907 at the earliest.

As stated, the important question relates to the construction of the various contracts above mentioned. It is insisted on the part of the defendant that the provision in respect to the right of the defendant to manufacture the excess of timber over 35,000,000 feet per year gave it the right, if it could procure such timber to be logged, to manufacture any part or all of both the Weyerhaeuser & Rutledge timber and the additional timber in any one or more years in excess of 35,000,000, while it is claimed by the plaintiff that the excess mentioned in the quoted provision from the second contract relates only to the excess of 5,000,000 over the 35,000,000 to be manufactured by the plaintiff in each year up to the 40,000,000 to be put in by Weyerhaeuser & Rutledge. It will be noticed that it is contemplated in the contract as modified that the sawing will proceed from year to year until the whole amount of the timber is exhausted. The parties will be presumed to have understood whatever practical limitations there may have existed as to the ability of Weyerhaeuser & Rutledge to log more than 40,000,000 per year. While it may be said that it was expressly stipulated that the defendant should have the right to manufacture any excess over 35,000,000 a year, yet such excess is in the first contract expressly confined to such amount as might be logged by Weyerhaeuser & Rutledge, and by no one else. When we come to the second contract, the same provision in respect to logging under any contract by Weyerhaeuser & Rutledge is by adoption carried over into that contract, and it is insisted on behalf of the defendant that, inasmuch as this provision in the first contract could apply only to the Weyerhaeuser & Rutledge logs, yet when it is carried over into the second contract it must be construed as applying to any action which might be taken by the defendant company in logging in excess of 35,000,000; and it is clear that any of the provisions of the first contract which related exclusively to Weyerhaeuser & Rutledge must be deemed to be carried over into the second contract; otherwise there would be no provision for the cutting and delivery of the additional timber. This is the difficult aspect of the matter, and needs careful consideration. The argument of counsel for defendant on this point is substantially this: No provision for the logging and delivery of the additional logs is written into the second contract. The manner of their cutting and delivery depends wholly on that clause in the second contract which adopts all the provisions of the first contract as modified as fully as if the additional logs were specifically mentioned in the last one. This, it is said, clearly

shows that the references to the duty of Weyerhaeuser & Rutledge to cut and deliver the Weyerhaeuser logs under the first contract between these parties must apply to the duty of the Hines Company to cut and deliver the additional logs under the second contract, because, it is argued, some one must cut and deliver the latter, and, as Weyerhaeuser & Rutledge were under no obligation so to do, necessarily it is meant that the Hines Company must do so; and, it is further argued, if the Hines Company is thus, by such adopted and implied provisions, under duty to cut and deliver the additional logs, why can it not with equal propriety be said that the Hines Company may cut the excess and deliver it to its own mill? If one provision formally applying to Weyerhaeuser & Rutledge really applies to the Hines company, why not the other? So that, when the second contract, by a provision adopted from the first, says that if, by any agreement with Weyerhaeuser & Rutledge, the Hines Company shall have more than 35,000,000 delivered in any year, it may itself manufacture such excess, it was really meant to drop the names of Weyerhaeuser & Rutledge, as logically impossible, and provide that the only person who could cut the additional logs should take the same place in respect to those logs occupied by Weyerhaeuser & Rutledge as to their logs. This argument would be very strong if the second Weyerhaeuser & Rutledge contract of November 13, 1900, had not existed when the second contract of February 19, 1902, was made. This contract provided that Weyerhaeuser & Rutledge should cut, haul, and deliver for the Hines Company about 100,000,000 of pine, spruce, and tamarack in the same towns referred to in the first contract, excepting six designated sections. In view of the existence of this contract, the language of the first Barker & Stewart contract as to cutting, delivery, and excess of the cut over 35,000,000 can be literally written into the modified contract without any logical break. The Weyerhaeuser & Rutledge obligation to cut and deliver logs had been by the 1900 contract extended to the additional logs, or at least a large part of them. Therefore there is no inconsistency in the literal adoption in the modified contract of language expressing that obligation, and applying such language to the additional logs.

I think this construction is also consistent with the general intention of the parties. This is, of course, the cardinal rule of construction, although I think the language is clear. Loud v. Pomona Land & W. Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822. The construction contended for by defendant tends to render nugatory the contract as to the additional logs, giving defendant the option to take them out of the contract. This cannot be supposed to have been within the intention of both parties. It is also to be noted, as already indicated, that the parties, in agreeing that defendant might have any excess over 35,000,000 logged by Weyerhaeuser & Rutledge, probably had in mind practical limitations on their ability in that direction. They may have understood that it would be difficult for these loggers alone to greatly exceed the 40,000,000, and have been willing to agree that the Hines Company might saw

any excess logged by Weyerhaeuser & Rutledge, without being willing to consent that it might saw any excess cut by others. It will be noted here, and seems important, that the additional timber was in the same towns as the Weyerhaeuser & Rutledge timber, and was presumably accessible to the Weyerhaeuser & Rutledge railroad. Undoubtedly the plaintiff knew this, and may be presumed to have relied upon the whole situation, as bearing upon the ability of Weyerhaeuser & Rutledge to log any great amount in excess of 40,000,000 feet. To hold that the Hines Company had the right to supplement the amount of logging to be done by Weyerhaeuser & Rutledge by its own acts is to give the contract, as I think, an unreasonable construction—one not contemplated by the parties. I think the modified contract means to import into it the provision that Hines might procure Weyerhaeuser & Rutledge, but no one else, to do any additional logging over the 40,000,000 per year, but I think the provision is confined to logging to be done by Weyerhaeuser & Rutledge under any contract between them and the Hines Company; and I think, also, as the additional timber introduced a very important element into the contract, that the plaintiff must be deemed to have relied upon this stipulation as greatly beneficial to it.

I do not think the tenth clause in the second contract in regard to winter sawing is significant, in view of the fact that logs cannot be taken from the boom in the water in the winter, but can only be delivered to the plaintiff over the Weyerhaeuser & Rutledge narrow-gauge railroad.

I think the act of the defendant in sawing the 71,000,000 out of the additional logs, no matter how bona fide, was a partial breach of the contract.

There was, then, if this reasoning be correct, a breach by defendant of the contract regarding the additional logs. By the voluntary act of defendant, due to a bona fide, but erroneous, construction of the contract, the additional logs were destroyed. This was not a renunciation or refusal to perform a contract provision still capable of performance. Such a refusal to do something still possible of execution is not itself a breach, but may or may not give the promisee the option to treat it as such. But the absolute destruction of part of the contractual subject-matter is a breach, ipso facto. The promisee has no option. Pro tanto the contract is at an end, whether the parties will or not. Whether it gives an immediate cause of action depends on whether performance by the other party has been prevented or excused. "We must, however, bear in mind, though every breach of the contractual obligation confers a right of action upon the injured party, every breach does not necessarily discharge him from doing what he has undertaken to do under the contract. The contract may be broken wholly or in part, and, if in part, the breach may or may not be sufficiently important to operate as a discharge, or, if it be so, the injured party may choose not to regard it as a breach, but may continue to carry out the contract; reserving to himself the right to bring action for such dam-

ages as he may have sustained by the breach. It is often very difficult to ascertain whether or no a breach of one of the terms of a contract discharges the party who suffers by the breach." Anson on Cont. 363. "If one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued, without demand, although the time specified for performance has not arrived." Bishop on Cont. § 1426; Wolf v. Marsh, 54 Cal. 228. "For partial derelictions and noncompliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must still seek his remedy upon the stipulations of the contract itself." Selby v. Hutchinson, 9 Ill. 319; Weintz v. Hafner, 78 Ill. 27. These citations show that a breach existed, but do not settle the question whether part performance can be anticipated while actual performance is going on. These considerations in part distinguish this case from those cited on the argument. The rule of those cases, as I understand it, is this:

(1) A total breach by some act making performance impossible puts an end to the contract. Anvil Min. Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; Lovell v. Life Ins. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; Canada v. Canada, 6 Cush. 15; Lee v. Briggs, 99 Mich. 487, 58 N. W. 477; Treat v. Hiles, 81 Wis. 280, 50 N. W. 896.

(2) The promisor may by his voluntary, wrongful act wholly and absolutely disable himself from performing a severable part of the contract. But such act is not intended to excuse performance of other parts of the contract, and does not go to the whole consideration, scope, or purpose of the contract, nor render unattainable its main object. If the promisee has performed his part of the contract to which such partial breach relates, he may sue at once. But if the time of performance of such part has not arrived, a performance of the balance is a condition of his right to demand performance of the part as to which such disability has occurred. He must await such time of performance before bringing suit, and must himself have performed up to that time.

(3) The promisor may, before the time for performance arrives, renounce the contract in part, performance of the whole being still possible. If the part so renounced be a dependent provision, or go to the whole consideration and scope of the contract, this is a breach. The other party may accept it as such, and sue at once for the difference between the contract price and the cost of performance. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Hochster v. De La Tour, 2 El. & Bl. 678; Lake Shore & M. S. Ry. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; Nilson v. Morse, 52 Wis. 240, 255, 9 N. W. 1; Pierce v. Tennessee Coal, Iron & R. Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591; Standard Oil Co. v. Denton (Ky.) 70 S. W. 282; Tenn. & Coosa R. Co. v. Danforth, 112 Ala. 80, 20 South. 502; Walsh v. Myers, 92 Wis. 397, 66 N. W. 250; Allen v. Field (C. C. A.) 130 Fed. 654; Bolles v. Sachs, 37 Minn. 315, 33 N. W. 862; Cinn., Ind., St. L. & Chi. R. Co. v. Lutes,

112 Ind. 276, 11 N. E. 784, 14 N. E. 706; Cort v. Ambeogaite Ry. Co., 6 Eng. L. & E. 230; Fell v. Newberry, 106 Mich. 542, 64 N. W. 474; Haines v. Tucker, 50 N. H. 307; Lincoln v. Orthwein, 120 Fed. 880, 57 C. C. A. 540; New Bruns., etc., Co. v. Wheeler (C. C.) 12 Fed. 377. He may also defer suit until the time for performance arrives, and then sue, being ready to perform in the meantime, and leaving the promisor a locus penitentiæ, unless the former has so changed his position as to create an estoppel. Id. Where the contract requires manufacture, or the delivery of articles of merchandise, the manufacturer or vendor cannot insist on continued performance, unless the other party retracts his repudiation and accepts further performance, but must in any reasonable way minimize the damages suffered by him from such repudiation. Allen v. Field (C. C. A.) 130 Fed. 641; Clark v. Marsiglia, 1 Denio, 317, 43 Am. Dec. 670; Moline Scale Co. v. Beed, 52 Iowa, 307, 3 N. W. 96, 35 Am. Rep. 272; Black v. Woodrow, 39 Md. 194; Heaver v. Lanahan, 74 Md. 493, 22 Atl. 263; Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; Dillon v. Anderson, 43 N. Y. 231; Johnson v. Meeker, 96 N. Y. 93, 48 Am. Rep. 609; Heiser v. Mears, 120 N. C. 443, 27 S. E. 117; Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783; Chicago, etc., Co. v. Barry (Tenn.) 52 S. W. 451; Tufts v. Lawrence, 77 Tex. 526, 14 S. W. 165; Danforth v. Walker, 37 Vt. 239; Id., 40 Vt. 257; Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992; Collins v. Delaporte, 115 Mass. 159; Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Nebraska City v. Nebraska City, etc., Co., 9 Neb. 339, 2 N. W. 870. Contra, Roebling's Sons v. Lock Stitch Fence Co., 130 Ill. 660, 22 N. E. 518.

(4) If the renunciation of part performance does not go to the whole consideration (full performance not being rendered impossible), and the renunciation was not intended to excuse performance of other provisions, and does not render unattainable the main object of the contract, no breach occurs, and no right of action arises. See Freeth v. Burr, L. R. 9 C. P. 213, and other cases cited in the same connection; Smoot's Case, 15 Wall. 36, 21 L. Ed. 107.

(5) Although renunciation goes to the whole contract, or to a vital, dependent provision, yet, if the other party does not promptly accept it as a breach, the contract is regarded as still alive for all purposes. Bernstein v. Meech, 130 N. Y. 358, 29 N. E. 255; Avery v. Bowden, 5 El. & B. 714; Weed v. Hoskins, Id. 729; Shields v. Carson, 102 Ill. App. 38; Rolling Mill v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Johnstone v. Milling, 16 Q. B. Div. 460; Kilgore v. Northwestern, etc., Ass'n, 90 Tex. 142, 37 S. W. 600; Foss-Schneider Brew. Co. v. Bullock, 59 Fed. 83, 8 C. C. A. 14.

(6) An agreement to do something not going to the whole consideration, and not expressly made a condition, will be regarded as a "stipulation," a breach of which can be compensated in damages, and not as a condition precedent. Instances are afforded by agreements to submit disputes arising under a contract to arbitration. A refusal to arbitrate is not a condition precedent, unless

expressly made so, but the other party may sue for any damage caused by such refusal. Scott v. Avery, 5 H. L. Cas. 811. Where a singer, among other agreements, was to report for rehearsals six days before the performances were to commence, but reported only two days before, this was a stipulation to be compensated in damages, not a condition precedent. Bettini v. Gye, L. R. 1 Q. B. D. 183; Andrew v. Chapple, L. R. 1 C. P. 643; Pickens v. Bozell, 11 Ind. 275; Boyle v. Guysinger, 12 Ind. 273.

The present case is sui generis, so far as direct authority goes. It is the breach of an independent promise, by destruction of part of the subject-matter, making further performance quoad hoc entirely impossible, but not giving plaintiff the right to abandon performance of the balance. This appears to me entirely demonstrable. Defendant's act in sawing the additional logs was professedly in performance of the contract as understood by it. No default or breach was intended. Defendant was, as it insisted and now insists, simply availing itself of an express stipulation of the contract. Nothing was done or apparently contemplated or intended to interfere with performance in other respects. The continued sawing of the Weyerhaeuser & Rutledge logs was at all times insisted on, the payment therefor punctually continued, and is still going on. No breach was intended. "The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." Freeth v. Burr, L. R. 9 C. P. 213, quoted with approval in Hoffman v. King, 70 Wis. 372, 378, 36 N. W. 25. In the latter case the rule laid down by Lord Mansfield in Jones v. Barkley, 2 Doug. 691, is approved, to the effect that the dependence or independence of covenants depends upon the order of time in which the intent of the transaction requires their performance. In the case here defendant was not required to deliver the additional timber for sawing until the Weyerhaeuser & Rutledge logs were exhausted; hence its failure to deliver them prior to 1907, if they had remained in existence, could not have justified plaintiff in repudiating the whole contract. Nor was the agreement to deliver the additional logs a condition precedent to either the building of the mill or the sawing of the Weyerhaeuser & Rutledge logs. The destruction of the additional logs did not go to the entire substance of the contract, and to the whole consideration, within the rule of Milldam Foundry v. Hovey, 21 Pick. 417, also quoted with approval in the Hoffman Case, or render unattainable the object of the contract, within Selby v. Hutchinson, 9 Ill. 319; Weintz v. Hafner, 78 Ill. 27. See, also, the leading case of Johnstone v. Milling, 16 Q. B. D. 460, cited and relied on by defendant's counsel, where it was held that a lessor's covenant to rebuild did not go to the whole consideration, and that a refusal to rebuild would not justify lessee in declaring a total breach; also Kerslake v. McInnis, 113 Wis. 659, 666, 89 N. W. 895, holding that the failure to cut 400 M of logs out of a larger amount was not a condition precedent. Kaukauna Water Co. v. Kaukauna, 114 Wis. 327, 89 N. W. 542.

I think, therefore, that the obligation to deliver the additional logs

was an independent one, the breach of which did not authorize plaintiff to stop sawing the other logs. If the act of defendant did not prevent performance of the contract as a whole, and such performance would be necessary to enable plaintiff to be in a position to finally saw the additional logs, then a cause of action would not arise before the time of performance arrives.

The question still remains whether the partial breach which has been found to exist in this case can be regarded as anticipating the time when an action for such breach can be brought. Every breach must give rise to a cause of action, but should the latter be deemed to arise until performance is due, especially in a case where performance of the major part of the contract is proceeding? This question has not arisen in any decided case, so far as I have been able to find, nor is it discussed by any text-writer, except to some extent by Prof. Williston in an article on Repudiation of Contracts in 14 Harv. Law Rev. 421, 428. The plaintiff has not fully performed all it is bound to do under the contract; hence it cannot be said that the time will ever come when a cause of action for the destruction of the additional logs will arise, and it is clear that such condition precedent has not been in any way dispensed with by the defendant. So it cannot be affirmed that plaintiff ever will have a right of action. The breach does not go to the full scope and consideration of the contract. So the condition of full performance by the plaintiff has not been excused. In order that an action can be maintained as for a breach, it must appear that performance by the plaintiff has in some way been excused by defendant. It seems clear that a breach falling short of a ground of rescission does not operate as such excuse. The agreements of the contract in question are not mutually dependent, in the sense that the destruction of the logs operated or was intended as a repudiation of the whole contract, but are so dependent in the sense that plaintiff must perform continuously in order to keep the contract alive, and justify an action for any breach; and, defendant not having excused such performance, no cause of action has yet arisen.

The supervening circumstances possible in this case are the destruction of the mill by fire, and a failure to rebuild within three months. The plaintiff's lease may expire, without renewal, before the time of performance arrives, or some default amounting to repudiation may occur, accepted as a breach by defendant. What effect these circumstances might have upon a default previously existing on defendant's part, it is not now necessary to decide. It is argued that any one of them would be material, although the additional logs had been cut long before. That question is not now presented.

Even when the repudiation is so serious as to lead to rescission and a consequent action for profits, many difficulties beset the proofs, as shown by Allen v. Field (C. C. A.) 130 Fed. 641. But how much more troublesome is the case where performance is going on, as here, up to and beyond the full present obligations of the parties, and where the time of actual performance as to the additional logs may

not be reached for several years. An action for a present breach under such circumstances may profoundly affect such continued performance. The defendant may also be deprived, in an action immediately brought, of the proper force and effect of all supervening circumstances either lessening or defeating liability. On the other hand, the plaintiff's damages may be so far projected into the future as to be immensely difficult of estimation. Continued performance, and whether it is efficient or otherwise, is also likely to improperly influence the measure of damages. In short, the estimation of profits under such circumstances is so difficult and burdensome, and attended with so many anomalous conditions, that the remedy given as upon anticipatory breach of a contract should not be extended to such a case as this unless plainly required by legal principle. There are anomalies and difficulties enough in the ordinary case of repudiation followed by a complete rescission, but these are greatly increased in a case like this, brought for a partial breach long before performance is due, at the same time that full performance of all other parts of the contract is going on.

For my part, I am unwilling to extend a legal rule attended by such difficulty to a case of partial breach, even where the subject-matter has been, as here, partially destroyed by the defendant, especially when performance by the plaintiff has not been excused or dispensed with. The main reason for the application of the rule of anticipatory breach is its practical convenience. 14 Harv. L. R. 438. When this ceases I think the rule itself should not be applied.

The motion to direct a verdict for defendant on the first cause of action is granted, without prejudice to the right of the plaintiff to sue when a cause of action shall arise.

VOCALION ORGAN CO. v. WRIGHT.

(Circuit Court, D. Massachusetts. May 2, 1905.)

No. 1,845.

1. CONTRACTS—RULES OF CONSTRUCTION.

In construing a written contract the court should put itself in the situation of the parties at the time it was made, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and the correct application of the language of the contract, taken as a whole, to the things described.

2. SAME—CONSTRUCTION—CONTRACT FOR INTEREST IN FUTURE INVENTIONS.

Complainant was a corporation engaged in the manufacture of musical instruments, including organs, and defendant was the superintendent of its factory, and had made certain inventions in relation to organs. A new contract was made between them by which, in consideration of an increased salary for a term of five years, it was provided in clause 2, which was the principal one, that a one-half interest in all improvements or inventions made by defendant during the term "in or relative to organs, both keyed and automatic," should be assigned to complainant, and they should be at once patented at complainant's cost. By clause 4 it was provided that complainant should have the exclusive right to purchase and use improvements and inventions made by defendant during the term "in self-playing pianos or self-playing devices for playing pianos," on such terms as should be mutually agreed upon. Defendant made and patented certain inventions which were applicable equally to organs and to self-playing pianos. *Held*, that such inventions came within the provisions of the second clause of the contract, being of the class which it was the principal purpose of the contract to cover, and that complainant was entitled to an assignment of a half interest therein without further payment than that provided for by the contract.

In Equity.

George D. Beattys and George B. B. Lamb, for complainant.
Henry Wood Fowler and Charles M. Thayer, for defendant

HALE, District Judge. This suit in equity is brought to compel the defendant to assign to the complainant a one-half interest in certain improvements, inventions, and patents in or relative to organs, in accordance with the terms of a written contract made by the parties on May 15, 1901. The suit is brought also to restrain the defendant, his heirs, executors, administrators, or assigns, from selling or assigning any interest in said inventions, improvements, and patents, to any person other than the complainant, during the life of the contract. The complainant corporation is a citizen of the state of New Jersey; the defendant is a citizen of the state of Massachusetts.

At the time of entering into the contract the complainant was engaged in the business of manufacturing and selling musical instruments, including organs, both keyed and automatic. The defendant was the superintendent of the complainant corporation, at a salary of $3,600 per year.

Although only the second and fourth paragraphs of the contract are brought before the court for construction, it is material, for

certain purposes of the inquiry, to examine the whole contract. That contract is as follows:

"Agreement made this fifteenth day of May, in the year nineteen hundred and one, between the Vocalion Organ Company, a corporation organized and existing under the laws of the state of New Jersey, transacting business at Worcester, in the county of Worcester, commonwealth of Massachusetts, and in the city of New York, state of New York, party of the first part, and Morris S. Wright of Worcester, aforesaid, party of the second part, witnesseth:

"That for and in consideration of the mutual covenants and other consideration hereinafter expressed the parties hereto covenant and agree as follows:

"First. The party of the first part covenants and agrees to employ the party of the second part and does hereby employ the party of the second part and the party of the second part covenants and agrees to accept and hereby does accept exclusive employment of the party of the first part as superintendent of factories of the party of the first part.

"Second. The party of the second part covenants and agrees that an undivided one half part of the whole right, title and interest in and to all inventions or improvements made by him during the term of this agreement, in or relative to organs both keyed and automatic shall be the property of the party of the first part, and immediately upon making any such inventions or improvements the party of the second part covenants to apply for letters patent of the United States therefor and for such foreign patents therefor as the party of the first part may desire, and to make, execute and deliver all such applications, specifications, drawings and other documents as may be necessary to obtain such letters patent; and the party of the second part further covenants to execute, acknowledge and deliver to the party of the first part a proper assignment for record of an undivided one half interest in each such invention and in the letters patent when issued: all, however, at the proper cost and expense of the party of the first part or its successors and assigns. The party of the second part further covenants not to sell or assign his undivided one half part in and to any of the above mentioned inventions, improvements and letters patent, which part shall be and remain the exclusive property of the party of the second part his heirs, executors and administrators, until the expiration of the term of this agreement.

"Third. The party of the second part further covenants and agrees that he will without further consideration than is herein expressed assign and transfer to the party of the first part letters patent of the United States number 509,506 for improvemens in reed and pipe organs and will upon request of the party of the first part execute and deliver to the party of the first part a proper assignment of said patent for record.

"Fourth. The party of the second part further covenants and agrees to grant and does hereby grant unto the party of the first part the exclusive right to purchase and use inventions or improvements made by him during the term of this agreement, in self-playing pianos or self-playing devices for playing pianos, upon such terms as to price or royalty and other conditions as may be mutually agreed upon; and the party of the second part further covenants that he will not sell, assign, transfer or in any way dispose of any such invention or improvement to any other corporation or persons than the party of the first part during the term of this agreement.

"Fifth. As and for the salary of the party of the second part and also in full consideration for the transfer of patent number 509,506 aforesaid, and for the transfer of the undivided one half part of the right, title and interest in and to the improvements and inventions and assignments thereof, mentioned in paragraph second of this agreement, the party of the first part covenants and agrees to pay to the party of the second part, and the party of the second part covenants and agrees to accept the sum of five thousand dollars per annum, together with a percentage of one per cent. upon the net value of the increased factory output in each year over the factory output of the preceding year of the term of this agreement, which said percentage shall be ascertained and paid at the end of each year for which it shall become due.

"Sixth. It is covenanted and agreed that this agreement supersedes and makes void the agreement bearing date the fourteenth day of December, eighteen hundred and ninety-eight, between the party of the second part hereto and the late the Mason & Risch Vocalion Company, Limited, and also cancels all other existing agreements between the parties hereto.

"Seventh. It is further covenanted and agreed that this agreement shall be deemed to be in full force and effect from and after the first day of July, nineteen hundred, and until the first day of July, nineteen hundred and five, and shall terminate on said first day of July, nineteen hundred and five.

"In witness whereof," etc.

The testimony tends to show that, previous to making the contract, Mr. Tremaine, the president of the complainant company, had many conversations with the defendant in regard to his experience and ability in manufacturing, improving, and inventing musical instruments; that the defendant gave the assurance that he could develop and improve the different instruments manufactured by the complainant company; that, in view of these representations made by the defendant, the complainant company was induced to make the agreement now in suit, providing for the increase of the defendant's salary from $3,600 per year to $5,000 per year, with an added percentage based on the value of the output; and that the arrangement under this contract was to continue from July 1, 1900, to July 1, 1905.

The second paragraph of the contract provides that an undivided one-half part of the whole right, title, and interest in and to all inventions or improvements made by the defendant during the life of the contract "in or relative to organs, both keyed and automatic," shall be the property of the complainant; that the defendant shall apply for letters patent upon such inventions immediately upon making them, and shall make, execute, and deliver the applications and all necessary papers, and assign and deliver an undivided one-half part of the inventions and letters patent to the complainant.

The fourth paragraph of the agreement provides that the defendant shall grant to the complainant the exclusive right to purchase and use inventions and improvements made by the defendant "in self-playing pianos or self-playing devices for playing pianos" upon such terms as shall be mutually agreed upon.

The testimony tends to show that the defendant made improvements and inventions during the term of the agreement, and applied for and obtained letters patent. The complainant requested the defendant to assign to it an undivided one-half interest in these improvements and letters patent, alleging that they were improvements or inventions "in or relative to organs, both keyed and automatic," but the defendant refused to do this.

There is considerable testimony as to the demands made by the complainant on the defendant for information touching the character of his inventions and improvements, and as to the replies made by the defendant, alleging that his inventions would control the manufacture of musical instruments throughout the world, that his organs known as orchestrelles were so far superior to those instruments at present in use as to take away the entire trade of the

orchestrelle, and that his inventions would control the production of metal piano players, and that they would apply equally well to self-playing pianos and pipe organs. The testimony tends to show that the defendant insisted that the complainant should pay him a satisfactory price for his inventions before he would show the papers.

It becomes material to inquire, at the threshold of the proceeding, what was the scope and meaning of the contract; for, under well-settled rules of law, in the construction of a contract courts are never to be shut out from the same light which the parties enjoyed when the contract was executed. They are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. Nash v. Towne, 72 U. S. 689, 699, 18 L. Ed. 527. See, also, Steamship Co. v. Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545. It is also necessary to examine not only the circumstances under which the contract was entered into, but to examine also the whole contract, and not merely isolated portions. O'Brien v. Miller, 168 U. S. 293, 18 Sup. Ct. 140, 42 L. Ed. 469; Potter v. Berthelet (C. C.) 20 Fed. 240.

Applying these familiar rules of construction, we find that the defendant was the superintendent of the complainant company; that he was possessed of mechanical and inventive skill, and of technical knowledge of musical instruments; that, with his experience and ability in this direction, he was capable of improving and inventing musical instruments; that the complainant was anxious to acquire a half interest in the inventions which the defendant should make; that it was willing to allow the defendant to spend the time of the corporation in the making of inventions, and, in pursuance of having the advantage of defendant's inventive thought, to give him a substantial increase of salary and a percentage based on the value of the output; that it was anxious to obtain, not only the one-half interest in the distinct subject of the business, namely, all improvements in or relative to organs, both keyed and automatic, but it was also anxious to have the option on any inventions or improvements which the defendant should make in another field of musical instruments, namely, self-playing pianos or self-playing devices for playing pianos. Accordingly, the second paragraph of the contract provided for the transfer by the defendant to the complainant of the undivided half part of all his inventions or improvements in or relative to organs, both keyed and automatic; and the fourth paragraph provided that the complainant should have the exclusive right to purchase and use inventions or improvements, during the life of the agreement, in self-playing pianos or self-playing devices for playing pianos, upon such terms as should be mutually agreed upon.

The evidence tends to show that the defendant made certain inventions in the musical art, for which application for letters patent was made and allowed. The testimony also tends to show

that all these alleged improvements and inventions were applicable equally as well to organs as to piano players. The complainant contends that all these improvements and inventions come under the terms of the second paragraph of the agreement, because they are improvements and inventions "in or relative to organs, both keyed and automatic"; and the complainant insists that these inventions and patents should be transferred to it, notwithstanding the fact that they also relate to self-playing devices for playing pianos. The defendant insists that, so far as these inventions relate to both organs, keyed and automatic, and also to self-playing pianos or self-playing devices for playing pianos, they should be excluded from the consideration of the contract; that the second paragraph should be held to embrace inventions which relate exclusively to organs, both keyed and automatic; and that the fourth paragraph should be held to embrace exclusively inventions in self-playing pianos or self-playing devices for playing pianos.

The court is of the opinion that this latter interpretation is too narrow in its construction of the contract and in its interpretation of the intention of the parties. The intention of the parties was clearly to cover all inventions and patents relating to organs, both keyed and automatic, and to embrace this subject in paragraph 2, the leading paragraph of the contract. It appears to be their intention that if inventions are shown to relate to the subject of organs, they should be considered under this paragraph, even though they also relate to self-playing pianos. The leading purpose of the contract was that the complainant corporation should have a half interest in all the inventions which related to organs, both keyed and automatic. It was upon the transfer of this half interest and in the transfer of the patent named in paragraph 3 of the contract that the consideration specified in paragraph 5 is based. Having obtained the assignment of the half part of all inventions covered by paragraph 2, the parties evidently intended that the complainant should obtain an option on all inventions relating to self-playing pianos. The court is of the opinion that paragraph 4 should be construed together with paragraph 2, so as to meet the evident purposes of the contract. Under this construction, all inventions relating to organs, both keyed and automatic, must be held to be within the contemplation of the second paragraph, even though those inventions relate also to self-playing pianos or self-playing devices for playing pianos. The purpose of paragraph 4 seems to be to give to the complainant an option to purchase inventions or improvements in self-playing pianos or self-playing devices for playing pianos, upon such terms as may be mutually agreed upon by the parties. It seems to the court that this is the only construction which takes into consideration the whole contract and its evident purposes. We have come to this conclusion after examining the whole instrument, and not any isolated provisions. We have done this under the rule laid down by the Supreme Court in Canal Co. v. Hill, 82 U. S. 94, 21 L. Ed. 64; O'Brien v. Miller, 168 U. S. 288, 297, 18 Sup. Ct. 140, 42 L. Ed. 469.

In placing a construction upon a contract, it often becomes ma-

terial for the court to consider what construction the parties themselves seem to have placed upon the instrument.

"'Tell me," says Lord Chancellor Sugden, "what you have done under a deed, and I will tell you what that deed means." Attorney General v. Drummond, 1 Drury & Warren, 368. This quotation is used in Chicago & Great Western Railway Co. v. Northern Pacific Railway Co., 101 Fed. 795, 42 C. C. A. 25. When we examine the acts of the parties in reference to making assignments, we find that the defendant has assigned patents which, under the terms of paragraph 2, relate to organs and also relate to pianos. He appears by the answer and the testimony to have done this after the execution of the contract and pursuant to the terms of paragraph 2.

The patents put in evidence in the case do not seem to us to embody inventions simply and only upon piano players according to their terms and their titles; they appear to relate as distinctly to organs as to pianos or piano players or devices for playing pianos. The interpretation sought by the defendant would eliminate all or nearly all the alleged inventions made by the defendant, and leave no improvements or patents upon which the contract is to operate. It seems to us this is an unreasonable interpretation of the contract, and an interpretation not warranted by the evidence in the case. We believe the interpretation which we have given is consonant with the terms of the whole contract, the evident intention of the parties, and with their action in the premises.

Under this interpretation an undivided half part of all inventions or improvements made by defendant during the term of the agreement, namely, from July 1, 1900, to July 1, 1905, in or relative to organs, both keyed and automatic, must be transferred to the complainant, even though those improvements and inventions may also relate to other musical instruments. The defendant should also assign to complainant an undivided half part of all such inventions or improvements for which applications for letters patent have been made as set forth in paragraph 4 of defendant's answer, except those on which letters patent have been already issued. The defendant should also assign to complainant all inventions for which any other applications for letters patent have been made both in the United States and foreign countries during such term. He should also assign to complainant a half interest in the letters patent named in the stipulation of the parties in the case, and all other letters patent embodying such inventions or improvements. The defendant should also apply for letters patent, both foreign and domestic, and should execute assignments of his applications to the complainant.

An injunction may issue as prayed for by the complainant.

Let a decree be drawn consistent with this opinion, with costs to the complainant.

CARRARA PAINT AGENCY CO. v. CARRARA PAINT CO.

(Circuit Court, N. D. Illinois. May 15, 1905.)

No. 27,393.

1. DEPOSITIONS—FEDERAL COURTS—FOLLOWING STATE PRACTICE.

Under Act March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], which provides that in addition to the mode of taking depositions in actions in federal courts "it shall be lawful to take the deposition or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held," where the laws of a state in which a court is held provide for the issuance of a commission by the clerk to take depositions of witnesses on interrogatories attached on notice to the adverse party, such practice may properly be followed in the federal court with respect to the taking of depositions of witnesses residing in other districts or states.

[Ed. Note.—Conformity to state practice in taking depositions, see notes to O'Connell v. Reed, 5 C. C. A. 602; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

2. SAME—LIMITING NUMBER OF WITNESSES.

A party will not be limited in advance as to the number of witnesses whose testimony he may take by deposition, unless it appears from the nature of the issues that the number is unreasonable and unnecessary.

On Motion by Defendant for Rule on Clerk to Withhold Commissions to Take Depositions.

Peck, Miller & Star and C. W. Baker, for plaintiff.
Winston, Payne & Straun, for defendant.

LANDIS, District Judge (orally). The declaration in this case seeks damages for the alleged violations by the defendant of the terms of a certain contract entered into between the parties. The charges are: First, that the paint to be manufactured and delivered to the plaintiff was not of the grade and quality specified in the agreement; and, secondly, that at a subsequent date the defendant put an end to the contract altogether by refusing to make any further deliveries. It appears that the commissions are sought to procure evidence as to the quality or grade of paint manufactured by defendant and marketed by the plaintiff, with a view to supporting plaintiff's theory respecting the first-mentioned breach of the contract. The witnesses whose testimony is desired are some 250 in number, and they live at various places in the several states from California to Maine. Section 863 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 661] provides that:

"The testimony of any witness may be taken in any civil cause depending in a District or Circuit Court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles."

In 1892 Congress enacted that:

"In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the deposition or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held." Act March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664].

The statute of Illinois (Hurd's Rev. St. 1903, p. 938, § 26) provides that:

"When the testimony of any witness residing within this state more than one hundred miles from the place of holding the court, or not residing in this state, * * * shall be necessary in any civil cause pending in any court of law or equity in this state, it shall be lawful for the party wishing to use the same, on giving to the adverse party or his attorney ten days' previous notice, together with a copy of the interrogatories intended to be put to such witness, to sue out from the proper clerk's office a dedimus potestatum or commission under the seal of the court, directed to any competent, disinterested person as commissioner, or to any judge, master in chancery, notary public, or justice of the peace of the county or city in which such witness may reside, * * * authorizing and directing him to cause such witness to come before him, at such time and place as he may designate and appoint, and faithfully to take his deposition upon all such interrogatories as may be enclosed with, or attached to, said commission."

It will be observed that the act of 1892 does not add to the classes of witnesses whose testimony may be taken by deposition before trial. The obvious purpose of that act was to provide an additional method, viz., that prescribed by the state law, of obtaining the evidence of a witness, the taking of whose deposition was authorized by federal law. The plaintiff in this case appears to have proceeded in accordance with "the mode prescribed by the statute of the state." It has given to its adversary "ten days' previous notice, together with a copy of the interrogatories, * * * of its intention to sue out from the proper clerk's office a commission" for the taking of the testimony of witnesses whose depositions are authorized by the federal statute, and I hold this procedure to be regular.

The court is petitioned by the defendant to limit the number of witnesses whose testimony may be thus taken. While it does appear that the plaintiff is proceeding to obtain the evidence of a considerable number of persons, the court is not prepared to rule, considering the nature of the issue involved, that the plaintiff has gone beyond a reasonable limit in this particular. I do not express the opinion that, should it be made to appear that a party is inflicting upon his adversary an unnecessary burden in the taking of depositions, the court is without power to prevent an abuse of its process.

The motion is denied.

AMERICAN LUMBER & MFG. CO. v. TAYLOR et al.

(Circuit Court of Appeals, Third Circuit. January 20, 1905.)

No. 47.

1. PLEADING—AFFIDAVIT OF DEFENSE.

An affidavit of defense, in an action by a trustee in bankruptcy to recover the value of property alleged to have been preferentially transferred to defendant by the bankrupt, which sets up that the property had been purchased from defendant, and that it had the right to rescind the sale because the bankrupt made a false statement to a mercantile agency for the purpose of deceiving wholesale dealers, is insufficient, where it is not alleged that the statement was intended to or did deceive defendant, and does not state any facts showing wherein the statement was false or fraudulent.

2. SALE—RESCISSION FOR FRAUD—RIGHT TO RECOVER PROPERTY.

A seller of lumber which was used by the purchasers, together with other lumber, in the construction of barges, cannot acquire any right or title to such barges by an attempted rescission of the sale for fraud.

In Error to the District Court of the United States for the Western District of Pennsylvania.

The following is the opinion of Buffington, District Judge, on motion for judgment:

The affidavit in this case admits the defendant company sold lumber to the bankrupts several months before bankruptcy, taking notes in payment. This lumber was in large part sold, and a considerable portion of the remainder built by the bankrupts, with some other lumber of their own, into barges. Shortly before adjudication, and with full knowledge of the bankrupts' insolvency, the defendant notified the bankrupts it rescinded the sale on the ground of alleged fraud, and took a bill of sale for the barges from them. The barges having been sold by the defendant, the trustee brought the present suit to recover their value. The defendant defends on the ground the lumber was obtained from it by fraud, and it had a right to rescind. The affidavit in this case does not purport to be made on information and belief. From the wording thereof, it would seem its allegations are based on the personal knowledge of the affiant. It would therefore seem that, if specific facts sufficient to constitute a defense exist, they would have been specifically stated. Briefly summed up, the defense here set up consists of a statement, alleged to falsely show solvency, made to a mercantile agency for the purpose of deceiving wholesale lumber dealers. There is no allegation it was made for the purpose of deceiving the defendant in particular, or that the bankrupts practiced any trick, artifice, fraud, or deception on the defendant. While the affidavit avers, in general, the statement was false, it fails to set forth any particular wherein such falsity lay. We think this is a material omission. An affidavit of defense should show facts sufficient to constitute a defense, and leave nothing to inference. See Bruner v. Wallace, 4 Wkly. Notes Cas. 53; Bardsley v. Delp, 88 Pa. 420; and other cases cited in 3 Brightly's Dig. 3624. Wherein was such statement false? Did the bankrupts inventory articles that did not exist, did they fraudulently overvalue existing assets, did they conceal liabilities, or was the statement a mistaken overestimate of their assets? The fact that the bankrupts proved afterwards to be insolvent, does not of itself show this statement was fraudulent. Wessels v. Weiss Bros., 156 Pa. 593, 27 Atl. 535; Greene v. Fondersmith, 200 Pa. 625, 50 Atl. 209. Now, as noted above, apart from the broad assertion that the statement was false and the defendant insolvent, there is an absence of all specific averments as to wherein the falsity lay. In the absence of such averments, and in view of the fact that this lumber was built into barges, and by taking the same the defendant has also taken the property of the bankrupt estate, the amount and value of which is not fixed by

the affidavit, we think the defendant has not shown facts warranting a right to rescind. To avoid a sale, there must be artifice, intended and fitted to deceive, practiced upon the defendant, in procuring the property. Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51. But as we have seen, the affidavit exhibits no facts from which it can be determined whether the statement was false in any particular detail, or a mistaken overestimate.

Being of opinion the facts set up fail to constitute a sufficient defense, the rule for judgment will be made absolute.

R. B. Ivory, for plaintiff in error.

Albert York Smith, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. As the learned District Judge said in his opinion:

"Briefly summed up, the defense here set up consists of a statement alleged to falsely show solvency, made to a mercantile agency for the purpose of deceiving wholesale lumber dealers."

It is not averred in the affidavit of defense that the statement to the mercantile agency was made for the specific purpose of deceiving the defendant, nor is it alleged that any artifice was practiced on the defendant to induce the sale of the lumber in question upon credit. The items entering into the statement to the mercantile agency are not given, nor is it stated in what particulars it was false. Here the defendant contented itself with the general allegation that, by the written statement to the mercantile agency, G. W. Weigel & Co. falsely "represented their good assets to be upwards of $38,000 in excess of their liabilities," whereas they were in fact totally and hopelessly insolvent. We cannot say that the District Judge erred in holding that the allegations of the affidavit of defense were not sufficiently specific to prevent judgment, especially in view of the cases of Wessels v. Weiss Bros., 156 Pa. 591, 27 Atl. 535, and Greene v. Fondersmith, 200 Pa. 625, 50 Atl. 209, relating to the rescission of an executed sale of personal property on the ground of alleged false representations by the purchaser as to his financial condition.

But aside from the question of the insufficiency of the affidavit of defense, there was a fact appearing in the case fatal to the defense. The suit was for the value of two coal barges which were on the docks of the bankrupts, G. W. Weigel & Co., nearly completed, at the time of the bankruptcy. Into the construction of these barges some of the lumber which the defendant had sold to G. W. Weigel & Co. had entered, together, however, with other lumber which never belonged to the defendant, but was the absolute property of G. W. Weigel & Co. Could the defendant, by a rescission for fraud of the sale of lumber, take possession of and acquire title to these barges? We think not. By the sale and delivery to G. W. Weigel & Co. the legal title to the lumber—voidable, it might be—had passed to the purchasers, and before attempted rescission they had used the particular lumber in question in the construction of these barges. If the barges had been built wholly of the defendant's lumber, a different question would have been presented. But in fact in the construction of the barges a considerable quantity of other lumber was used. The lumber which formerly be-

longed to the defendant had lost its identity, and could not be separated from the other lumber with which it had been incorporated in the construction of the barges. Indeed, the defendant did not attempt to reclaim any specific lumber which had gone into the barges. The defendant well understood that it could not acquire title to the barges by an attempted rescission of its sale of the lumber which had gone into them in connection with other lumber, and hence a bill of sale of the barges was executed by G. W. Weigel & Co. to the defendant. Plainly, the transaction, upon the evidence, was an unlawful preference by the bankrupts to the defendants, and the trustee in bankruptcy had a right to recover the value of the barges.

The judgment of the District Court is affirmed.

THE SANTIAGO.

(Circuit Court of Appeals, Second Circuit. February 28, 1905.)

1. SHIPPING—LONGSHOREMAN—INJURIES—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

   Libelant, after cleaning up a dock, returned with other laborers to a barge, and went into an unlighted section of the hold, where they were to clean up ore left by the unloading machine. The men asked an employé of the vessel for lights, which it was his duty to furnish, and he promised to send them down immediately. While they were waiting for lights, libelant, without any obligation to do so, laid his shovel on an uneven pile of ore, in order to attend to the lowering of a bucket, and then climbed on the pile in search of his shovel, and, while groping about in the dark, fell from a higher portion of a pile, and was injured. *Held*, that libelant's contributory negligence in needlessly and recklessly climbing about on the uneven surface of the ore was the proximate cause of his injury.

2. SAME—NEGLIGENCE.

   The vessel being under no obligation to light that section of the hold until its representatives were notified that the men were ready to work there, it was not guilty of negligence in failing to provide lights until within five or six minutes after libelant was hurt.

Appeal from the District Court of the United States for the Western District of New York.

This cause comes here by claimant's appeal from a decree of the United States District Court for the Western District of New York awarding libelant $413.95 for damages for personal injuries. 131 Fed. 383.

J. H. Metcalf, for appellant.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Libelant was a laborer in the employ of the Minnesota Dock Company, engaged in shoveling ore on the dock and vessels at the West Shore Docks, Buffalo. At about half past 1 o'clock on the morning of May 6th he was working in the hatch of claimant's barge Santiago, when he received orders from Nagle, the foreman of the Minnesota Dock, to clean up the dock. When this was done he returned with other laborers to the barge, went down a lad-

der into one of the hatches, and through a bulkhead into another section, where they were to go to work cleaning up the ore left by the unloading machine. The custom and course of employment on these barges was to clean up one hatch at a time, and then to move on to another hatch. It was the business of the vessel to furnish candles when needed; the candles and torches being thrown down to the men; the men lighting them, sticking them up, and shifting them from place to place, so as to throw light on the places where they were working. The men had asked for lights as they descended the ladder to the place which had been cleaned out. From there they went on to the place where they were to go to work, and called up to the hatch tender for lights, and he said he would send them down right away. While they were waiting for the lights, a bucket was sent down, and some one called out to pull in the bucket. Libelant saw the bucket coming, and set down his shovel on the top of a pile of ore in order to attend to the bucket. The ore in the hold at this place was of depths varying from two feet to six or seven feet. After the bucket had been pulled in and set down, and before the candles were thrown down, libelant climbed upon a pile of ore six or seven feet high to look for his shovel, and, while groping about for it in the dark, he fell down into a place where the ore was only two feet deep, and sustained the injuries complained of.

The court below held that claimant was negligent in failing to provide a safe place for the men to work, and that libelant was not guilty of contributory negligence. We are unable to concur in either of these conclusions.

It does not appear that libelant was bound to go to this place of danger when he did, or to do any work there until the customary lights were supplied. No reason is shown why he could not have waited on the deck until the lights were brought. It does not appear that any one ordered him to go down the hatchway—even to the safe place in the hold which had been cleaned out. But even if it be assumed that he went there under orders, the order was that of his foreman, and not of the watchman who represented the vessel, and who is not shown to have had any authority to give, or to have given, any orders to any one. The only other person who could have represented the vessel was the hatch tender, who sent down the bucket and called to the men to pull it in. But the witnessses testified that there was light enough above, so that they could see the bucket coming down, and that it was pulled in and set down in safety before libelant started to look for his shovel. Libelant and the other men had been sitting down, waiting for the buckets to come down, and had not begun work when he was injured. As his counsel says:

"The libelant did not, in the darkness, attempt to work. He did not attempt to fill the buckets or begin work. It is not too much to say that he was injured while waiting for lights."

The doctrine, therefore, of a safe place to work, or of being ordered to work in a dangerous place, can have no application here.

No testimony was introduced by claimant. But it appears from the testimony of the libelant himself that he voluntarily went below to a

place of safety; that he crawled from that place of safety to one of danger, and, when in said dangerous place, where he was under no obligation to use his shovel, and could not use it until the promised lights arrived, that he needlessly and recklessly climbed about on the uneven surface of the ore trying to find it, and while so doing was injured. The fact that he was under no obligation to work until the lights came appears from the foregoing facts, and, further, from the uncontradicted evidence that Nagle, his foreman, told the watchman, "if he didn't get some lights down there, he would take the machines out of the hold and send the men home."

In Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, plaintiff was a fireman on a passenger train of the defendant. After the return from one of his trips, he had gone aboard his engine for his own convenience, and, in attempting to get off the engine, he fell and was injured by reason of the turning of a step which was insecurely fastened. The court held that defendant was not liable, and said as follows:

"On the other hand, it must be remembered that the plaintiff, who knew that the engine was to be taken to the roundhouse at El Paso and inspected and repaired before he was called upon to perform any duties upon it, for his own convenience, before such inspection and repair, went on the engine and attempted to discharge his duties of cleaning, etc. If he, knowing that there was to be an inspection and repair, and that he had ample time thereafter to do his work, preferred not to wait for such inspection and repair, but to take his chances as to the condition of the engine, he ought not to hold the company responsible for a defect which would undoubtedly have been disclosed by the inspection, and then repaired."

In The Saratoga, 94 Fed. 221, 36 C. C. A. 208, libelant was one of a gang of men engaged in coaling a steamer. He worked on the vessel until the foreman called out to put out the lights and go ashore. The libelant did not happen to have a light in his hand, but there were other men designated to provide lanterns, and two of the lanterns remained lighted. The libelant went to get his coat, and then started for the port by which he had come aboard. The foreman told him to go out the other way. "Without waiting for the lantern held by those closing the port, or for the other in use where Vaughan was collecting the shovels, and without taking up any of those standing on the deck, and making an effort to relight it for his individual use, libelant turned and walked straight for the hatch ladder; and, 'not knowing,' as he says, 'that the hatch cover was off,' he fell through the opening into the hold." In these circumstances, this court held that claimant was not liable, and that the proximate cause of the accident was the negligence of libelant and of his fellow workmen in failing to avail themselves of the lanterns furnished them to guide themselves.

Inasmuch as libelant's contributory negligence would only deprive him of one-half of his damages, it is necessary further to inquire whether claimant was negligent. There is nothing in the record on which any such claim can be founded. It does not appear that any one representing the vessel had any communication with the libelant. The vessel was under no obligation to light up this section of the hold until its representatives were notified that the men were ready to go to work there. It does not appear that claimant unreasonably delayed to fur-

nish lights after they were called for. They came within five or six minutes after libelant was hurt. He testified that when he got hurt, and was sitting on the ore pile, he saw the watchman there with the candles he had brought down with which to light the hold.

The decree of the District Court is reversed, and the cause remanded, with instructions to dismiss the libel.

CAMDEN & S. RY. CO. v. RICE.

(Circuit Court of Appeals, Third Circuit. May 4, 1905.)

No. 19.

1. CARRIERS—STREET RAILROADS—INJURIES TO PASSENGERS—TIME TO ALIGHT—CONTRIBUTORY NEGLIGENCE.
   In an action for injuries to a passenger on a street railway car while attempting to alight, evidence *held* to require submission of plaintiff's contributory negligence to the jury.

2. SAME—ACTIONS—PLEADING—ISSUES AND PROOF.
   In an action for injuries to a passenger by the premature starting of a street car as she was attempting to alight, an allegation that it then and there became and was the duty of the defendant to use due care that the plaintiff should be safely conveyed on her journey, was sufficient to present the question of defendant's negligence in not properly supervising the car and in looking after passengers at the point where plaintiff attempted to alight, to see whether any of them wanted to alight or not, and whether defendant's employés did everything that reasonable prudence required of them at the time, etc.

3. SAME—EVIDENCE—MORAL CHARACTER—EFFECT—LIMITATION.
   Where, in an action for injuries to a passenger on a street car, defendant, in rebuttal, introduced evidence showing a physical condition since the accident different from that described by plaintiff at the trial some of which tended to asperse plaintiff's moral character, it was not error for the court to charge that the evidence relating to plaintiff's moral conduct could not be used to impeach her testimony as a witness.

4. SAME—NEGLIGENCE.
   Where a street car approached a railroad crossing protected by a derailing switch there was no negligence in the mere fact that the conductor of the street car left it and went ahead to operate the switch.

In Error to the Circuit Court of the United States for the District of New Jersey.

J. H. Gaskill, for plaintiff in error.

Francis D. Weaver, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. Suit was brought in the court below by the defendant in error, hereinafter called the plaintiff, against the plaintiff in error, hereinafter called the defendant, to recover damages for injuries alleged to have been occasioned by the negligence of said defendant.

The defendant company operated an electric or trolley railway from the Market Street Ferry, in the city of Camden, N. J., to the town of Haddonfield, in the same state. On the evening of the 21st

of July, 1903, the plaintiff boarded a trolley car of the defendant company at the said Market Street Ferry, as a passenger, on her way to her brother's house, who lived on Line street in the city of Camden, a short distance from its intersection with Haddon avenue, upon which the trolley line of the defendant company ran. Haddon avenue and the trolley line crossed Line street diagonally in a direction away from the house of plaintiff's brother, his house being on the side of Line street farthest from the car as it approached said street. Right at the intersection of Line street and Haddon avenue and the said trolley line, the tracks of the West Jersey & Seashore Railway crossed Line street, at, or nearly at, right angles, and Haddon avenue and the tracks of the trolley line diagonally. There is testimony tending to show that when the plaintiff paid her fare, she told the conductor that she wished to get off at Line street. There is also testimony tending to show that, as the car approached Line street, the conductor called out the name of that street, and that directly after the car stopped at a point, which placed the rear end of the car about 120 feet from the near side of Line street. It was also in testimony, and undisputed, that the car always stopped at that point to allow the conductor to go ahead to the near side of Line street, in order to operate a derailing switch, which would permit his car to cross the tracks of the said West Jersey & Seashore Railway, and that when he had so operated the switch, upon his signal for that purpose, the motorman started his car and crossed the said railway tracks and Line street, stopping upon the farther side thereof. There was also testimony tending to show that at this point where the car usually stopped, in order that the derailing switch might be operated, passengers were in the habit of alighting and going in the direction of a brick tavern or saloon, situated at the corner of Haddon avenue and Line street. On the night in question, there was evidence tending to show that, after the car had stopped at the point mentioned, being the first stop after Line street had been announced by the conductor, and after the conductor had left the rear platform and gone ahead for the purpose stated, the plaintiff, while attempting to alight from said platform, was thrown violently forward upon the ground, by reason, as she alleges, of the starting of the car at that instant. The plaintiff testified that she had, on several occasions, used this trolley line in visiting her brother's house, and was aware of the custom to stop before reaching Line street, at the point indicated, and knew that the stop was for the purpose of allowing the conductor to go ahead and operate the derailing switch.

At the conclusion of plaintiff's testimony, the defendants moved for a nonsuit, and the refusal of this nonsuit is made the first assignment of error. The nonsuit was contended for on the ground that the plaintiff, by her own testimony, had shown contributory negligence in getting off the car at the point where it stopped, just before reaching Line street; that from her familiarity with the running of the cars, she must have known why the car stopped at that point, and why the conductor was not on the rear platform. We

think, however, on the whole, that the trial judge was right in refusing the nonsuit and deciding to submit to the jury the question whether the plaintiff was guilty of contributory negligence, or not, along with the question as to the negligence of the defendant company. There was testimony tending to show that it was customary for passengers to alight at this point; that when they did so, they were facing a large saloon, situated at the corner of Haddon avenue and Line street, not more than 60 feet away. The point was also a convenient one from which to go to her brother's house, the distance being somewhat shorter and the route more direct and convenient than that from the alighting point on the farther side of Line street. It was between 10 and 11 o'clock in the evening when she attempted to alight, and, according to her testimony, the conductor was not only absent from the rear platform, but no notice was given, by bell or otherwise, that the car was about to start.

There is little added to our knowledge of the situation by the testimony of the defendant. No one seems to have seen the plaintiff when she arose from her seat to go to the rear platform, or to testify how long she waited after the stopping of the car before she started to leave it. The car was in two compartments, the forward one being used for smoking, the plaintiff sitting in the one in the rear. The motorman testifies that after he had received the signal from the conductor to go ahead over the railroad tracks, he looked through the car to see if anybody was about to alight, and seeing no one he proceeded to cross the railroad. At the conclusion of the case, there was a motion for peremptory instructions in favor of the defendant, which was also refused on much the same ground that the motion for a nonsuit was refused. Though the case is a close one, we think the judge below was right in this refusal. It is a salutary and well-established rule that if, looking at all the evidence and drawing such inferences therefrom as are just and reasonable, the court could say, as matter of law, that the plaintiff was not entitled to recover, an instruction to find for the defendant would be proper. Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780; Randall v. B. & O. R. R., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003. Or, as the rule is sometimes stated, if the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony, a peremptory instruction should be given in advance of the verdict. The suggestion of such a course, however, is, in the nature of things, largely addressed to the sound judicial discretion of the trial judge. A reviewing court will be careful not to interfere with the judgment of the trial judge in such a case, unless the evidence is such as to clearly and unequivocally show that he was mistaken in refusing such peremptory instructions. We think the learned judge of the court below, in submitting the primary question of the negligence of the defendant company, and the secondary question of contributory negligence of the plaintiff, has correctly analyzed these questions and clearly stated the grounds upon which his refusal of peremp-

tory instructions is justified. We quote from the charge as follows:

"The defendant company is a common carrier of passengers; it is bound to take reasonable care of passengers that it conveys in its cars, and the law is well settled that that reasonable care on the part of a common carrier towards its passengers is a high degree of care. That is what the defendant company was bound to do in this case. Now was the defendant company guilty of negligence? Was there any act of negligence on the part of the conductor, or on the part of the motorman, which approximately contributed to this accident, or which was the proximate cause of this accident? That is the question in the case. If the conductor did call out Line street before reaching the point at which the car stopped, that being the point where the plaintiff alighted, was that an invitation on his part to any person in the car who desired to get off at Line street to alight there? Was it in view of the fact that the plaintiff had told him that she wanted to get off at Line street, in case you find she did so tell him, an invitation to her to alight from the car at that point? Or was it her duty to remain in the car until the steam car track had been crossed and until the trolley car had actually reached Line street? The conductor told you that he himself is not sure, but he thinks (if my memory is right) that he did call Line street before reaching the steam car track. If the plaintiff was justified in attempting to get off of the car at that point, was the defendant company negligent in not properly supervising the car or the passengers, looking after the passengers in the car at that point to see whether any of them wanted to alight or not? Did the conductor leave the car and pass forward to the switch before the car had quite stopped? The testimony does not tell us, as I recall. Did he exercise toward the plaintiff that care that reasonable prudence would call for from him in case she had notified him that she wanted to get off at Line street and in case he had called Line street before reaching this point? If she did tell him that she wanted to get off at Line street, and if he did call Line street before reaching this point, was it his duty to remain on the platform of the car until the car had come to a full stop, to see that she alighted properly from the car? These are all questions for you to consider and decide, not for me. The conductor, at any rate, went forward and operated the switch; the car, it is admitted, came to a full stop; the conductor, having operated the switch, signaled the motorman to proceed; the motorman says that he opened the door of the car and looked into the car and saw none of the passengers moving, and so started the car. Did he do all that reasonable prudence required of him at that time? There was a smoking compartment in the car; the testimony shows that the two compartments were separated by a partition. The exact character of that partition is not explained. Was it a partition of glass, or was it a partition which obstructed the view of the motorman as he peered into the car? Was the motorman able to see through the car from one end of it to the other, and the rear platform, in order to see whether any of the passengers were alighting? If he could not, then did he discharge his full duty, or was he bound to look out on the side of the car, or make some other effort to ascertain whether any one was attempting to get off the car? Was he not obliged, as he knew there was no conductor on the car, to take greater precaution to ascertain whether any one was attempting to alight from the car, than would have been required of him had he known the conductor was on the car? These are all questions for you to consider, and they all bear upon the question of the negligence of the defendant company."

It is true that counsel for the plaintiff in error make this part of the charge the ground for special assignments of error. In their brief, they thus in part state the grounds of their assignments of error:

"It is respectfully submitted, with due deference to the learned judge who tried the case below, that he, of his own motion and without any allegation in the declaration, and without any testimony, sets up certain duties which, according to his notion, the defendant company was under obligation to per-

form, and submits to the jury in the form of a query whether their failure to perform these duties, existing wholly in the imagination of the judge, constituted negligence on the part of the defendant. He asks the jury: 'If the plaintiff was justified in attempting to get off of the car at that point, was the defendant company negligent in not properly supervising the car or the passengers, looking after the passengers in the car at that point to see whether any of them wanted to alight or not?' The declaration nowhere sets up any insufficient supervision of the car or of the passengers; the negligence alleged is that the car was started as the plaintiff was alighting."

Again:

"It seems to the defendant that all the way through this portion of the charge, the judge is raising a standard of duty which is not justified by the facts nor by the testimony."

We think the declaration, in alleging that when the relation of passenger to the defendant was established by the payment of her fare, "it then and there became and was the duty of the defendant to use due and proper care that the plaintiff should be safely and securely carried and conveyed on her said journey," sufficiently and comprehensively alleged a duty, the consideration of which rendered the possible phases of that duty, suggested by the trial judge as above quoted, proper subjects of inquiry for the jury. We do not find that any standard of duty has been suggested that was not pertinent to the evidence as a matter of inquiry, or that in point of law was amenable to just criticism. We think the court, in the part of the charge quoted, clearly and correctly performed its duty of assisting the jury in coming to a correct conclusion as to, and proper determination of, the issues committed to them, and we cannot find that, in so doing, it trenched at all upon the prerogatives of the jury as triers of fact, or made any suggestion as to the duty of either defendant or plaintiff in the premises, that was not covered by the pleadings.

What we have here said is applicable to the subject-matter of the fifteenth and sixteenth assignments of error, to the effect that there was a material variance between the allegations and the proof. Objection is made in these assignments to the refusal of the court to charge the jury that "the negligence of the defendant, as laid in the declaration, has not been proven," and that "no other negligence of the defendant than such as was laid in the declaration, can be considered in this case." We think the learned judge of the court below properly answered these requests by saying in his charge:

"I am not prepared to hold that evidence of negligence in this case is not fairly embraced in the declaration. It is true that you should be confined to evidence of negligence, of the character described in the declaration, but I think the declaration sufficiently covers evidence of negligence that has been adduced in this case."

During the trial, the defendant produced testimony to rebut that of the plaintiff in regard to her physical condition as the result of her injuries. In the course of that testimony, witnesses testified as to conduct on her part, tending to show a physical condition since the accident different from that described by her at the trial. Some of this testimony tended to asperse the moral character of

the plaintiff. In response to a request by the plaintiff, the judge charged the jury as follows:

"I am also asked to charge by the plaintiff that 'evidence relating to the moral conduct of the plaintiff cannot be used to impeach her testimony.' I have already said that her moral character is not in question at all. She might be a person of immoral character, of very bad character, and yet, if she received an injury on this night in question, she would be entitled to compensation for that injury. As I have said, we are dealing with the injury she received, and not with her moral character."

This portion of the judge's charge is made the subject of one of the assignments of error. As the evidence in question was only admitted on account of its relevancy to the question of the plaintiff's physical condition, we fail to see why it was not entirely proper for the trial judge to warn the jury that, so far as the testimony related to moral character, it could not be used, directly, to impeach the credibility of the plaintiff, or to affect her right to recover full compensation for injuries received through the negligence of the defendant. Such testimony, in so far as it did not relate to moral delinquencies that directly affected veracity, would not have been admissible if offered for the purpose of impeaching the credibility of a witness, and, in our opinion, it was perfectly proper to protect the jury from falling into the mistake, not an uncommon one, of supposing that credibility can be impeached by showing that a witness is in other respects immoral. Whatever effect such testimony was calculated to produce in the minds of the jury, in the way of general diminution of respect for the witness and in detracting from the strength and weight which high and unimpeached character gives to testimony, that effect was not necessarily impaired by the remarks quoted from the charge. It will be observed that these remarks do not refer to moral character as especially affecting credibility. The trial judge merely, and as we think properly, cautioned the jury against supposing that her moral character is a question at issue before them, or that her right to compensation for an injury could be affected thereby.

The only other assignments of error that have been insisted upon before us are those that relate to the refusal of the court to charge certain requests of the defendant. These requests, and the court's answers thereto, are as follows:

"Fifth. 'There was no negligence on the part of the conductor in leaving the car to operate the switch, and in signaling the motorman to start the car as he did.' I cannot charge that in those words. I am willing to say that there was no negligence in the mere fact that the conductor left the car and went ahead to operate the switch, but whether before leaving the car he exercised that duty toward the plaintiff that he should have exercised is, as I said awhile ago, a question for you to consider. I cannot charge that request.

"Sixth. 'There was no negligence on the part of the motorman in starting the car as he did.' I cannot charge that. That is a question for you to decide.

"Seventh. 'The defendant owed no duty to plaintiff with respect to giving her time or opportunity to alight, until the far side of Line street had been reached, that being her destination and of which she had given notice to the conductor.' I cannot charge that. That is a question for you to decide. As I said awhile ago, whether she was justified in leaving the car at the point she did leave it, or whether she should have remained in the car until the

car reached Line street and crossed over the steam railroad track, is a question for you to decide.

"Eighth. 'The plaintiff knew the railroad tracks had to be crossed to reach Line street; she knew the conductor had gone ahead to turn the switch that the car might cross the railroad tracks; while he was gone for this purpose she attempted to alight, and at a place which she knew was not her destination; she was therefore guilty of such contributory negligence as will bar her recovery, and the verdict must be for the defendant.' I cannot charge that for reasons I have already stated.

"Ninth. 'Even if the conductor had called Line street before leaving the car to turn the switch, the plaintiff, knowing that Line street had not been reached, and knowing the purpose for which the conductor had stopped and left the car, and knowing that the car would again stop on the far side of Line street for her to alight, she was herself negligent, and cannot recover in this action.' I cannot charge that; I decline so to charge."

For the reasons already stated, in considering the refusal of the court below to nonsuit, or to give peremptory instructions to find for the defendant, we think there was no error in the answers given by the learned judge of the court below to these requests. All of them, except the first, are equivalent to a request for peremptory instructions. As we have already intimated, the province of the jury, as triers of fact, should not be lightly or inconsiderately invaded by the court. Where it is at all doubtful whether a question should be decided by the court as one of law, or be left to the jury as a question of fact, it is the safer and better course to refrain from withdrawing it from the jury.

The judgment below is affirmed.

DAVIS CALYX DRILL CO. v. MALLORY et al.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1905.)

No. 2,132.

1. SALE—IMPLIED WARRANTY OF FITNESS FOR PARTICULAR PURPOSE—WHEN IT ARISES.

An implied warranty that an article will be fit for a particular purpose may be inferred from a contract to make or furnish it to accomplish that specific purpose, because the accomplishment of the purpose is the essence of this contract.

2. SAME—WHEN IT DOES NOT ARISE.

But no implied warranty of such fitness arises out of a contract to make or supply a described and definite article, although the vendor knows that the vendee is purchasing it to accomplish the specific purpose, because the essence of this contract is the delivery of the specific article, and not the accomplishment of the purpose.

3. SAME—FACTS—DECISION.

A vendee contracted with a manufacturer, in writing, to buy and pay for one class F3 drill made by the latter, and described in its catalogue, and certain other specific machinery and tools, for an agreed price. Before this contract was made, the vendee informed the vendor that he wanted the drill and machinery to bore holes through certain described strata in land in the county of Lucas, in the state of Iowa, and the manufacturer assured him that its class F3 drill would do this work as rapidly and economically as a diamond drill. But the written contract was silent upon this subject. The vendor relied upon this assurance of the manufacturer, and made the contract. *Held*, there was no implied warranty

that the drill and its machinery would be suitable to bore holes through the specific described strata in Lucas county, Iowa.

4. Written Contract—Presumptions—Parol Evidence to Extend Incompetent.

When the written agreement of the parties is complete in itself, the conclusive legal presumption is that it embodies the entire engagement of the parties, and the manner and extent of their obligations, and parol evidence of other terms relating to the same subject-matter is inadmissible to extend, modify, or contradict it.

5. Same—Implied Warranty of Fitness—Extent.

An implied warranty of the fitness of a machine to do a particular work does not include a warranty that it will do the work as rapidly or economically as some other specified machine. Such a covenant can be introduced by express contract only, and parol evidence of it is excluded by a written contract of sale which is silent on the subject.

Philips, District Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Southern District of Iowa.

On June 25, 1902, the Davis Calyx Drill Company, a corporation, made a written contract with S. H. Mallory to furnish him free on board the cars at Tarrytown, in the state of New York, one class F3 drill, which is described in its catalogue, and certain specific machinery, tools, and articles, for which Mallory promised to pay $2,459. Mallory has since died, and the defendants are the executrices of his will. The Calyx Company made and delivered the drill, the machinery, and the articles according to the contract, and this is an action to recover their purchase price. Two defenses were interposed—fraudulent misrepresentation and the breach of an implied warranty by the plaintiff. The court withdrew the former defense, and submitted the latter to the jury. There was evidence which had a tendency to establish these facts: The plaintiff was a corporation engaged in the manufacture of drills and other machinery at Tarrytown, in the state of New York. Mallory was engaged in prospecting for coal in lands in Lucas county, in the state of Iowa, and William Haven was his agent. Haven had used a diamond drill for this purpose prior to June, 1902, but he objected to it because it would frequently fail to produce any core, for the reason that the coal was soft, and the diameter of the core was only one inch. He was desirous of obtaining a drill which would produce a larger core. He heard of the Davis Calyx drill, procured one of the plaintiff's catalogues, went to Tarrytown, and saw one of the plaintiff's drills in operation with a shot bit; but he could not form any opinion upon the question whether or not it was fit to work in the strata in earth in Lucas county, in the state of Iowa. The drill was provided with a cutter and a shot bit, and these were exchanged in the operation to accommodate the drill to the hardness of the material through which it was to pass. Haven met the secretary and the general manager of the plaintiff. He described to them the strata through which a drill must pass in boring holes upon the land of Mr. Mallory, and explained to them that he desired to get a machine which would produce a larger core than a diamond drill, and would operate as economically and rapidly. They told him that their machine was just the drill he wanted. They showed him pieces of stone through which it had passed, and stated to him that it would sink 25 or 30 feet per day; that it would operate as economically and as rapidly as a diamond drill, and would get a larger core. Thereupon Haven made the contract in suit on behalf of his principal, Mallory, in reliance upon these representations, and upon the judgment of the officers of the plaintiff, expressed in this way. The plaintiff furnished the drill and all the other specific machinery, tools, and articles described in the contract, and furnished an expert to set up and operate the drill. But the machine would not work satisfactorily. It would sink only 8 or 10 feet per day on the average, while a diamond drill would bore into the same ground at the rate of 25 feet per day. The plaintiff claimed that these facts evidenced an implied warranty that the drill would be fit and suitable

to bore holes through the strata in Lucas county, Iowa, underneath his land, as rapidly and economically as a diamond drill. All the testimony relative to this alleged warranty was received over the objections of the plaintiff, and was contradicted by testimony which it produced. The court instructed the jury, in effect, that if Haven correctly described to the secretary and general manager of the plaintiff the strata through which the drill was to be sunk under the land of Mallory, and if the secretary and general manager knew where the drill was to be used, and stated that it would do as much work there, and do it as economically, as a diamond drill, then the plaintiff had made an implied warranty that the drill would work in this way, and that, if it did not do so, the defendants had a right to rescind the contract, to return the drill, and to recover the expenses which they or their decedent had incurred in the attempt to operate it. The plaintiff excepted to this portion of the charge, and to the introduction of the evidence relative to the alleged warranty, and there was a verdict for the defendants.

Joseph C. Mitchell and Francis M. Hunter, for plaintiff in error.

Washington I. Babb and Theodore M. Stuart, for defendants in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

An implied warranty that an article will be fit for a particular purpose may be inferred from a contract to make or supply it to accomplish that purpose, because the accomplishment of the purpose is the essence of the undertaking. But no such warranty arises out of a contract to make or supply a specific, described, or definite article, although the manufacturer or dealer knows that the vendee buys it to accomplish a specific purpose, because the essence of this contract is the furnishing of the specific article, and not the accomplishment of the purpose. In other words, a warranty that a machine, tool, or article sold is fit and suitable to accomplish a particular purpose or to do a specific work may be implied when the manufacturer or dealer knows the purpose or work to be effected, and the purchase of the machine, tool, or article is in reality an employment of the vendor to do the work by making or furnishing a machine, tool, or article to effect it. Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116, 3 Sup. Ct. 537, 28 L. Ed. 86; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Leopold v. Van Kirk, 27 Wis. 152, 156; Brenton v. Davis, 8 Blackf. (Ind.) 318, 44 Am. Dec. 769; Omaha Coal, etc., Co. v. Fay, 37 Neb. 68, 75, 55 N. W. 211; Lee v. Sickles Saddlery Co., 38 Mo. App. 201, 205; Rodgers & Co. v. Niles & Co., 11 Ohio St. 53, 57, 78 Am. Dec. 290; White v. Adams, 77 Iowa, 295, 297, 42 N. W. 199.

But no implied warranty that a machine, tool or article is suitable to accomplish a particular purpose or to do a specific work arises where the vendor orders of the manufacturer, or purchases of the dealer, a specific, described, or definite machine, tool, or article, although the vendor knows the purpose or work which the purchaser intends to accomplish with it, and assures him that it will effect it. Such an assurance is but the expression of an opinion, when it is followed by a written contract, complete in itself, which

is silent upon the subject. The extent of the implied warranty in such a case is that the machine, tool, or article shall correspond with the description or exemplar, and that it shall be suitable to perform the ordinary work which the described machine is made to do. Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 518–519, 12 Sup. Ct. 46, 35 L. Ed. 837; Keates v. Cadogan, 2 E. L. & E. 320, 10 C. B. 591; Grand Ave. Hotel Co. v. Wharton, 24 C. C. A. 441, 443, 79 Fed. 43, 45; Morris v. Bradley Fertilizer Co., 64 Fed. 55, 56, 12 C. C. A. 34, 35; Leake on Contracts (4th Ed.) 261, 262; 1 Parsons on Contracts, 586, 587; Union Selling Co. v. Jones, 128 Fed. 672, 675, 677, 63 C. C. A. 224, 227, 229; McCray Refrigerating, etc., Co. v. Woods, 99 Mich. 269, 58 N. W. 320, 321, 41 Am. St. Rep. 599; Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 360; Goulds v. Brophy, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392; Wisconsin Red Pressed Brick Co. v. Hood, 54 Minn. 545, 56 N. W. 165; Fairbanks, Morse & Co. v. Baskett (Mo. App.) 71 S. W. 1113; Wheaton Roller Mill Co. v. John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854, 855; Boiler Co. v. Duncan, 87 Wis. 120, 58 N. W. 232, 41 Am. St. Rep. 33; Case Plow Works v. Niles, Scott & Co., 90 Wis. 590, 63 N. W. 1013; Deming v. Foster, 42 N. H. 165, 175; Morse v. Union Stockyard Co., 21 Or. 289, 28 Pac. 2, 3, 14 L. R. A. 157; Dushane v. Benedict, 120 U. S. 630, 647, 7 Sup. Ct. 696, 30 L. Ed. 810; Carleton v. Jenks, 80 Fed. 937, 26 C. C. A. 265; Checkrower Co. v. Bradley & Co., 105 Iowa, 537, 546, 75 N. W. 369; Latham v. Shipley, 86 Iowa, 543, 53 N. W. 342; Blackmore v. Fairbanks, Morse & Co., 79 Iowa, 289, 44 N. W. 548; Parsons Band-Cutter, etc., Co. v. Mallinger, 122 Iowa, 703, 98 N. W. 580.

If the purchaser, Mallory, or his agent, Haven, had described the strata through which he desired to drive the drill, and had ordered the Calyx Company to make or to select and furnish to him a drill that would bore the desired holes through these strata as rapidly and economically as a diamond drill, for an agreed price, and the plaintiff had accepted the order, an implied warranty would have arisen that the drill to be furnished under that contract would do the work as speedily and cheaply as a diamond drill. But an accepted order to make and deliver a specific, described drill, which the vendor is engaged in making, has no such effect, although the manufacturer knows the use for which the vendee desires to obtain it. The reason for this rule is conclusive and unanswerable. When a manufacturer or dealer agrees to make or furnish an article that will accomplish a particular purpose, the accomplishment of the purpose is the substance of his undertaking, and he is free to make or to supply any article that will do the work required. If he furnishes an article that will accomplish this purpose, he performs his contract, although the article he supplies may differ widely from that contemplated by the purchaser when he made the agreement to buy. On the other hand, when the manufacturer or dealer contracts to make or to deliver a specific and definitely described article, to enable the vendor to accomplish a known purpose, the essential part of his obligation is the delivery of the identical article described in the contract; and the delivery

of a different article, although it may better accomplish the desired result, is not a performance of his agreement, and does not entitle him to recover the purchase price The furnishing of the article described, and that alone, whether that article is fit for the known purpose to which the vendee intends to apply it or not, constitutes a compliance with the contract by the vendor, and entitles him to secure its fruits. The familiar illustration of this distinction by Maule, J., in Keates v. Cadogan, 2 Eng. Law & Eq. Rep. 320, 10 C. B. 591, is still the most felicitous:

"If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequences; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the former will not be able to ride it, that would not make him liable."

In Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116, 3 Sup. Ct. 537, 28 L. Ed. 86, the bridge company had erected a portion of the falsework requisite for the construction of a bridge across the Maumee river. Hamilton made a contract with the company to purchase the falsework, the foundation of which was concealed by the river, and to complete the bridge. While he was engaged in the performance of this contract, the falsework gave way, by reason of defects in its construction, and precipitated the iron upon it into the river. The Supreme Court held that the bridge company impliedly warranted that the work which it sold to Hamilton was suitable to construct the bridge upon because it built this falsework, and had sold it to Hamilton to accomplish that specific purpose.

But in Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 512, 519, 12 Sup. Ct. 46, 35 L. Ed. 837, the refrigerating company had been informed before it made its agreement that Seitz was cooling his brewery with ice, that he wanted to dispense with the use of ice, that no machine would be of any value to him unless it would enable him to accomplish this result, and that such a machine must continuously cool 150,000 cubic feet of air to a temperature of 40° Fahrenheit. Thereupon the refrigerating company assured Seitz that its machine would accomplish this result, and, in reliance upon this statement, he entered into a written contract with the company to the effect that the latter should supply and put in operation in his brewery a No. 2 size refrigerating machine, as constructed by it, for the sum of $9,450. The company made and put such a machine in his brewery, but it did not work satisfactorily, and it was incapable of cooling 150,000 cubic feet of air to 40° Fahrenheit. The Supreme Court held that this case fell under the rule that "where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer," and that there was neither an expressed nor an implied warranty that the ice machine would do the work for which the manufacturer knew that it was purchased, or that it would cool 150,000 cubic

feet of atmosphere to 40° Fahrenheit or to any other temperature. This decision indicates the unavoidable conclusion in the case at bar. It also answers the contention of counsel that this case is not governed by the rule that there is no implied warranty of fitness where a known, definite, and described thing is purchased, because Mallory and Haven were not familiar with, and had had no experience in the operation of, the class F3 drill which they purchased. It is not the familiarity of the purchaser with the character and work of the machine ordered, but the identity of the thing described in the contract, which brings the latter within the rule. Seitz was probably ignorant of the character and of the operation of the No. 2 size refrigerating machine which he bought, and he relied upon the assurance of the vendor that it would cool his brewery as he desired. But the machine which he ordered was identified by the description in his contract, and that description made it a known, described, and definite thing. So in the case at bar the description in the accepted order which Haven made of the class F3 drill perfectly identified it—made it a known, described, and definite thing, within the meaning of this rule, and brought the contract clearly under its operation.

In Grand Avenue Hotel Co. v. Wharton, 24 C. C. A. 441, 443, 79 Fed. 43, 45, the vendee ordered two boilers for use in its hotel. The vendor knew the use to which the vendee intended to put the articles, and knew that it must necessarily use the muddy water of the Missouri river in order to operate them. The boilers were furnished, but they would not operate with the water of the Missouri river. This court held that there was no implied warranty that they would do so, and sustained the judgment for their purchase price.

In Boiler Co. v. Duncan, 87 Wis. 120, 58 N. W. 232, 234, 41 Am. St. Rep. 33, the purchaser informed the manufacturer before he made his order that he required a boiler that would produce 130 pounds steam, working pressure, and thereupon the latter offered to furnish a described boiler, and he accepted the offer. The boiler specified was furnished, but it failed to produce 130 pounds steam, working pressure, or to do the work for which the manufacturer knew the purchaser ordered it. The Supreme Court of Wisconsin decided that there was no implied warranty that it would accomplish the particular purpose for which it was bought, and said:

"The distinction seems to be between the manufacture or supply of an article to satisfy a required purpose, and the manufacture or supply of a specified, described, and defined article, as in this case."

In Goulds v. Brophy, 42 Minn. 109, 112, 43 N. W. 834, 835, 6 L. R. A. 392, the vendee ordered from the catalogue of the manufacturer an auger outfit to bore wells. The vendor furnished the outfit, but it was not suitable to bore the wells which the vendee desired to sink. The Supreme Court of Minnesota held that there was no implied warranty that it would do so, and said:

"There was an implied warranty—or, more correctly speaking, condition of the contract—that it should conform to the description, and be of good material

and workmanship according to that description, but none that it should answer the purpose described or supposed."

There are many authorities to the same effect, but it would be a work of supererogation to review them. The contract of the Calyx Drill Company in this case was expressed in writing. It was that it would make and deliver to the purchaser, Mallory, one class F3 drill, and certain other machines and articles, which were definitely specified in the contract. When it supplied these articles, it performed its agreement, whether they were suitable to perform the specific work of boring holes in the land controlled by the vendee in Lucas county, Iowa, or not. There is no averment or proof that they were not fit to accomplish the general purpose for which they were made—to bore holes in the earth under ordinary circumstances. The contract of the Calyx Drill Company was not that it would make and deliver a drill which would sink holes in the ground of the vendee in Lucas county as rapidly and economically as a diamond drill; and, if it had made and delivered a drill which would have done this, it would have been required, if the testimony of the defendants is true, to have furnished a different drill and different machinery from that described in its contract, and in so doing it would have failed to perform it.

The reception of the evidence and the charge of the court upon this subject were erroneous (1) because there was no implied warranty that the drill and machinery would be fit to bore holes through the specific strata in the earth in Lucas county; and (2) because, if there had been such a warranty, it would not have included a covenant that the machinery would sink them as rapidly and economically as a diamond drill. Such a covenant could be imported into the contract only by an express agreement, and such an agreement was excluded by the fact that the contract is in writing, and by the rule that, where the written contract of the parties is complete in itself, the conclusive legal presumption is that it embodies the entire engagement of the parties, and the manner and extent of their obligations, so that parol evidence of other terms is inadmissible to extend, modify, or contradict it. Green v. Chicago & N. W. Ry. Co., 35 C. C. A. 68, 71, 92 Fed. 873, 877; McKinley v. Williams, 20 C. C. A. 312, 319, 74 Fed. 94, 101; Wilson v. New U. S. Ranch Co., 20 C. C. A. 244, 249, 73 Fed. 994, 999; Union Selling Co. v. Jones, 63 C. C. A. 224, 227, 128 Fed. 672, 675.

The judgment is accordingly reversed, and the case is remanded to the court below, with instructions to grant a new trial.

PHILIPS, District Judge (dissenting). I am unable to concur in the foregoing opinion. I make no question of the correctness of the general rule laid down, that, where a known and definite article is ordered of a manufacturer, although it be stated by the purchaser that it is required for a particular purpose, yet, if the known described thing be accordingly supplied, there is no warranty that it will answer the particular purpose desired by the purchaser. This for the obvious reason that the vendor undertakes by the

terms of the expressed contract to furnish only the articles both parties have designated, and therefore the contract is performed by the vendor when the article delivered corresponds with the thing described and called for. Such was the case in Seitz v. Brewers' Refrigerating Machine Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837. In that case the parties entered into a written contract, whereby the vendor agreed to supply the vendee with a No. 2 size refrigerating machine, "as constructed by the said party of the first part." The answer in that case simply alleged that the plaintiff represented that the machine was capable of cooling certain rooms in the brewery, but the machine, when set up and operated, was not so capable, and failed to perform the work for which, upon the representations of the plaintiff, the machine had been contracted for; that the defendant contracted upon the faith of the guaranty by the plaintiff that it would cool certain rooms. The representation was that it had the capacity of cooling a space of 150,000 cubic feet of air to a temperature sufficiently low for the purpose of brewing or manufacturing beer. The evidence tended to show that, prior to the execution of the contract, plaintiff's agent had represented that the machine would cool 150,000 cubic feet of 40° Fahrenheit; that the defendant had been cooling his brewery with ice, and wished the machine to cool it to about the same extent. The evidence further showed that, perhaps before the machine was accepted, the defendant wrote to the plaintiff, and requested a guaranty from it that the machine would accomplish this result, which was refused, notwithstanding which the defendant used the machine. It was of this state of the case that the court said that the machine purchased was specifically designated in the contract, and that:

"The only implication in regard to it was that it would perform the work the described machine was made to do, and it is not contended that there was any failure in such performance. This is not the case of an alleged defect in the process of manufacture known to the vendor, but not to the purchaser, nor of presumptive and justifiable reliance by the buyer on the judgment of the vendor rather than his own, but of a purchase of a specific article, manufactured for a particular use, and fit, proper, and efficacious for that use, but in respect to the operation of which, in producing a desired result under particular circumstances, the buyer found himself disappointed."

Further on the court said:

"The alleged antecedent representations as to whether the machine possessed sufficient refrigerating power to cool this brewery were no more than expressions of opinion, confessedly honestly entertained, and dependent upon other elements than the machine itself, concerning which plaintiff in error could form an opinion as well as defendant; and the conduct of plaintiff in error in demanding, two days after the contract was executed, a written guaranty that the machine company would cool his building to 40° Fahrenheit, and keep it at that all the time, and in acquiescing in the company's refusal to give the guaranty for reasons stated, and in thereupon afterwards ordering the company to go on with the work, seems to us to justify no other conclusion than that reached by the verdict."

I respectfully submit that that case is not this. Here the vendee was engaged in prospecting for coal in given localities in the state of Iowa. Because of the peculiar geological formation of the earth to be bored through to reach the coal deposit, the diamond drill,

customarily employed in such operations, proved to be ineffective and inadequate. Chancing to see a prospectus issued by the plaintiff manufacturer in the state of New York, commending its drills, Mallory sent his agent on to New York to interview the manufacturer. This agent informed the representative of the manufacturer fully as to the trouble Mallory encountered in using the diamond drill—that, the coal being soft, the defendant would not get any core at all, or it would be so small that he could not judge the quality of the coal, and that what was desired was to procure a drill that would produce a larger core. This agent went to Tarrytown, where the plaintiff's machine shops were located, but it had no drills manufactured and set up so that they could be seen. The agent went with plaintiff's representative to another place, and saw one of plaintiff's drills operated with a shot bit attachment, working a short distance only from the surface. He did not see it working with a "cutter," as represented. The agent could not form an opinion as to whether that drill was fitted for operating and working in the desired locality in Iowa. He told the plaintiff the general geological formation of the several coal veins, and the difficulty of getting through the different varieties—some very hard and some very soft material. Plaintiff's agent then represented how his machine would work—that it would go through the character of stratas and geological formation in the territory where Mallory was operating; that it would work all right, operate cheaply, producing a large core instead of a small one—and thereupon Mallory's agent closed the contract. In this case, therefore, there was an article—a machine—not in esse. It was to be manufactured to answer a purpose made known to the manufacturer, which purpose the manufacturer said his machine would accomplish. Whether or not it could do so could not possibly be known to the purchaser until the machine was put in actual operation in the field in Iowa. The vendor knew that the machine it was to manufacture would not meet the purpose of the vendee unless it could be successfully operated in the earth to be bored into through such strata to overcome the defects of the diamond drill. It was sold to accomplish this very object. Thereupon the agent of the vendor turned to his desk, and, in the form of a letter or proposition, stated, not as in the contract in the Seitz Case, supra, that the company agreed to furnish a machine "as constructed by the party of the first part," but "we propose to furnish you one Class F3 drill," with certain equipments, which proposition Mallory's agent instantly accepted at the bottom of the submitted letter.

If it is to be established as law that such method of concluding such transactions precludes the vendee from asserting an implied warranty that the machine to be manufactured is suitable to the use for which the manufacturer is advised the purchaser is buying it, it does seem to me that the doctrine of implied warranty can afford no protection to the confiding purchaser against the smart secretary of the manufacturer.

The case of Grand Avenue Hotel v. Wharton et al., 79 Fed. 43, 24 C. C. A. 441, when read with regard to the particular facts of

that case, and the qualifying language of Judge Lochren, furnishes little support to the majority opinion. There was a written contract in that case, whereby the defendant agreed to furnish and deliver to plaintiff, on the cars at Philadelphia, two certain described safety boilers, of 150 horse power each, and the services of a man to put them up, for a given sum, to be paid for as specified; the contract containing specifications of the material and the construction of the boilers in their parts. The defense interposed was that the vendor knew that the boilers were to be used in the Midland Hotel at Kansas City, and that the water to be used in operating them was supplied from the Missouri river. The contention was that the company should have taken notice of the quality of that water, as to the amount of sand it contained in solution, which rendered the use of the boilers largely ineffective. Aside from the fact that there was nothing in the evidence to show any knowledge on the part of the vendor as to the peculiar properties of the water of the Missouri river as affecting the use of the boilers, there was present in the case the affirmative fact that the hotel had in prior use similar boilers. So that the purchaser not only had its own engineer run and operate the boiler, but it had a special knowledge of the quality and properties of the Missouri river water. While there was present in the case knowledge on the part of the vendor that Missouri river water was to be used in operating the boilers, it could not be said that the vendee had any right to rely upon the fact that the vendor knew the use to which the boilers were to be put. It was of this character of case that evidence was excluded tending to show the knowledge of the plaintiff as the basis of invoking an implied warranty. It can therefore better be understood why the learned judge, while stating in the first paragraph of the opinion that, "where a manufacturer contracts to supply an article which he manufactures to be applied to a particular use, of which he is advised, so that the buyer necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the use to which it is to be applied," he then said:

"But when a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular use, yet if the known, described, and definite thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer. * * * Here the purchaser contracted for a definite, well-known kind of boiler; its president having then a boiler of the same kind in use."

From which it is apparent that the ruling was based upon the proposition that the buyer in that case was bargaining for a specific article known to him.

Mr. Justice Harlan, in Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86, cited in the foregoing opinion, discussing the applicability of the doctrine of implied warranty, summed up the rules as follows:

"According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circum-

stances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller, and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold, and, the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case, any inequality, it is such that the law cannot, or ought not to attempt to, provide against. Consequently the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified in part by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he use due care, must have been informed during the process of manufacture. If the buyer relied, and, under the circumstances, had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed; the seller at the time being informed of the purpose to devote it to that use. * * * In the cases of sales by manufacturers of their own articles for particular purposes, communicated to them at the time, the argument was uniformly pressed that, as the buyer could have required an express warranty, none should be implied. But plainly such an argument impeaches the whole doctrine of implied warranty, for there can be no case of a sale of personal property in which the buyer may not, if he chooses, insist on an express warranty against latent defects."

In that case there was a written contract as to what the parties were to do in completing the bridge, in connection with the work already done by the bridge company. There was no express warranty about the character of the work the bridge company had already done. But the bridge company knew that Hamilton was to use the structure for a particular purpose. Its internal construction and adaptability were known to the bridge company, but presumptively could be known to Hamilton only after using it. Of this situation the learned justice said:

"The buyer did not, because, in the nature of things, he could not, rely on his own judgment; and, in view of the circumstances of the case and the relations of the parties, he must be deemed to have relied on the judgment of the company, which alone of the parties to the contract had or could have knowledge of the manner in which the work had been done. The law therefore implies a warranty that this falsework was reasonably suitable for such use as was contemplated by both parties. It was constructed for a particular purpose, and was sold to accomplish that purpose; and it is intrinsically just that the company, which held itself out as possessing the requisite skill to do work of that kind, and therefore as having special knowledge of its own workmanship, should be held to indemnify the vendee against latent defects arising from the mode of construction, and which the latter, as the company well knew, could not by any inspection discover for himself."

In Pullman Palace Car Co. v. Metropolitan Street Railway Co., 157 U. S. 94, 15 Sup. Ct. 503, 39 L. Ed. 632, the contract for the building of the cars by the Pullman Company was in writing, containing specifications as to the thing to be made and shipped—as

much so as in the case at bar. Notwithstanding the fact that the contract provided for an inspection of the cars after completion, by the purchaser's expert engineer, before they were delivered, it was contended by the vendee, when sued for the purchase money, that there was an inherent defect in the brakes furnished for the cars, not discoverable by inspection, and that there was an implied warranty of such latent defects in the cars. As the Pullman Company was advised that the cars to be manufactured were to be operated on a particular line of road, with peculiar, acute curves, requiring brakes especially adapted thereto, it was held that there was an implied warranty on the part of the manufacturer that the brakes constructed by it as a part of the machinery would meet the requirements of the purchaser. Inasmuch as the defendant had accepted the cars, and the only defect was the insufficiency of the brakes, which the vendee had the means of supplying, it was ruled that it could recoup for the difference which it would cost to equip the cars with such obtainable brakes.

The utility of the machinery furnished by the plaintiff company in this case consisted entirely in the adaptability of the drill bit to accomplish the required boring in the peculiar strata formation where Mallory was exploring for coal. While the plaintiff submitted in writing an itemized specification of the equipment to be furnished by it, and the cost thereof, and Mallory agreed by the acceptance to pay the sum specified, it was practically contemporaneous with the information given the manufacturer by the purchaser as to the particular use to which it was to be applied, and with the knowledge that, unless it accomplished the desired work, it would be practically useless to the purchaser. It does seem to me therefore, that if there can be a case where the law writes into the executory contract, where the manufacturer undertakes to manufacture a machine with full knowledge of the purpose for which it is bought, a warranty that it is fit for the specified use, and when the manufacturer knows that the vendee is relying upon the manufacturer's superior knowledge of the fitness of the machine, this is clearly a proper case for the application of this wholesome rule of law.

WESTERN NEW YORK & P. R. CO. et al. v. PENN REFINING CO., Limited, OF OIL CITY, PA. (two cases).

(Circuit Court of Appeals, Third Circuit. May 1, 1905.)

Nos. 2, 3.

1. INTERSTATE COMMERCE—EXCESSIVE CHARGES—ORDER OF REPARATION—EXECUTION.

Interstate Commerce Act, § 16 (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act March 2, 1889, c. 382, § 5, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3167], provides that whenever any common carrier, as defined in such act, shall violate, refuse, or neglect to obey any lawful order or requirement of the commission, not founded on a controversy requiring a trial by jury, it shall be lawful for the com-

mission or any person interested to apply in a summary way by a petition to the Circuit Court of the United States sitting in equity for the enforcement of such order; and, if the matters involved require a trial by jury, it shall be lawful for any person interested to apply to a court of the United States sitting as a court of law to fix a time for a trial of the case, etc. *Held*, that the Interstate Commerce Commission, though clothed with quasi judicial functions, being an administrative body, no "lawful order" referred to in section 16, was self-executing.

2. SAME—EVIDENCE—FINDINGS OF COMMISSION—CONCLUSIONS OF LAW.
The mere opinions of the Interstate Commerce Commission are inadmissible in an action brought for the enforcement of an order of pecuniary reparation.

3. SAME.
Interstate Commerce Act, § 16, as amended by Act Cong. March 2, 1889, c. 382, § 5, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3167], providing that the findings of fact of the Interstate Commerce Commission shall be prima facie evidence of the facts found in a subsequent proceeding to enforce the commission's order, contemplated that the findings of fact should be so prepared and arranged in the commission's report that they could be offered in evidence unaccompanied by extraneous or incompetent legal arguments, opinions, or other conclusions.

4. SAME — DISCRIMINATION — REMEDIES — INTERSTATE COMMERCE COMMISSION—ORDERS.
Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159], providing that any person claiming to be damaged by violation of the act may make complaint to the commission thereby created, or bring suit to recover damages sustained, where plaintiff elected to proceed by a complaint to the commission, he was thereafter confined to the remedy provided by the act.

5. SAME—APPEAL.
The law allows no appeal from or writ of error to review a decision of the Interstate Commerce Commission denying or awarding reparation for an alleged violation of the act.

6. SAME.
The lawfulness of an order of reparation issued by the Interstate Commerce Commission does not necessarily depend on a sufficiency of evidence adduced before the commission, but on the existence of facts, whether disclosed or not before that body, warranting the reparation ordered; and in an action to enforce such reparation it is sufficient that such facts be established by proper evidence.

7. SAME.
Though an action to recover pecuniary reparation ordered by the Interstate Commerce Commission is triable de novo, the cause of action must have been included in the order of reparation, and have constituted the whole or part of the basis of such order, whether the proceeding to enforce the same is in equity or at law.

8. SAME—RAILROADS—LEASE.
Where a railroad company owning a part of the through route over which oil was transported under an alleged discriminating rate leased its line to another company, and the lessee, by virtue of the lease or otherwise, was not a partner, agent, or representative of the lessor company during the time the former was operating such portion of the through route, the lessor was not personally liable for violation of the interstate commerce act by the lessee's participation in such discriminating rate during the continuance of the lease.

9. SAME—PROCEEDINGS—PARTIES—ORDERS.
Where a lessee railroad company operated a part of a through route over which oil was transported under an alleged discriminating rate, but was not a party to a proceeding before the Interstate Commerce Commission to recover reparation, an order in favor of petitioners including dis-

criminating freight charges by such lessee company was neither conclusive nor effective as to it.

10. SAME—PARTIES—RECEIVERS—PERSONAL LIABILITY.
Since execution cannot issue against the property of a railroad company in the hands of a receiver appointed by a federal court to enforce a judgment for damages sustained by the charge of discriminating freight rates in violation of the interstate commerce act, the receiver as such should not be joined with other railroad companies constituting a through route, against which the judgment would constitute a personal liability, to be enforced by execution at law.

11. SAME—CLAIMS—FAILURE OF PROOF—LIMITATION.
Where an order for the sale of the assets of a railroad company on mortgage foreclosure provided that any claims not included in the receivers' statements, and which shall not have been presented in writing to the receivers, or filed with the clerk of the court prior to the delivery of possession of the property, shall be presented for allowance and filed within six months after the first publication by the receivers of a notice to the holders of such claims to present the same for allowance, and declaring that claims not so presented shall not be enforceable against the receivers nor against the property or the purchasers, an alleged liability of the receivers for participating in a through freight rate which was in violation of the interstate commerce act, not so presented, was unenforceable either against the receivers or the succeeding corporation.

12 SAME—DISCHARGE OF RECEIVERS.
Where receivers of a railroad company had been finally discharged and released from all liability on their bonds more than four years before the bringing of an action to enforce an interstate commerce reparation order for an alleged participation by the receivers in an illegal freight rate, and there was no evidence of any vacation of the orders of discharge, or any application in that behalf, the receivers were not liable as such.

13. SAME—RATES—REASONABLENESS—QUESTION FOR JURY.
In an action to enforce an interstate commerce reparation order based on a discriminating freight rate, whether such rate was just and reasonable or unreasonable and excessive is a question for the jury.

In Error to the Circuit Court of the United States, for the Western District of Pennsylvania.

Francis I. Gowen and John G. Johnson, for plaintiffs in error.

M. J. Heywang, Eugene Mackey, J. W. Lee, and S. S. Mehard, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. The questions before us arise on writs of error to the circuit court of the United States for the western district of Pennsylvania in two statutory actions brought April 11, 1901, by the Penn Refining Company, Limited, of Oil City, Pennsylvania, for the recovery of certain sums of money respectively mentioned in two orders of reparation in its favor made October 22, 1895, by the Interstate Commerce Commission, together with interest. One of these actions, No. 23 May Term, 1901, was brought against the Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, receiver thereof, the Western New York and Pennsylvania Railway Company and the Lehigh Valley Railroad Company, and the other, No. 25 May Term, 1901, against the Western New York and Pennsylvania Railroad

Company and Samuel G. De Coursey, receiver thereof, the Western New York and Pennsylvania Railway Company, the New York, Lake Erie and Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, the Erie Railroad Company and the Delaware and Hudson Canal Company. In No. 23 a verdict for the plaintiff was found May 23, 1902, for $12,706.92, and in No. 25 a verdict for the plaintiff was found on the same day for $514.30. Judgment on verdict was entered in each action February 12, 1903. The assignments of error in both cases by consent of counsel and as a matter of convenience were argued at the same time and appropriately may be considered in one opinion. The order of reparation on which action No. 23 is founded was made in proceedings, No. 154, before the Interstate Commerce Commission, instituted December 4, 1888, the Independent Refiners' Association of Titusville, Pennsylvania, and the Independent Refiners' Association of Oil City, Pennsylvania, being the petitioners, and the Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company and the Lehigh Valley Railroad Company being the original respondents. The order of reparation on which action No. 25 is founded was made in proceedings, No. 153, before the commission, also instituted December 4, 1888, the same refiners' associations being the petitioners, and the Western New York and Pennsylvania Railroad Company, the New York, Lake Erie and Western Railroad Company, the Delaware and Hudson Canal Company, the Fitchburg Railroad Company and the Boston and Maine Railroad Company being the original respondents. It appears that the plaintiff below was and is a member of the Independent Refiners' Association of Oil City, Pennsylvania. The order of reparation in proceeding No. 154 is as follows:

"The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the defendant, the Lehigh Valley Railroad Company, the sum of eight thousand five hundred and seventy nine dollars ($8,579.00) as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company, or to its said receiver, for transportation over the Western New York & Pennsylvania Railroad and the Lehigh Valley Railroad from Oil City, Pa., to Perth Amboy, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York & Pennsylvania Railroad Company and its said receiver; and the said Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey the receiver thereof, and the Lehigh Valley Railroad Company are hereby ordered and required to pay to the claimant, the Penn Refining Company, Limited, the said sum of eight thousand five hundred and seventy nine dollars ($8,579.00), together with interest thereon at the rate of 6 per cent. per annum from May 15, 1894."

The order of reparation in proceedings No. 153 is as follows:

"The claimant, the Penn Refining Company, Limited, of Oil City, Pa., is entitled to recover from the defendant, the Western New York & Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the

defendant, the New York, Lake Erie & Western Railroad Company and J. G. McCullough and E. B. Thomas, the receivers thereof, and the defendant, the Delaware & Hudson Canal Company, the sum of three hundred and forty three dollars and fifty eight cents ($343.58), as reparation for damage resulting to said claimant from excessive and unlawful transportation charges exacted upon shipments of petroleum oil in barrels delivered by said claimant to said Western New York & Pennsylvania Railroad Company or to its said receiver for transportation over the Western New York and Pennsylvania Railroad, the New York, Lake Erie and Western Railroad the Delaware and Hudson Canal Co.'s railroad and the Central Railroad of New Jersey from Oil City, Pa., to Newark, N. J., which said shipments of oil in barrels were so transported over said railroads between the 3rd day of September, 1888, and the 15th day of May, 1894, as appears from claim filed and statement thereon made by said Western New York and Pennsylvania Railroad Company and its said receiver; and the said Western New York and Pennsylvania Railroad Company and Samuel G. De Coursey, the receiver thereof, and the New York, Lake Erie and Western Railroad Company, and J. G. McCullough and E. B. Thomas, the receivers thereof, and the Delaware & Hudson Canal Company are hereby ordered and required to pay to the claimant the Penn Refining Company, Limited, the said sum of three hundred and forty three dollars and fifty eight cents ($343.58), together with interest thereon at the rate of 6 per cent per annum from May 15, 1894."

The plaintiff below recovered in each action judgment for the full amount awarded in the order of reparation, together with interest at the specified rate from May 15, 1894. The independent refiners' associations in their petitions in cases No. 153 and No. 154 before the commission alleged in substance, among other things, that they were composed of a number of separate and distinct refining companies organized for the purpose of obtaining from railroad companies equal, reasonable and just rates of freight for refined petroleum and its products, manufactured and sold by the members of the petitioning associations at and from works owned and operated by them in the oil regions of Pennsylvania at or near Titusville and Oil City respectively; that in the conduct of their business the members of the petitioning associations had for several years shipped from their works large quantities of petroleum over the railroads of the respondents; and that the respondents as common carriers engaged in interstate commerce had violated the provisions of the interstate commerce act of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], in establishing and collecting from the members of the petitioning associations excessive, unjust and unreasonable through rates and charges for the transportation over the lines of the respondents of petroleum in barrels in carload lots, and in giving an undue and unreasonable preference or advantage to shippers of petroleum and its products other than the members of the petitioning associations, and in subjecting the latter to an undue and unreasonable prejudice and disadvantage. In each case the petitioners prayed, among other things, that the commission would order the respondents to desist from the acts complained of and to make such reparation in the premises to the petitioners as should be found just and proper. The assignments of error are numerous and it is unnecessary to take them up seriatim and give to each a separate consideration. They may in each case be divided into three groups, raising respectively three classes of questions, namely, those relating to the conduct of

the trial in the court below, those relating to the lawfulness of the order of reparation, and those in other respects bearing upon the validity of the judgment recovered.

In each action error has been assigned by all the defendants therein to the admission in evidence of a paragraph from the report of the commission containing the following allegations:

"After full investigation and mature consideration * * * we hold, that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shippers in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers."

This statement was objected to as "not containing a finding of fact, but involving a conclusion of law." The objection was overruled, the learned district judge remarking, "We think the paragraph constitutes a finding of fact, and the objections are therefore overruled." All of the paragraph with the exception of the concluding negative allegation that "no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers," consists of mere legal conclusions. Taken as a whole it is argumentative, and when pronounced and admitted by the court as "a finding of fact," was calculated unduly to influence and perchance to mislead the jury to the prejudice of the defendants by causing the belief, possibly on insufficient grounds, that the charge for the barrel package in barrel shipments of oil complained of was not reasonable and just as required by the interstate commerce act. The subject to which it related was of vital importance in the case. Whether the charge for the barrel package was reasonable and just, or unjust and excessive, was a question to be decided by the jury on proper evidence, and not on mere arguments and legal conclusions of the commission. The interstate commerce act, as originally passed, (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) manifestly contemplated and intended that pecuniary reparation in proper cases should be made to persons sustaining damage through the violation of its provisions by a common carrier subject thereto, whether proceedings were instituted by complaint before the commission, on the one hand, or, on the other, were brought in the first instance in a court of the United States. It provided that such a common carrier violating its provisions should be "liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation"; that "any person or persons claiming to be damaged" through such violation "may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act"; that, should complaint be made to the com-

mission and the carrier not "make reparation for the injury alleged to have been done" within a limited period, it should be the duty of the commission to investigate the same, and make "recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured," and, if it should appear that "any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation," to notify such common carrier to "make reparation for the injury so found to have been done * * * within a reasonable time, to be specified by the Commission." The commission, although clothed with quasi judicial functions, is an administrative body in contradistinction to a judicial tribunal. Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567, 613, 2 L. R. A. 289; Int. C. C. v. Brimson, 154 U. S. 447, 474, 489, 14 Sup. Ct. 1125, 38 L. Ed. 1047; Int. C. C. v. Louisville & N. R. Co. (C. C.) 73 Fed. 409; Int. C. C. v. Cin., etc., R. Co. (C. C.) 64 Fed. 981. No "lawful order or requirement" of the commission, referred to in section 16 (24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]) executes itself. Should the carrier or carriers to whom it is directed not voluntarily obey it, it can be enforced only through judicial proceedings as provided for in that section. Under the act as originally passed such proceedings were solely in equity. As the constitutional guarantee of the right to trial by jury attaches to the enforcement in a federal court of an order or requirement of mere pecuniary reparation, there was no means to compel payment, and such order or requirement, if not a nullity, was at least ineffective. It was, consequently, the uniform practice of the commission, prior to the taking effect of the amendatory act of March 2, 1889, c. 382, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3158] to decline to order, require or recommend pecuniary reparation. Councill v. Railroad Co., 1 Interst. Com. Com'n R. 339; Heck & Petree v. Railway Co., 1 Interst. Com. Com'n R. 495; Riddle, Dean & Co. v. Railroad Co., 1 Interst. Com. Com'n R. 594, 607; Rawson v. Railroad Co., 3 Interst. Com. Com'n R. 266; Macloon v. Railway Co., 5 Interst. Com. Com'n R. 84. Such refusal on the part of the commission was based on one or the other of two grounds; one of them being, as stated in Heck & Petree v. Railway Co., that "the claim for pecuniary damages made by complainants * * * presents a case at common law in which the defendants are entitled to a jury trial"; and the other, as stated in Rawson v. Railroad Co., that "as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at Common Law and where more than twenty dollars was involved, we could award no reparation in consequence of the provisions of the seventh amendment to the Constitution of the United States." But by the act of March 2, 1889, c. 382, § 5, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3167] § 16 (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]) was so amended as to provide for trial by jury and judgment as at common law on the law side of the court in proceed-

ings for the enforcement of orders or requirements of the commission involving matters "founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States." In proceedings at law under section 16, as amended, for the enforcement of an order or requirement of the commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury. Section 14 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3164]), as amended (Act March 2, 1889, c. 382, § 4, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3164]), provides, among other things, as follows:

"That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

And section 16 as amended provides with respect to proceedings at law in a circuit court of the United States in case of the disregard of a lawful order or requirement of the commission, among other things, that, where "the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, * * * at the trial the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated." The act does not make the mere legal opinions, arguments or reasons of the commission prima facie evidence or evidence of any kind in any judicial proceeding. It was not the intent of the act to introduce into proceedings for the recovery of pecuniary reparation awarded by the commission elements of uncertainty, complexity or confusion, foreign to any orderly system of juridical procedure. Not only did the paragraph in question from the report of the commission include conclusions of law, but the jury was instructed that these conclusions were findings of fact. In this there was error tending to mislead and the assignment must, therefore, be sustained. The constitutionality of the provisions making "findings of fact" prima facie evidence before a jury has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guarantee relative to trial by jury in the courts of the United States does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants.

In each of the two actions error has been assigned to the admission in evidence of the findings of fact as appearing in the report and order of the commission on the subject of reparation marked

Exhibit H. The court in overruling the objections made on the part of the defendants, among other things, said:

"The objections to the admission of this order as an order are overruled. The order is received in evidence, and its effect is restricted simply as showing the basis on which the statutory proceeding by the petition is based, and is not to have any binding effect as an order upon the jury; to this extent, and to this extent only, the order is admitted as such in evidence."

Had the learned judge stopped at this point probably the defendants would have had no just cause of complaint. But he proceeded as follows:

"As to the findings of fact contained or embraced in the order, we are of opinion that the objections thereto should be overruled. We are of opinion that these findings of fact are made prima facie evidence under the act of Congress."

Exhibit H is composed of heterogeneous matter, containing not only findings of fact, but legal arguments, opinions and other conclusions. It is fairly to be inferred from the provisions of sections 14 and 16 that the findings of fact were intended to be so arranged and set forth in the report of the commission that they could be offered as prima facie evidence of "each and every fact found", unaccompanied with extraneous, embarrassing or incompetent matter calculated to confuse or mislead. Int. C. C. v. Louisville & N. R. Co. (C. C.) 73 Fed. 409, 414, 415. While not expressing the opinion that findings of fact even when mixed with incompetent matter should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be wholly disregarded. Unless this course be pursued the parties are deprived at least in part of the benefits or safeguards intended to be secured to them under the constitutional guarantee of trial by jury. In omitting in the present instance to follow such method we think there was error and that the assignments must be sustained.

There are other assignments of error in each of the two actions of the same general nature as those already considered, to which it is unnecessary particularly to allude. If the matter rested here, while a judgment of reversal would be necessary, it would be accompanied with a direction for a writ of venire facias de novo. But there are other assignments requiring our attention. In each of the two actions there are assignments of error to the following portion of the charge to the jury:

"The questions you are to ascertain are to be passed upon by you under the evidence in the case given before you, and your conclusions are to be reached by you without reference to these orders made by the interstate commerce commission. They may or may not have been justified in making their orders. But the question for you to determine is one independent and apart from the orders they have made, and it is a question to be determined by you under the evidence that has been given before you in this case, without respect to what prior orders have been made by this interstate commerce commission."

The orders referred to in this instruction included the order of reparation specifying the sum for which action was brought. The statement that the commission "may or may not have been justified

in making their orders" was directly calculated to impress the jury with an idea that the lawfulness or unlawfulness of the order of reparation was a wholly immaterial consideration and should in no way be permitted to influence its deliberations in reaching a verdict. This portion of the charge gives rise to two questions; first, whether it was necessary to a recovery that the order of reparation should have been lawful, in whole or in part, and, if so, secondly, whether relief not lawfully embraced in such order could be obtained by the plaintiff below. Section 9 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]) provides, among other things, as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

The plaintiff elected the method of procedure by complaint to the commission, and thereafter was confined to that remedy. One of the objects designed to be accomplished by such procedure is the making in a proper case of an order of pecuniary reparation. To this end the commission is clothed with authority to compel the attendance of witnesses and the production of evidence. It is true that the commission is without power to enforce such an order, and, unless it be voluntarily obeyed by those to whom it is directed, resort to judicial proceedings is necessary to obtain the relief covered by it. But that such relief may be obtained the order must be lawful. It is not sufficient that it be within the jurisdiction of the commission, if it be unlawful. The phrase "lawful order," as employed in section 16 as amended, implies more than the exercise of mere jurisdictional power or authority. In Int. Com. Com. v. Alabama Midland Ry., 168 U. S. 144, 159, 18 Sup. Ct. 45, 42 L. Ed. 414, distinguished counsel contended:

"The words 'lawful order' mean an order the Commission has jurisdiction to make. An order may be lawful and at the same time erroneous, so that if the Commission made an order in a matter over which they had jurisdiction, which was merely an error of judgment as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful."

The court, however, with respect to this contention said:

"The first contention we encounter, upon this branch of the case, is that the Circuit Court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the commission has misconstrued the statute and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact and not of power, and hence unreviewable. We think this contention is sufficiently answered by simply referring to these portions of the act which provide that, when the court is invoked by the commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in

such manner as to do justice in the premises. * * * It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal, in such cases, that they are not restricted to the evidence adduced before the commission, nor to a consideration merely of the power of the commission to make the particular order under question, and that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence."

It is essential that the order be warranted by the provisions of the act in connection with the principles of law involved in the proper application of these provisions to a given case. Not only must an order of pecuniary reparation be lawful, but no recovery by judicial proceedings under section 16 as amended can exceed, aside from interests and costs, the amount required by such order to be paid, nor be had for any cause not presented to the commission in the proceedings in which such order is made. It is incumbent on one claiming damages against a common carrier for alleged violation of the act, and electing to proceed by complaint to the commission, to apply to that body by petition briefly stating the facts. Thereupon a statement of the charges so made is forwarded by the commission to the carrier who is called upon "to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the commission." If the carrier within the specified time makes reparation for the alleged injury, such carrier is wholly relieved from liability to the petitioner for the violation of law complained of. If, however, the carrier does not "satisfy the complaint" within the specified time it becomes the duty of the commission "to investigate the matters complained of." It is only because the carrier fails to satisfy the complaint that an investigation by the commission of the "matters complained of" is had. The regular course in conducting the investigation, save in exceptional cases not included in those now under consideration, is to take evidence only "after a cause or proceeding is at issue on petition and answer." In cases No. 153 and No. 154 (Independent Refiners' Ass'ns v. Western New York & P. R. Co., 6 Interst. Com. Com'n R. 378) this course was pursued. If on investigation it appears to the satisfaction of the commission by the testimony of witnesses or other evidence that a violation of law cognizable by that body has been committed by a common carrier whereby "injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation," the commission is authorized, and it is its duty, forthwith to "cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission." If within that time it appears to the commission that such carrier has ceased from such violation of law and has made reparation for such injury or damage "in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from

further liability or penalty for such particular violation of law." It is only in case the carrier, having failed to satisfy the party or parties complaining, "shall violate or refuse or neglect to obey or perform" a lawful order of pecuniary reparation, that an action will lie for the recovery of the reparation so ordered, and it is necessary that the petition shall allege "such violation or disobedience as the case may be." To undertake to determine whether one, in suing for pecuniary reparation lawfully ordered by the commission, proceeds, on the one hand, for the enforcement of the lawful order of reparation, or, on the other, for the recovery of the reparation lawfully ordered, were to indulge in unprofitable refinement. It is enough for present purposes that in either view the substantial object of the action is the obtaining of reparation lawfully ordered to be paid. The law allows no appeal from a decision of the commission denying or awarding reparation, nor does a writ of error lie in such case. The lawfulness of an order of reparation does not necessarily depend upon a sufficiency of evidence adduced before the commission, but upon the existence of facts, whether or not disclosed to that body, warranting the reparation ordered; and in an action brought to obtain such reparation it is enough that such facts be established by proper evidence. Hence in such an action the parties are not confined to the evidence adduced before the commission during the investigation resulting in the order of reparation. They are at liberty either wholly or partially to rely upon the "findings of fact," made by the act prima facie evidence in any judicial proceeding "as to each and every fact found," or resort may be had by them or any of them to cumulative or other evidence. Int. Com. Com. v. Alabama Midland Ry., 162 U. S. 144, 175, 18 Sup. Ct. 45, 42 L. Ed. 414; Texas & Pac. Railway v. Interstate Com. Com., 162 U. S. 184, 196, 16 Sup. Ct. 666, 40 L. Ed. 940; Kentucky, etc., Co. v. Louisville & N. R. Co. (C. C.) 37 Fed. 567, 614, 2 L. R. A. 289; Int. Com. Com. v. Lehigh Val. R. Co. (C. C.) 49 Fed. 177; Int. Com. Com. v. Atchison, etc., R. Co. (C. C.) 50 Fed. 295; Int. Com. Com. v. East Tenn., etc., Ry. Co. (C. C.) 85 Fed. 107, 110; Int. Com. Com. v. Cin., etc., Ry. Co. (C. C.) 56 Fed. 925. The cause of action is examined de novo and the proceeding is in a qualified sense independent of the investigation by the commission. Detroit, etc., Ry. Co. v. Int. Com. Com., 74 Fed. 803, 839, 21 C. C. A. 103; Kentucky, etc., Co. v. Louisville & N. R. Co. (C. C.) 37 Fed. 567, 615, 2 L. R. A. 289; Shinkle, Wilson & Kreis Co. v. Louisville & N. R. Co. (C. C.) 62 Fed. 690, 693; Int. Com. Com. v. Cin., etc., Ry. Co. (C. C.) 56 Fed. 925. The commission in making an order of reparation may have been actuated by insufficient or erroneous reasons and the order nevertheless be valid if it be within the scope of the complaint made to that body. Int. Com. Com. v. Southern Pac. R. Co. (C. C.) 132 Fed. 829, 837; Int. Com. Com. v. East Tenn., etc., Ry. Co. (C. C.) 85 Fed. 107, 110. In the latter case the court said with respect to an erroneous ground upon which the commission based its order:

"In this undoubtedly it was in error. The contrary doctrine is now well established. But this error is not material. The legal reason given may be

wrong and the order right if, upon the facts, the latter should be found by the court to be warranted by law. Nor would it affect the duty of the court if the commission had founded its order upon one provision of the act, and the facts brought the case within some other. The question, therefore, is whether the order made was a lawful one in the circumstances as they are made to appear."

But the cause of action in a suit brought for the recovery of pecuniary reparation must have been included in the order of reparation and have constituted the whole or part of the basis of such order. Int. Com. Com. v. Louisville & N. R. Co. (C. C.) 73 Fed. 409, 413, 428; Detroit, etc., Ry. Co. v. Int. Com. Com., 74 Fed. 803, 840, 841, 21 C. C. A. 103; Int. Com. Com. v. Delaware, L. & W. R. Co. (C. C.) 64 Fed. 723; New York & N. Ry. v. New York & N. E. R. Co. (C. C.) 50 Fed. 867, 870; Int. Com. Com. v. Detroit Railway Co. (C. C.) 57 Fed. 1005, 1008, 1013. We do not perceive either on the authorities or on principle, with respect to the necessity that the substantive relief to be obtained, aside from interest and costs, should have been included in the order of the commission, any distinction between a suit in equity to enforce obedience to an order that a carrier shall desist from acts in contravention of the statute, and an action at law to recover pecuniary reparation where complaint has been made to the commission. This conclusion not only is a reasonable inference to be drawn from the various provisions of the act adverted to but is supported by other considerations. That the findings of fact by the commission on which its order for pecuniary reparation is founded should have been made prima facie evidence in an action for the recovery of such reparation is strongly indicative of a legislative intent that the demand for such reparation sought to be enforced in such action must be confined to such reparation as was considered by the commission and included in its order. In Cin. N. O. & Tex. Pac. Ry. v. Int. Com. Com., 162 U. S. 184, 196, 16 Sup. Ct. 700, 705, 40 L. Ed. 935, the court said:

"The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded. The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as prima facie evidence, that the facts of the case are to be disclosed before the Commission. * * * The purposes of the act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved."

Further, the fact that where a remedy is sought for the recovery of damages resulting from a violation of the provisions of the act there must be an election between procedure by complaint to the commission and procedure by suit or action in the proper court, leads to the same conclusion. Both remedies cannot be pursued either contemporaneously or successively. To permit the recovery, in an action brought for violation of or disobedience to an order of pecuniary reparation, of damages not included in such order would involve judicial sanction of a virtual blending of both remedies in palpable disregard of the provision that the petitioner "shall not have the right to pursue both of said remedies," but

must in each case make an election between the two. We think there was substantial error in the portion of the charge just considered.

In each of the two actions error has been assigned by each of the defendants to the refusal of the court to charge the jury that there could be no recovery against them respectively. In addition to this general assignment, there was a specific assignment by the Lehigh Valley Railroad Company to the following portion of the charge in action No. 23:

"On the part of the Lehigh Valley Railroad Company, it is shown that on February 11, 1892, it leased its road to the Philadelphia & Reading Railroad Company, which latter continued to operate it under said lease until August 1, 1893. It is claimed on behalf of said road that for such period no damages can be found against it or recovered from it. In view of the fact that under the lease in question the Lehigh Valley Railroad Company was to be paid by the Reading Company a percentage on the gross earnings of the road during the lease, we are of opinion that the Lehigh Valley Railroad Company was not exempt from liability during the lease, if it was chargeable in other respects, and the plaintiff is entitled to recover against it in other respects. In view, however, of the admission of counsel for plaintiff that they have shown no shipments during said period and claim no reparation for such, it will be apparent to you that the question as to the giving of this lease need not concern the jury, and so I instruct you."

Section 8 of the act (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3159]) provides, among other things, as follows:

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act."

On the assumption that the conduct of and relationship between the defendants with respect to the through route from the oil regions in Pennsylvania to New York Harbor points, including Perth Amboy, were of such a character as to render all of them personally liable for the exaction by the initial carrier, or other defendants, of excessive and unjust freight charges, such liability on the part of any defendant would, save under exceptional circumstances, be confined to exactions occurring during the co-operation of that defendant with the others. In the absence of such special circumstances, we are not aware of any principle or ground on which one of the common carriers would incur liability on account of the exaction of illegal charges by other common carriers over the through route during a period when the former carrier was not co-operating with the others. Section 1 in defining the word "railroad" as employed in the act, certainly does not countenance such an idea of liability. So far as material in this connection, it provides that "the term 'railroad' as used in this act shall include * * * all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease." It appears from the record that there was evidence before the commission and also before the court below that part of the

mount included in the order of reparation sued on, and in the udgment, represented alleged illegal exactions of freight charges eceived while the Philadelphia and Reading Railroad Company vas operating a portion of the through route under a lease from ne Lehigh Valley Railroad Company. This fact is disclosed by ne report of the commission of October 22, 1895, exhibit H, in connection with the copy of the lease set forth in the record. The commission said:

"On July 12, 1895, counsel for the defendant, the Lehigh Valley Railroad ompany, suggested to the Commission, by the filing of an affidavit of John . Fanshawe and copy of a lease of the Lehigh Valley Railroad to the Philaelphia and Reading Railroad Company, that for the period between February , 1892, and August 1, 1893, (a portion of the time covered by these reparation aims) the Lehigh Valley Railroad was operated by the Philadelphia and eading Railroad Company, as lessee, under the terms of a lease bearing the ite first mentioned; and that, during such time, the receipts from the operaon of the Lehigh Valley road enured to and were received by the Philadelhia and Reading Railroad Company, and were not received by the defendnt, the Lehigh Valley Railroad Company. Though the Philadelphia and eading Company, as lessee, would be liable for injuries inflicted durg its management of the road, that company is not a party to these proedings. It is understood that the Lehigh Valley Railroad Company reumed operation of its properties under a clause in the lease providing for its rmination at the option of the lessor company, in the event of the terminaon, for any reason whatsoever, of a certain agreement of even date thereth between the Lehigh Valley Coal Company and the Philadelphia and eading Coal and Iron Company. There is thus raised in these proceedings e question whether the lessor company is liable to respond in damages to rties injured through non-performance of public duties as a common carrier ring the operation of its railroad property by a lessee. * * * The Lehigh lley Railroad Company, a common carrier subject to the provisions of the t to Regulate Commerce, could not, by leasing its road, free itself from liaities for practices made illegal by that statute; nor after resuming operaon of its property pending proceedings against it to enforce statutory prosions so violated and to recover damages for injuries sustained under such olation, can it claim exemption from liability during the term of the lease."

Further, in Cattle Raisers' Association v. Railway Company, 7 terst. Com. Com'n R. 513, 537, which report by virtue of section 14 is made "competent evidence of the reports and decisions of e Commission therein contained, in all courts of the United tates * * * without any further proof or authentication thereof," the commission, referring to cases No. 153 and No. 154 (Independent Refiners' Ass'ns v. Western New York & P. R. Co., 6 terst. Com. Com'n R. 378) said:

'In the matter of the Independent Refiners' Association, the Lehigh Valley ilroad was engaged in the discriminating practices complained of, and sed its road for a short time to the Philadelphia & Reading Railroad Comay, by whom the practices were continued. Upon the termination of the se the Lehigh Valley resumed possession of its property and still continued e same discriminations. The Commission held that the Lehigh Valley Comay was liable for damages accruing to shippers by these unlawful practices ring the period of the lease."

It does not appear that the Philadelphia and Reading Railroad ompany was, by virtue of the lease or otherwise, a partner, agent representative of the Lehigh Valley Railroad Company during e time the former company was operating a portion of the through

ute under the lease, with respect to any benefit derived or to
e derived through the exaction by it or any of the defendants
freight charges. Nor did the exaction during that time by the
gislatively sanctioned lessee or any of the defendants, other than
e lessor, of illegal freight charges, assuming them to have been
ich, belong to the category of torts for which the lessor could
e held liable. The amount of such charges, though included,
not specified either in the order of reparation or in the judgment.
oth were entire and in solido against all the defendants. What-
ver may have been the amount of such charges, it is inseparable
nd indistinguishable from the balance of the sum ordered by the
ommission and adjudicated by the court below. The order was,
nerefore, for all practical purposes ineffective, and must be treated
s unlawful and the judgment erroneous. But little need be said
f the "admission of counsel for plaintiff that they have shown no
hipments during said period and claim no reparation for such."
There was uncontradicted evidence that there were shipments dur-
ng that period and that the order of reparation, for the whole
mount of which judgment was rendered, included alleged illegal
reight charges in such period. While it was competent for the
ounsel for the plaintiff to admit away or waive the rights of their
lient, it was beyond their power to admit away or waive the right
of the defendants to a valid defence. Further, the Philadelphia
and Reading Railroad Company was not made a party either to the
proceedings before the commission or to the action in the court be-
low. It has never had its day in court. Whatever amount of al-
leged illegal freight charges may have been directly or indirectly
exacted by it while operating a portion of the through route was
assessed in proceedings to which it was a stranger, and in which
it had no opportunity to make a defence. It, certainly, could not be
concluded by the judgment; and that judgment, being entire, may
be prejudicial to all the defendants therein with respect to the
amount—whatever it may have been—included therein on account
of freight charges by the Philadelphia and Reading Railroad Com-
pany. In the portion of the charge now under consideration we
think there was error.

In each action error has been assigned to the following portion of the charge to the jury:

"In regard to the defendants, Samuel G. De Coursey, Receiver, and the Western New York and Pennsylvania Railway Company, it appears that the original company (that is, the Western New York and Pennsylvania Railroad Company), against which this petition was originally filed on December 4, 1888, went into the hands of Samuel G. De Coursey, as Receiver, on April 1, 1903. Prior thereto, to wit, on the 14th day of November, 1892, an order was made by the Interstate Commerce Commission against the Western New York and Pennsylvania Railroad Company, commanding it to desist from charging the rate complained of and ordering it to make reparation. It is alleged, (and upon this point we express no opinion, for you will notice that we leave some facts to be found by you), that thereafter, to wit, on the 22nd day of October, 1895, an order was made against the Receiver, Samuel G. De Coursey, among others, directing him, as Receiver of the road, and the Western New York and Pennsylvania Railroad Company, to make reparation to the plaintiff of a specific amount which has been read in evidence before you. It is alleged

that during this proceeding to thus ascertain the amount of reparation to be made, the Receiver was represented by counsel and took part in those proceedings and resisted the entry of the making of such an order. It is also alleged that he was notified of this order of reparation and declined to comply with the same. If you find the facts to be as above alleged, and you further find that the plaintiff has shown a right to recover against the Western New York and Pennsylvania Railroad Company, the original company, in other respects, and that the said railroad company united, as explained above, in making a through joint rate with the New York, Lake Erie and Western Railroad Company and the Delaware and Hudson Canal Company, and in so doing subjected refined oil in barrels to an undue and unreasonable prejudice or disadvantage, and that when the company ceased to operate its road and it passed into the hands of a Receiver, such Receiver continued to maintain such rate and declined to obey the desisting and reparation orders, and continued the litigation, then we are of opinion that by such acts and the adoption of the rate, the Receiver, as Receiver, had so acted that he should not be exempt from the verdict that this jury might find, if in other respects the plaintiff is entitled to recover a verdict. And as, under the decree of this Court, under which this road was sold to the Western New York and Pennsylvania Railway Company, the said company was made liable for liabilities incurred by the Receiver, we instruct you that if the plaintiff is entitled, under the foregoing instructions, to a verdict against the Receiver, the jury should be warranted in also rendering a verdict against the Western New York and Pennsylvania Railway Company."

It appears that the Western New York and Pennsylvania Railroad Company operated its portion of the through route from a date prior to September 3, 1888, until about April 1, 1893, when its property and affairs passed into the hands of De Coursey as receiver appointed by the circuit court of the United States for the western district of Pennsylvania; that the receiver continued to operate the portion of the through route in his hands as receiver from his appointment until March 31, 1895, when the property of the Western New York and Pennsylvania Railroad Company was acquired by the Western New York and Pennsylvania Railway Company by virtue of a judicial sale made under an order of the court having jurisdiction of the cause. The order of sale provided as follows:

"Such sale to be subject, however, to all executory contracts made by the Receiver in this suit under the authority of the Court, of which contracts the Receiver is directed to give the trustee a full and accurate statement; and subject, also, to all the debts and liabilities of the Receiver and to all aftermaturing interest upon the first-mortgage bonds and all car-trust obligations and equipment notes now outstanding; such debts and liabilities, if any, will remain a lien upon the premises until discharged."

In each action the order of reparation in a lump sum is directed against the Western New York and Pennsylvania Railroad Company, De Coursey as receiver thereof, and the Western New York and Pennsylvania Railway Company, the purchaser, besides others. So far as the purchaser is concerned, the words "all the debts and liabilities of the receiver," in the order of sale, do not include all the debts and liabilities of the Western New York and Pennsylvania Railroad Company; for, as stated by Mr. Justice Miller in Hoard v. Chesapeake and Ohio Railway, 123 U. S. 222, 227, 8 Sup. Ct. 74, 31 L. Ed. 130, "if, as such purchasers, they thereby become bound to pay all the debts and perform all the obligations of the corporation whose property they bought, it would put an end to purchases of railroads." The or-

cifies that the sale should be subject to all executory con-
nade by the receiver by authority of the court, all after-
g interest upon the first mortgage bonds and car-trust
ons, and equipment notes then outstanding; but the debts
oilities of the receiver, which, with the items above men-
were to remain "a lien upon the premises until discharged"
anifestly debts and liabilities incurred by the receiver as
nd not by the Western New York and Pennsylvania Rail-
ompany. To hold the purchaser liable for them would in-
departure from the order of sale, and charge it with an
tained portion of the alleged illegal overcharges for which
n nowise responsible. With respect to the receiver, it may
that, aside from the act of March 3, 1887, c. 373, 24 Stat.
S. Comp. St. 1901, p. 508], the allowance and enforcement
a claim against a receiver as such is within the jurisdiction
court appointing him and entertaining the receivership pro-
s, although such court, if the facts be disputed, may in a
case either of its own motion or at the instance of the par-
ging damage, or any of them, allow the receiver to be sued
art of law or direct the trial of an issue to settle the facts.
v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Porter v. Sabin,
S. 473, 479, 13 Sup. Ct. 1008, 37 L. Ed. 815. Section 3 of the
mentioned (24 Stat. 554 [U. S. Comp. St. 1901, p. 582])
s:

every receiver or manager of any property appointed by any court of
ed States may be sued in respect of any act or transaction of his in
on the business connected with such property, without the previous
the court in which such receiver or manager was appointed; but
t shall be subject to the general equity jurisdiction of the court in
ich receiver or manager was appointed, so far as the same shall be
y to the ends of justice."

e case of In re Tyler, 149 U. S. 164, 182, 13 Sup. Ct. 785, 789,
d. 689, the court said:

the third section of the act of Congress of March 3, 1887, c. 373, 24
2 [U. S. Comp. St. 1901, p. 508] now permits a receiver to be sued
leave, it also provides that 'such suit shall be subject to the general
risdiction of the court in which such receiver or manager was ap-
so far as the same shall be necessary to the ends of justice.' Nei-
, nor the second section, which provides that the receiver shall man-
property 'according to the valid laws of the State in which such prop-
ll be situated,' restricts the power of the Circuit Courts to preserve
in the custody of the law from external attack."

therefore, clear that the function of an action against a
in his official capacity, brought without leave of the court
ing him, to recover damages for an alleged tort committed
while acting in such capacity, is to establish the amount of
intiff's claim, but in nowise to interfere with the custody,
and disposition by the court of the property of which it
en possession in the receivership proceedings. Execution
judgment recovered in such an action cannot be enforced
lly issue against the property in custodia legis, and, con-
ly, the receiver as such should not be joined with others

against whom the judgment would constitute a personal liability to be enforced by execution at law. We think there was error in the portion of the charge just discussed.

In action No. 35 error has severally been assigned by the Erie Railroad Company to the refusal of the court below to give two instructions to the jury. They may be considered together and are as follows:

"That it appears that this defendant had no participation in any of the acts for which recovery is sought in this proceeding and in fact at the time of the commission of the alleged acts had not been incorporated. That if any alleged liability on its part is to be enforced, on the ground of any assumption by it, it can only be done in accordance with the reservation of the foreclosure decree, by an intervention in the foreclosure suit in the circuit court of the United States for the Southern District of New York, the court of primary jurisdiction in the foreclosure suit, and, therefore, your verdict should be for this defendant.

That by the decree of foreclosure in the suit in which the defendants, McCullough and Thomas, were appointed Receivers of the New York, Lake Erie and Western Railroad Company, it was expressly provided that all claims against the Receivers and all claims against the said Railroad Company entitled to priority over the mortgage should be presented for allowance and filed within six months after the publication by the Receivers of a notice to holders of such claims to present the same for allowance, and that any claims which should not be so presented or filed within such period of six months should not be enforcible against the Receivers, or against the property, or against the purchaser or purchasers, or their successors or assigns. That the Receivers caused such a notice to be published, as provided in said decree, and that the claim set up in the petition was not presented or filed within the period fixed by the said decree and such notice, and, therefore, your verdict should be for this defendant."

It appears from the record and is not disputed that the property of the New York, Lake Erie and Western Railroad Company, one of the defendants, went into the hands of the defendant McCullough and John King, as receivers, in the latter part of July, 1893, by virtue of proceedings in the circuit court of the United States for the southern district of New York and in the circuit court of the United States for the western district of Pennsylvania; that King, having resigned from the receivership, the defendant Thomas became receiver in his stead on or about May 1, 1895; that the receivers continued in possession and operation of the line of the New York, Lake Erie and Western Railroad Company, forming a portion of the through route referred to in the action below, from the latter part of July, 1893, until December 1, 1895; and that meanwhile the property, including that line, was sold under foreclosure proceedings, hereinafter more particularly referred to, and the purchasers conveyed title to the then newly created and organized Erie Railroad Company, which took possession of it December 1, 1895, and has since continuously operated it. Proceedings having been instituted on or about June 15, 1895, in the circuit court for the southern district of New York, and on or about July 1, 1895, in the circuit court for the western district of Pennsylvania, for the foreclosure of the second consolidated mortgage of the New York, Lake Erie and Western Railroad Company, dated October 3, 1878, and covering its line, and having

n consolidated with the receivership proceedings, a decree of
eclosure and sale was made in each court in the latter part of
gust, 1895. The Erie Railroad Company did not exact or co-
rate in exacting any of the alleged overcharges for which the
er of reparation was made. These alleged exactions covered
period from September 3, 1888, to May 15, 1894. The order
eparation was made October 22, 1895. The Erie Railroad Com-
y was not in existence until November, 1895, and did not
rate the line of the New York, Lake Erie and Western Rail-
d Company before December 1, 1895. If, then, the Erie Rail-
d Company, prior to the commencement of the action below,
ame personally liable for the amount or any portion of the
ount included in the order of reparation, such liability must
e resulted from the judicial proceedings for the appointment
receivers and the foreclosure of the mortgage and the sale and
veyance of the property thereunder, or have been voluntarily
umed by it in and by the deed executed to it pursuant to those
ceedings, or in some other manner wholly undisclosed by the
ord. Hoard v. Chesapeake and Ohio Railway, 123 U. S. 222,
, 8 Sup. Ct. 74, 31 L. Ed. 130. Doubtless under certain cir-
nstances, and within reasonable limits, personal liability proper-
may be fastened by judicial decree upon a purchaser, taking
e under a foreclosure sale, for the contracts or torts of the
endant in the decree prior to the commencement of the pro-
dings, or of the receivers while operating the property which
he subject of the foreclosure and sale. But, aside from the
d to be adverted to later, does the record disclose any liability,
sonal or otherwise, on the part of the Erie Railroad Company
any portion of the amount included in the order of reparation,
reason of any judicial proceedings against the New York, Lake
e and Western Railroad Company? The decree of foreclosure
l sale in the southern district of New York, which was substan-
ly similar to that in the western district of Pennsylvania, con-
ned, among other things, the following provisions:

The purchaser or purchasers shall as part consideration and purchase price
he property purchased, and in addition to the sum bid, take the same and
ive the deed therefor upon the express condition that he or they or his or
r successors or assigns shall pay, satisfy and discharge any unpaid com-
sation which shall be allowed by the court to the Receivers, and any in-
tedness and obligations or liabilities which shall have been contracted or
urred by the Receivers, or which may be contracted or incurred by the
eivers before delivery of possession of the property sold, whether or not
resented by certificates hereafter issued, and also any indebtedness or lia-
ies contracted or incurred by said defendant railroad company in the
ation of its railroad prior to the appointment of the Receivers, which are
r in lien or superior in equity to said second consolidated mortgage, and
ch shall not be paid or satisfied out of the income of the property in the
ds of the Receivers, upon the Court adjudging the same to be prior in lien
uperior in equity to said mortgage and directing payment thereof. * * *
the event that said purchaser or purchasers shall refuse after demand
le to pay any of the before mentioned indebtedness, obligations or liabili-
, the person holding the claim therefor may, upon fifteen days' notice to
l purchaser or purchasers, their successor or successors, assign or assigns,
his petition in this Court to have such claim enforced against the property

aforesaid in accordance with the usual practice of this Court in relation to claims of a similar character; and such purchaser or purchasers, and his and their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, but either party shall have the right to appeal from any judgment, decree or order made thereon. And jurisdiction of this cause is retained by this Court for the purpose of enforcing the foregoing provisions of this decree. * * * The Receivers shall prior to the sale hereunder and as soon as practicable, file with the Clerk of this Court a statement showing as definitely as practicable all indebtedness, obligations and liabilities contracted or incurred by them remaining unpaid, and shall within two weeks prior to the time of sale file with the Clerk of this Court a further statement showing as definitely as they shall find practicable, any additional indebtedness, obligations or liabilities contracted and incurred, and outstanding, and also the amount of the indebtedness, obligations and liabilities included in such first statement which may have been discharged; but nothing contained in any such statements shall be binding upon the purchaser or purchasers at said sale. Any such claims for indebtedness, obligations or liabilities which shall not have been included in such statements of the Receivers, or which shall not have been presented in writing to the Receivers or filed with the Clerk of said Court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the Receivers of a notice to the holders of such claims to present the same for allowance. The Receivers shall publish such notice at least once a week for the period of six weeks in one or more newspapers published in * * *, upon the request of any purchaser or purchasers after delivery of possession of the property to the purchaser, and any such claims which shall not be so presented or filed within the period of six months after the first publication of such notice shall not be enforceable against said Receivers nor against the property sold nor against the purchaser or purchasers, his or their successors or assigns. Any such purchaser or purchasers, and his or their successors and assigns shall have the right to enter his or their appearance in this Court, and he or they, or any of the parties to this suit, shall have the right to contest any claim, demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which may arise or be presented thereafter, which would be payable by such purchaser or purchasers, his or their successors or assigns, or which would be chargeable against the property purchased, in addition to the amount bid by such purchaser or purchasers at the sale, and may appeal from any decision relating to any claim, demand or allowance according to the law and practice of said court."

Pursuant to the decree of sale, the property of the New York, Lake Erie and Western Railroad Company in the hands of the receivers, was sold by a special master November 6, 1895, to Charles H. Coster, Lewis Fitzgerald and Anthony J. Thomas; and the circuit court of the United States for the southern district of New York made a decree November 9, 1895, confirming the sale, in which, after reciting that the sale was subject to the "mortgages, receivers' debts and other preferential liens and claims, and to all and singular the terms and conditions in said decree set forth," it was said:

"The same is, in all things ratified, approved, confirmed and made absolute, subject, however, to all the mortgages, receivers' debts and preferential claims and to all equities reserved and to all and singular the conditions of purchase as recited in such decree, and the continued right of the Court to adjudge and declare what Receivers' or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed, or ought to be paid out of such proceeds of sale in preference to the mortgage bonds; and this Court expressly reserves for future adjudication and power thereby to bind the property sold, all liens, claims and equities specified in and reserved by the said final decree of foreclosure so as aforesaid entered on August 21, 1895."

ccepting Coster, Fitzgerald and Thomas as purchasers
h bound to comply with the order of the court, the de-
nfirmation provided as follows:

h and every obligation on account of such purchasers may be
to and assumed by the new corporation to be formed by them under
Law of the State of New York as successor to the said the New
Erie and Western Railroad Company. * * * And the court
rves full power from time to time to enter orders binding upon
sers or their said transferee, requiring them to pay into the reg-
court all such sums as have been or may be ordered by the court
ment of any and all Receivers' debts or claims adjudged or to be
prior in lien or equity to the mortgage herein foreclosed, or en-
ference in payment out of the proceeds of sale."

rt also reserved "full power notwithstanding such con-
nd delivery of possession to retake and resell the prop-
he purchasers or the new corporation as their trans-
uld fail to pay into court all sums thereafter ordered to
to discharge "any and all such debts, liens or claims as
ree ought to be paid out of the proceeds of sale in pref-
the mortgage herein foreclosed." The record does not
ny personal liability on the part of the Erie Railroad
enforcible in the action below for the payment of the
any portion of the pecuniary reparation ordered by the
n, by virtue of the foreclosure proceedings or the judi-
mation of the sale thereunder, or either of them. The
f the New York, Lake Erie and Western Railroad Com-
decreed to be sold subject to the condition that the pur-
their assigns should pay, satisfy and discharge (1) any
mpensation to be allowed to the receivers, (2) "any in-
s and obligations or liabilities" which should have been
or incurred by the receivers before the delivery of
of the property sold, (3) "any indebtedness or liabili-
acted or incurred by said defendant railroad company
eration of its railroad prior to the appointment of the
which are prior in lien or superior in equity to said
nsolidated mortgage, and which shall not be paid or
ut of the income of the property in the hands of the
upon the court adjudging the same to be prior in lien
r in equity to the said mortgage and directing payment
There was a general provision, applicable to all of the
uses, to the effect that in case of refusal by the pur-
their assigns, after demand, to pay "any of the before
indebtedness, obligations or liabilities," the "person
e claim therefor" might after fifteen days' notice to the
s or their assigns file his petition in the court entertain-
foreclosure proceedings "to have such claim enforced
e property aforesaid in accordance with the usual prac-
s court in relation to claims of a similar character," and
sdiction of this clause is retained by this court for the
f enforcing the foregoing provisions of this decree."
e of confirmation states that the sale was subject to "all
lar the terms and conditions in said decree set forth,"

and, more specifically, (1) to "mortgages, Receivers' debts and preferential claims," (2) to "all equities reserved and to all and singular the conditions of purchase as recited in said decree" and (3) to "the continued right of the court to adjudge and declare what Receivers' or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed, or ought to be paid out of such proceeds of sale in preference to the mortgage bonds"; the court reserving "for future adjudication and power thereby to bind the property sold all liens, claims and equities specified in and reserved" by the decree of foreclosure and sale. In addition to the reservation of power just mentioned, the court reserved power (1) to require the Erie Railroad Company "to pay into the registry of the court all such sums as have been or may be ordered by the court for the payment of any and all Receivers' debts or claims adjudged or to be adjudged as prior in lien or equity to the mortgage herein foreclosed, or entitled to preference in payment out of the proceeds of sale," and (2) to resell the property sold if the Erie Railroad Company failed to pay into court all sums thereafter ordered to be paid to discharge "any and all such debts, liens or claims as it may decree ought to be paid out of the proceeds of sale in preference to the mortgage herein foreclosed." It is clearly to be gathered from the provisions of the decree of foreclosure and confirmation that no personal liability, if, indeed, any liability, arising from a mere tort whether of commission or omission, on the part of the New York, Lake Erie and Western Railroad Company or its receivers, was intended to be enforcible against the Erie Railroad Company as purchaser, until after such personal liability should be adjudged, established and allowed in the exercise of the power reserved to the court in the foreclosure proceedings. But it does not appear that any portion of the reparation ordered by the commission was adjudged, established or allowed in connection with those proceedings. The deed from the purchasers to the Erie Railroad Company was offered by the counsel for the plaintiff as "made in pursuance" of the decrees of sale and, while the record does not disclose a copy of the entire deed, it fairly may be assumed that it referred by recital or otherwise to the terms and conditions in those decrees pursuant to which it was made. Its language must, therefore be read in the light of those terms and conditions. If, aside from all assignments of error other than those under immediate consideration, the Erie Railroad Company could be held personally liable for the exaction of alleged unlawful overcharges by the New York, Lake Erie and Western Railroad Company, or its receivers, the ground must be that by the execution by the Erie Railroad Company of the deed in the foreclosure proceedings it voluntarily assumed such liability. Any supposition that the Erie Railroad Company intended by executing the deed to become pecuniarily liable for other purposes and otherwise than provided for in the decrees of foreclosure and confirmation, or that the other parties to the deed intended that there should be such a departure in it from those decrees, is so unreasonable as to be inadmissible in the absence of clear and convincing language

kably disclosing such intent. We find no such language portions of the deed spread upon the record. The deed d that the property thereby conveyed should be

also, to the lien and charge of all liens and incumbrances prior or su- the mortgage herein above mentioned, and * * * subject to all ess of the said Receivers as such, incurred or to be incurred by them eir receivership and remaining unpaid, which said indebtedness judgment aforesaid, charged upon the mortgaged premises as a lien the mortgage hereinabove mentioned; it being the true intent and of these presents that all and singular the liabilities incurred by, eable against the said Receivers, of every nature and description, ut of any acts done or omitted to be done by them, in good faith, as ilities now exist, or may at any time hereafter be established, or ny property hereby conveyed, or against them on account of such ce, do and shall constitute a lien and charge upon all and singu- remises hereby conveyed to the party of the second part, as fully, to s and purposes, as such liabilities, or any of them, would or could e such lien or charge upon the said premises, had the same or any eof continued to remain in the hands, possession and custody of the n G. McCullough and Eben B. Thomas, Receivers; and the said lien ge hereby created and declared shall rank in order of priority before re or subsequent lien or charge that may be created and imposed upon ises, or any part thereof, by the said party of the second part, in any r form whatsoever; and the said lien or charge hereby created and or any claim to any specific part or portion of the premises under or of title paramount, is hereby declared to be, and the same shall be, le against the said party of the second part, in the same manner and me extent that the same might have been enforced against the said McCullough and Eben B. Thomas, if they had continued to be such in actual possession of the premises."

inly down to this point the deed does not show an assump- the Erie Railroad Company of any personal liability on its any mere tort of omission or commission by the New Lake Erie and Western Railroad Company. The deed s:

nsideration whereof, the said Erie Railroad Company, party of the rt does hereby covenant and agree, to and with the said parties of part, their successors and assigns, that it will truthfully and truly ulfill and perform on its part each and every of the liabilities above to, whatever the form or nature thereof, and will pay off and dis- l the liabilities and indebtedness or liabilities incurred, or to be in- y said Receivers, and charged upon the said mortgaged premises as ove set forth, and will fully indemnify and save harmless the said , and each of them, from and against any such indebtedness or lia- nd every part thereof, to whomsoever due, and from and against all ense or charges which may arise or accrue out of or concerning the lso, that it will assume, and it does hereby assume, all the acts of Receivers done by them at any time in the due execution of their such, and all liabilities aforesaid, and will at all times indemnify and nless the said John G. McCullough and Eben B. Thomas, Receivers, against all liability, damage, cost and expense arising or which may ny manner aforesaid."

e above clause the Erie Railroad Company agreed to "ful- perform * * * each and every of the liabilities above to" and to "pay off and discharge all the liabilities and dness or liabilities incurred, or to be incurred, by said Re- and charged upon the said mortgaged premises or herein-

above set forth," and to "assume all the acts of the said Receivers done by them at any time in the due execution of their office as such, and all the liabilities aforesaid." But unlawful overcharges exacted by the New York, Lake Erie and Western Railroad Company were not included in the "liabilities above referred to" or the "liabilities aforesaid"; nor is there any evidence that they were "charged upon the said mortgaged premises as hereinabove set forth," or that they arose "in any manner aforesaid." The deed further proceeds:

"Also, that if any liability shall be in any manner established against the said John G. McCullough and Eben B. Thomas, or either of them, individually, or as Receivers, as aforesaid, for the payment of any claim or demand, of whatsoever nature, or any part of any claim or demand, legally or equitably entitled to satisfaction out of any property or estate heretofore and hereby granted or assigned, then that the said party of the second part will at once assume and pay any liability so established, and will fully indemnify and save harmless the said John G. McCullough and Eben B. Thomas therefrom, and from all loss, cost and damage which may arise or accrue out of or concerning the same; the true intent of this clause being to require the said party of the second part always to take care of and pay any sum or sums of money which the said McCullough and Thomas, as Receivers, have become liable for, or which it may be established the said McCullough and Thomas, as Receivers, ought to pay or have paid out of any property and estate which by this indenture are conveyed or assigned unto the said party of the second part, and as fully to protect the said John G. McCullough and Eben B. Thomas, Receivers, as if they or either of them had retained in their or his hands and possession funds and estate for the satisfaction of any and all such claims and demands."

The record discloses no evidence that, prior to the action below, the claim for alleged unlawful overcharges by the New York, Lake Erie and Western Railroad Company was "in any manner established," in connection with the foreclosure proceedings or by any court, against any person or property. The Erie Railroad Company agreed to assume "liability so established" or "which it may be established" the receivers ought to pay or have paid out of the property conveyed. We are unable to perceive that the Erie Railroad Company became liable either by the foreclosure proceedings or the deed for any overcharges which unlawfully may have been exacted by the New York, Lake Erie and Western Railroad Company. Yet such alleged unlawful charges by that company are included in the judgment below which is in solido against all the defendants. It further appears that the receivers after the sale under the decree of foreclosure duly caused six weeks' notice to be published for the presentation of claims within the period therein required, and it does not appear that the claim in controversy was "presented in writing to the Receivers or filed with the Clerk of said Court" at any time prior to the action below. On the part of the plaintiff there was an offer of incompetent evidence to show that the claim in controversy was so presented. This evidence was admitted against the objection of the Erie Railroad Company that it was incompetent, and its admission is specifically assigned by that company as error. Under the terms of the decree such claim, if it ever had legal existence, was not "enforceable against said Receivers nor against the property

against the purchaser or purchasers, or his or their suc-
or assigns," and therefore not enforcible against the Erie
Company. We think there was substantial error in the
to which the assignments last considered relate.
has been assigned by McCullough and Thomas, receivers
New York, Lake Erie and Western Railroad Company, to
sal of the court below to charge the jury as follows:

"The defendants have duly accounted for all funds which came into
ds as such receivers and have been discharged by the order of the
ourt of the United States for the Southern District of New York,
iginally appointed them, and also by the order of this court, and
the verdict should be for these defendants."

ecord shows that the receivers were finally and unqualified-
harged and released from all liability and their bonds di-
o be canceled, in the southern district of New York Febru-
897, and in the western district of Pennsylvania February
, more than four years before the bringing of the action
There is no evidence of any vacation of these orders of
ge or either of them or of any application in that behalf.
these circumstances McCullough and Thomas could not
liable as receivers at the time the action below was brought.
v. McQuown (C. C.) 31 Fed. 138; Davis v. Duncan (C. C.)
477; Farmers' L. & T. Co. v. Central R. of Iowa (C. C.)
37; Jesup v. Wabash, St. L. & P. Ry. Co. (C. C.) 44 Fed.
, 666; Beach on Receivers, §§ 725, 802; Smith on Re-
ips, § 286; Anderson on Receivers, § 586. The court be-
not in its charge to the jury include in words or substance
ruction asked for. The receivers were entitled to it and
as error in denying it.

are a number of assignments to portions of the charge,
the refusal of instructions, touching the lawfulness or un-
ess of the barrel package charges complained of. These
ents cannot be sustained. Whether a given transportation
is just and reasonable, or unreasonable and excessive, is
ly a question for a jury. In Texas & Pac. Railway v. In-
Com. Com., 162 U. S. 197, 219, 16 Sup. Ct. 666, 675, 40 L.
, the court said:

"hird section forbids any undue or unreasonable preference or ad-
n favor of any person, company, firm, corporation or locality; and
is nothing in the act which defines what should be held to be due or
easonable or unreasonable, such questions are questions not of law,
ct."

erceive no reason why the principle here enunciated should
applicable to the terms "unjust and unreasonable" as em-
in the first section. Upon the facts disclosed in the rec-
re may be room for a difference of opinion among intelli-
en touching the justness and reasonableness of the alleged
rges, and, were it not for error on other points, the ques-
s properly left to the jury.

the reasons hereinbefore given, and particularly in view
nvalidity of the orders of reparation on which both of the

actions are based, and others we have not deemed it necessary to discuss, the judgment below in each of the two actions must be absolutely reversed, with costs; and it is so ordered.

GUILD et al. v. ANDREWS et al.

(Circuit Court of Appeals, Eighth Circuit. April 17, 1905.)

No. 1,977.

1. CONTRACTS—CONSTRUCTION OF SEWER—PROVISION MAKING ENGINEER'S DECISION FINAL—CONCLUSIVENESS OF HIS ACTION.

A stipulation in a contract for the construction of a sewer, making an engineer the arbiter of the amount and character of the work done, its conformity to the contract, and the compensation to be paid, is valid and obligatory on the parties, and the engineer's action thereunder is final and conclusive, in the absence of fraud or such gross mistakes as imply bad faith or a failure to exercise an honest judgment.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 880.]

2. SAME—PRESUMPTION OF GOOD FAITH ON PART OF ENGINEER—WHEN OVERCOME BY GROSS MISTAKES.

While it is sometimes said that, to be efficient to destroy the final and conclusive character of the engineer's action, gross mistakes must be such as not only to imply, but to necessarily imply, bad faith, the distinction is ideal, rather than practical. Good faith, which is presumed in the absence of clear and convincing evidence to the contrary, renders the action of the engineer final and conclusive. Bad faith renders it of no effect. Gross mistakes imply bad faith only when, all the circumstances duly considered, they cannot be reconciled with good faith, and then they not only imply, but necessarily imply, bad faith.

3. SAME—ACTION OF ENGINEER'S AUTHORIZED INSPECTORS—INSTRUCTION TO JURY.

Instructions to the effect that if the work was done in the presence of the engineer's authorized inspectors, and as directed or permitted by them, the contractors would not be responsible for or affected by any defects due to mistakes of the inspectors, whether or not the manner in which they directed or permitted the work to be done was in accordance with the contract, were properly refused, because such instructions erroneously assumed that the responsibility would be concluded by all mistakes of the inspectors, whether made honestly and in good faith, or otherwise, and because they erroneously disregarded the provision of the contract requiring the engineer to make a final and careful inspection of the work after its completion, and the further provision requiring the contractors to take out and replace any work found to be imperfect prior to final acceptance, whether it had been passed upon by an inspector or not.

4. SAME—CONCLUSIVE EFFECT OF ENGINEER'S FINAL ACCEPTANCE—BAD FAITH—INSTRUCTION—ERROR NOT PREJUDICIAL.

An instruction that "any failure of the engineer to consider all matters submitted to him is, to that extent, a fraud upon the party discriminated against," is error, if standing alone and broadly applicable to each and all of the many matters of varying degrees of importance bearing upon the proper completion and acceptance of the work. The effect of a failure to consider any particular matter depends, as in the instance of other mistakes, upon whether the failure was fraudulent or so gross as to imply bad faith. But, it appearing in the present case that the jury must have found that there was an entire failure on the part of the engineer to make a final and careful inspection of the work as required by

the contract, and therefore a failure to consider whether the work as completed conformed to the requirements of the contract, the error in the instruction was without prejudice because a failure to consider the character and effect of the completed work, under such a contract, is so gross a departure from duty as to imply bad faith and render the engineer's acceptance inconclusive.

STRUCTIONS—NO ERROR IF CHARGE AS AN ENTIRETY IS IMPARTIAL AND CORRECT.

Where in its entirety the charge is an impartial and correct exposition of the law applicable to the questions arising upon the evidence, error cannot be successfully assigned upon portions of the charge which appear to be subject to criticism when separated from the context and from the main body, but which are not subject to criticism when considered in connection with the immediate context and other portions.

Error to the Circuit Court of the United States for the Eastern trict of Arkansas.

is was an action at law by the sewer district against George Guild, J. uild, and the United States Fidelity & Guaranty Company to recover damclaimed to have been sustained by the plaintiff through the failure of Guilds, for whom the guaranty company was surety, to construct and plete a sewer system in accordance with a contract entered into with the r district. The defense was that the sewer system had been constructed completed under the supervision and to the satisfaction of the engineer ted by the sewer district, and that the terms of the contract made his otance of the work final and conclusive. The defendants Guild also inosed a counterclaim for a balance claimed to be due to them under the act. The crucial issue presented by the pleadings, and to which the nce was directed, was whether or not the engineer's supervision and otance of the work were fraudulent or attended by such gross mistakes plied bad faith or a failure to exercise an honest judgment. These prons were in the contract:

9. * * * No pipe shall be laid, or other construction work done, exin the presence of the engineer or his authorized inspectors, and the neer may order the removal and relaying of any pipe or the reconstruc- of any work which has been done without such presence. * * *"

5. Upon notification by the contractor of the completion of the work, the neer will carefully inspect all sewers, appurtenances and all other work by the contractors. * * * In general the work shall comply with e specifications, and if found not to be so in any respect, it shall be ght to the proper conditions by cleaning, pointing, or if necessary exting and rebuilding, all at the expense of the contractor. But if it be d, after uncovering any pipe or other work, at the order of the engineer, no defects exist, or that a defect was not due to the fault of the conor, then the expense of this shall be borne by the District.

6. * * * The work shall be prosecuted in such manner and from as y different points, at such time and with such force as the engineer may rmine from time to time during the progress of the work. * * *"

8. When any work or material is found to be imperfect, whether passed by the inspector or not, the said work shall be taken up and replaced ew work without delay, at any time prior to final acceptance. * * *"

3. The Engineer-in-charge shall have the final decision of all matters in ute involving the character of the work, the compensation to be made efor, or any question arising under this contract. He shall, as representthe District, have the option of making any changes in the line, grade, form, position, dimensions or material of the work herein contemplated r before or after construction is begun, and all other explanations or dions necessary for carrying out or completing satisfactorily the different riptions of work contemplated and provided for under this contract will ven by the engineer.

4. The contractor must perform the work contracted for strictly accordto these specifications, and follow at all times, without delay, all orders

and instructions of the engineer in the prosecution and completion of the work, and every part thereof, and be constantly on the ground or be represented by a duly qualified person to look after the work and receive instructions.

"35. * * * When the contract shall have been completely performed on the part of the contractor, the engineer shall proceed to make final measurement and estimates of same, and shall certify the same to the Board. * * *"

The jury found for the plaintiff, and the defendants now seek to reverse the judgment which was rendered upon the verdict.

Frank Spurlock and J. F. Loughborough (F. V. Brown and D. H. Cantrell, on the brief), for plaintiffs in error.

M. L. Stephenson and Jacob Fink (R. W. Nicholls, on the brief), for defendants in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

A stipulation in a contract like the one here sued upon, making an engineer, inspector, or other person the arbiter of the amount and character of the work done, its conformity to the contract, and the compensation to be paid, is valid and obligatory upon the parties, and the action of the arbiter thereunder is final and conclusive, in the absence of fraud or such gross mistakes as imply bad faith or a failure to exercise an honest judgment. Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106; Sweeney v. United States, 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; Chicago, Santa Fe & California R. Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; United States v. Gleason, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284; Elliott v. Missouri, Kansas & Texas Ry. Co., 21 C. C. A. 3, 74 Fed. 707; United States v. Bonness, 60 C. C. A. 321, 125 Fed. 485; Hot Springs Ry. Co. v. Maher, 48 Ark. 522, 3 S. W. 639.

The contention is made that, to be efficient to destroy the final and conclusive character of the arbiter's action, gross mistakes must be such as not only to imply, but to necessarily imply, bad faith. The distinction is ideal rather than practical, as is illustrated in Martinsburg & Potomac R. Co. v. March, and Chicago, Santa Fé & California R. Co. v. Price, supra, where the two expressions are used interchangeably and as having the same meaning. Good faith, which is presumed in the absence of clear and convincing evidence to the contrary, renders the action of the arbiter final and conclusive. Bad faith renders it of no effect. Gross mistakes imply bad faith only when, all the circumstances duly considered, they cannot be reconciled with good faith, and then they not only imply, but necessarily imply, bad faith.

The evidence produced upon the trial covers more than 800 pages of the printed record. It has been attentively read and carefully considered, with the result that we are agreed in the conclusion that there was substantial evidence tending to show mis-

s in the work so numerous, so serious, so readily observable, enerally favorable to the contractors, and therefore so gross, as nply bad faith in the supervision and acceptance of the work. re was also substantial evidence to the contrary. The conflict e it necessary to submit the case to the jury, and the defendants' est for a directed verdict was properly refused.

everal instructions requested by the defendants were to the t that if the work was done in the presence of inspectors, and irected or permitted by them, the contractors would not be re- sible for or affected by any defects due to mistakes of the in- tors, whether or not the manner in which they directed or per- ed the work to be done was in accordance with the contract. se requests were properly refused because they erroneously as- ed that the sewer district would be concluded by all mistakes e inspectors, whether made honestly and in good faith, or other- , and because they erroneously disregarded the provision of the ract requiring the engineer to make a final and careful inspec- of the work after its completion, and the further provision re- ing the contractors to take out and replace any work found to mperfect prior to final acceptance, whether it had been passed n by an inspector or not. In this connection it should be ob- ed that the court charged the jury that as the inspectors repre- ed the engineer, and were clothed with a power of supervision the work as it progressed, mere negligence or errors of judg- t on their part would not be chargeable to the contractors.

ne portion of the charge was as follows:

s fraud can but seldom be proven by direct evidence, the jury should ully consider all the evidence and circumstances surrounding all the acts e engineer and the contractors, in order to determine from them whether ted honestly and in good faith when he supervised, inspected, and at last ted the work as being in accordance with the terms of the contract and pecifications thereof, and certified the amounts which are now claimed ne defendants in this action."

is said of this instruction that it was calculated to cause the to regard all the acts of the engineer and the contractors with icion, and to have the effect of transferring the burden of f from the plaintiff to the defendants. The criticism has very t, if any, justification in the terms of the instruction, and has no fication in the charge as an entirety because in the same con- ion the jury were plainly told that the law presumes honesty good faith, and places the burden of proof upon him who as- the contrary.

nother portion of the charge of which complaint is made is as ws:

ou will consider whether, in passing on this work, he was guilty of such errors or mistakes as would lead you to believe he acted fraudulently ne purpose of favoring the contractors, for, in the absence of direct testi- to establish fraud, gross errors, which an experienced and competent eer, acting honestly, is not reasonably supposed to make, and which ma- ly favor one of the parties to the contract at the expense of the other , raise a strong presumption of fraud, which, if not explained, may make presumption conclusive."

This instruction permitted the jury, in determining the honesty and good faith of the engineer's action, to consider what would have been the probable action of an experienced and competent engineer, acting honestly, in the same situation; but, as the uncontradicted evidence disclosed that the engineer had had large experience and was of acknowledged competence, the instruction was not objectionable as permitting his action to be judged according to a standard of experience and competence which he did not possess. It is said that an experienced and competent engineer may commit gross mistakes, not reasonably supposable of him, which materially favor one party at the expense of the other, and yet are due to mere negligence or errors of judgment, and not to fraud or bad faith; and therefore it is claimed this instruction permitted the jury to presume fraud or bad faith from gross mistakes which were reconcilable with honesty and good faith. This interpretation of the instruction, if permissible at all, is not so apparent as to have created any misapprehension or confusion in the minds of the jurors, when other portions of the charge are considered. In terms which are unmistakable, and which the jury could not have failed to regard as controlling, it was stated and reiterated in other portions of the charge that the action of the engineer could not be revised for mere negligence or errors of judgment, even though injurious to the sewer system, and that, unless he was guilty of such gross mistakes as implied bad faith or a failure to exercise an honest judgment, his action was unassailable and conclusive. Certainly, if he committed gross mistakes, which an engineer of his experience and competence, acting honestly, would not be reasonably supposed to make, which were not reconcilable with mere negligence or errors of judgment, and which materially favored one party to the contract at the expense of the other, a strong implication of bad faith would arise therefrom, which, in the absence of an explanation, would be conclusive. We think this was plainly the effect of the instruction when considered in connection with other portions of the charge.

One portion of the charge was as follows:

"The contractors cannot avoid the loss and expense where it appears, from the nature of the work done, that, if passed on favorably by the engineer in charge, he was guilty of gross mistakes in the performance of his duty towards his employer. Where the work approved by the engineer is so defective that any man of ordinary prudence, familiar with such work, as the contractors, according to the evidence in this case are shown to be, must know that it would not attain the object for which it is intended, then a strong presumption of fraudulent collusion between the contractors and the engineer in charge may naturally arise, although it is not conclusive. Their duty would be to notify the sewer district of these acts of the engineer, if it is apparent to them, as reasonable men, that his acts are such as will result in disaster, and perhaps defeat the object for which the work is intended and contemplated."

It is said that this instruction embodies three erroneous propositions: (1) That the contractors could not avoid the loss if it was apparent to them that the engineer was guilty of gross mistakes in the acceptance of the work, regardless of whether these mistakes were such as to imply bad faith; (2) that a strong pre-

tion of fraudulent collusion between the contractors and the eer arose if the work approved by the latter was so defective ne contractors must have known it would not attain the object hich it was intended; (3) that the contractors should have ed the sewer district if it was apparent to them that the action engineer was such as to result in disaster. At the trial one ation of the defendants was that, even though the engineer fraudulently in accepting the work, his action was final and sive, unless the contractors participated in the fraud. This ction had reference to that contention, and, as its terms show, irected to matters from which it might be properly inferred ne contractors participated in the fraud, rather than to a state- of what gross mistakes would render the engineer's action in- sive. That had been carefully and correctly stated in an portion of the charge, and, when gross mistakes were subse- ly mentioned, reference was plainly had to that statement. s illustrated by the concluding statement in the charge, which s follows:

re are one or two slight corrections I want to make in my charge to My attention was called to the fact that I used the words 'carelessly' egligence' in speaking of the examination of the work of the action of gineer. If I did, I did not mean to use the words 'carelessly' or 'negli- What I meant was 'recklessly' and 'gross mistakes.' Now, his con- n order to imply bad faith, must have been reckless, and he must have uilty of such gross mistakes as to imply bad faith. That is what I "

the instruction under consideration was not altogether silent pect of what was meant by gross mistakes. It spoke with nable accuracy when it referred to the engineer's approval of which was so defective that any man of ordinary prudence ar therewith must know that it would not attain the object nich it was intended, and also when it referred to acts of the eer which it would be apparent to reasonable men would result aster. It is not reasonably conceivable that the contractors, nowledge that the conditions were as stated in the instruction, have remained silent and have sought to avail themselves of gineer's action unless they were participating in his breach of and bad faith. If they did participate therein, his acceptance work was inconclusive, and they were liable for the loss and se reasonably incurred by the sewer district in completing ork in accordance with the contract.

other portion of the charge was as follows:

the engineer cannot dispense with a substantial part of the work. as the contract provided for substantial foundations for the pipes where ound is so soft that it will not support them without a foundation, his to require the contractors to put dry dirt, sand, or concrete under would not be conclusive on the district, and would be evidence to be ered by you on the question of fraud and collusion with the contractors. lly if the contractors, as experienced sewer builders, should have known d know that without such foundations the pipes in these places would nd thus seriously affect the sewer system and its efficiency."

e criticism of this instruction is that the contract clothed the eer with large discretion in making changes in the specifica-

tions, and that, if he dispensed with the pipe foundations in the exercise of an honest judgment, his action was final and conclusive, even though the change subsequently proved to be a detriment to the sewer system. But all this was plainly concealed in the charge. In close connection with the portion complained of, it was said that the contractors would not be affected by the fact that changes in the specifications made in good faith by the engineer afterward proved to be injurious to the sewer district, and also that if, through an error of judgment of the engineer, committed in good faith, sufficient foundations were not placed under the pipes, and the work had to be altered in this respect after its acceptance, the contractors would not be liable for the cost of the alteration, but that it would be otherwise if the foundations had been dispensed with fraudulently for the purpose of saving expense to the contractors. When all that was said upon the subject is considered, it is apparent that the law was correctly stated.

Error is assigned upon this passage in the charge: "Any failure of the engineer to consider all matters submitted to him is, to that extent, a fraud upon the party discriminated against." If this passage had stood alone, and if the case made by the evidence had permitted the jury to apply it broadly to each and all of the many matters submitted to the judgment of the engineer, it would have been prejudicial error. Of course, it was the engineer's duty to consider each of the matters submitted to him by the contract, but not every failure to perform his duty would render his final action inconclusive. The effect of the failure, as of any other mistake, would depend upon whether it was fraudulent, or was so gross as to imply bad faith. If he honestly and in good faith accepted the work after finally inspecting it, the acceptance was conclusive, even though he failed to consider some of the many matters which it was his duty to consider. Necessarily the acceptance of the work, as completed according to the contract, depended upon the consideration of so many matters of varying degrees of importance that it was possible for him to overlook or neglect some of them, and yet be in the exercise of an honest judgment. But the passage complained of did not stand alone. It was preceded by the statement that when the pleadings impugn the engineer's conduct, and the evidence tends to show that he "willfully disregarded his duties," it becomes necessary "for the jury to determine whether he acted negligently, merely, but honestly, or whether he acted fraudulently," and it was followed by the statement that the verdict must be for the defendants "if you find there was no fraud on the part of the engineer when he made the final inspection and accepted the work and certified it as being complete, nor * * * such gross mistakes as would imply bad faith or failure to exercise an honest judgment." These further statements so clearly put the matter before the jury in the right way that error was avoided. Much of the evidence was directed to the claim on the part of the plaintiff that there had been an entire failure to make a final inspection, and therefore a failure to consider whether the work, as completed, conformed to the requirements of the contract, and the record makes it

n that this question was resolved in favor of the plaintiff by erdict of the jury. In this situation, the error in the instruc- even if not avoided by other portions of the charge, was clearly ut prejudice, because the provisions of the contract were such failure to consider the character and effect of the completed was so gross a departure from duty on the part of the en- as to imply bad faith and render his acceptance of the work clusive.

may be properly observed of the charge that it was almost sarily a long one, and, as is not infrequently true, some por- when separated from the immediate context and from the body, appear to be subject to criticism; but, when they are lered in connection with the immediate context and with portions, the ground for criticism disappears. In its entirety harge was an impartial and correct exposition of the law ap- le to the questions arising upon the evidence. This is all that equired.

ner errors are assigned, but no useful purpose will be served discussion of them. Upon full consideration, they have been to be untenable—some because the exception taken at the was not sufficiently specific to present any question to this and others because the ruling was manifestly correct.

e judgment is affirmed.

WEBSTER v. LANUM.

(Circuit Court of Appeals, Second Circuit. February 27, 1905.)

No. 130.

ED PARTNERSHIPS—LIABILITY OF SPECIAL PARTNER—NEW YORK STATUTE. Under the New York statute providing for the formation of limited rtnerships, which requires the filing of a certificate showing the amount capital contributed by a special partner, and an affidavit that such pital has been "actually and in good faith paid in in cash," and makes m liable as a general partner in case such certificate or affidavit is lse, but contains no provision with respect to the capital of the general rtners, nor requirement that the same shall be shown, it is immaterial here a special partner obtains the money which he puts in, if it is ac- ally paid in cash, so that it may be used by the firm as capital, and he not liable as a general partner because of the fact that the money was rnished to him as a loan or gift by third persons, or by a pre-existing rm merged into the new partnership or its members.

Error to the Circuit Court of the United States for the South- District of New York.

arles N. Morgan, for plaintiff in error.

ul Armitage, for defendant in error.

fore WALLACE, TOWNSEND, and COXE, Circuit Judges.

ALLACE, Circuit Judge. This is a writ of error by the de- nt in the court below to review a judgment entered for the tiff upon the verdict of a jury. The action was brought to

recover an indebtedness owing to the plaintiff by Seymour Johnson & Co., a limited partnership formed under the statute of New York. The partnership was created January 3, 1900, by the filing of the certificate required by the statute, which among other things recited the name of Seymour Johnson & Co. as the firm name, the name of Webster as the special partner, and that the amount of the capital contributed by said special partner Webster was $100,000. In the accompanying affidavit required by the statute, which was filed at the same time, it was recited that the $100,000 contributed by said special partner Webster had been actually and in good faith paid in cash. Subsequently and February 7, 1900, a certificate was filed reciting that the amount contributed by Webster as special partner had been increased from $100,000 to $200,000, and the affidavit filed therewith recited that such sum had been actually and in good faith paid in in cash. The question litigated upon the trial was whether Webster did contribute and in good faith pay in cash the special capital mentioned in the certificates.

It appeared upon the trial that prior to the formation of the limited partnership some of the general partners had been doing business as a firm by the style of Seymour Johnson & Co.; that the firm was indebted to one Goslin in the sum of $60,000; that an arrangement was made between the members of this firm, Goslin, and one Ammon contemplating the formation of a limited partnership in which Webster was to be the special partner, and Goslin and Ammon should provide the capital which was to be contributed in his name. This arrangement was carried out on January 2d in the following manner: The existing firm drew its check for $60,000 (the amount of its indebtedness to Goslin), and deposited it to the credit of Ammon with the Wells Fargo & Co. Bank, where Ammon had on deposit $40,000; upon the deposit of the $60,000 to the credit of Ammon he made his check upon the Wells Fargo & Co. Bank for $100,000, and handed it to one of the members of the firm; thereupon the firm transferred the check to Webster, and Webster deposited it to his own credit in a bank with which he had an account; and immediately thereafter Webster drew his own check for the same amount upon the bank, and handed it to one of the members of the firm, who had it cashed; and thus the firm received the $100,000 in full. It was a part of the arrangement that Goslin should receive 40 per cent. of the profits of the limited partnership and Ammon 20 per cent. Webster testified that the money (represented by the check handed to him) went to him and through his bank, and his own check went against it, simply to enable him to send the money to the firm of Seymour Johnson & Co., and as far as he was concerned the transaction was merely an accommodation to Mr. Johnson, who told him it would assist the firm. The capital subsequently contributed in the name of Webster, and mentioned in the certificate filed February 7th, was furnished in substantially the same way by Goslin and Ammon, and a detailed statement of the facts respecting that transaction is unnecessary. Some evidence was

tending to show that Goslin was a member of the pre-existing

trial judge instructed the jury, in substance, that if they that the $100,000 which was furnished to Webster, and Webster put back into the partnership, was money of the r money which Goslin and Ammon had loaned to the firm, er had not paid into the capital in good faith the sum of 00, and he was liable as a general partner; but if they found oslin and Ammon loaned the $100,000 to Webster, so that ame liable to them for the amount, or if they found that and Ammon gave this amount to Webster, then Webster ot liable. He further instructed the jury, in substance, that amount which Webster paid in was loaned to him for that e by the firm, or the partners therein individually, they be justified in finding that he had not paid in the amount d faith. He also instructed the jury if they found that the ant went through the form of contributing the special capi- the partnership, and did not actually contribute the amount n in good faith to the common stock, the certificates and af- s filed were false, and their verdict should be for the plain- On behalf of the defendant the trial judge was requested to "that the evidence shows that Goslin and Ammon intended $100,000] to be furnished to Webster to be contributed n as special capital." The court declined so to charge, and ted the question to the jury whether the evidence so showed. principal assignments of error are based upon the exceptions instructions thus given or refused. We find no occasion ew the other assignments of error, because upon the undis- facts, established by evidence which was not objected to, fendant was or was not liable as a general partner, and the udge would have been justified in taking the case from the nd directing a verdict.

n the evidence it was entirely clear that it was the scheme members of the pre-existing firm, and of Goslin and Am- vhen they entered into the arrangement by which the capi- s to be supplied which was to be contributed in the name of er, to constitute Webster a special partner only in name, vhile holding him out to the public as the special partner, ire for Goslin and Ammon exemption from liability as part- The scheme contemplated was carried out. The capital to tributed by the special partner was actually paid in, but it ubstantially from Goslin and Ammon or from the pre-exist- m, and only formally from Webster. It was in a sense con- d by him, because it was derived from funds standing in his on the books of the bank upon which his check was drawn. ct it was contributed by Goslin and Ammon, or by the firm, e his check was drawn upon funds which they had sup- o him, and which were not his for any other use than as a rary deposit to be checked out again and handed over to the isting firm. If there was an agreement or understanding en the others that the amount should be regarded as a tem-

porary loan or as a gift to Webster, he was not a party to it, and there was not a scintilla of evidence upon the trial to show that he was informed of such an understanding or regarded himself as under any other obligation to any person than to use it as he did use it. Consequently Webster did not incur any obligation either to Goslin and Ammon or to the pre-existing firm, though he would have incurred one if he had misapplied the check which was intrusted to him.

For the protection of those who may become creditors of the partnership by giving them an opportunity to be informed concerning the facts required to be stated in the certificate, and to prevent misinformation to them, the statute provides that any false statement in the certificate, by the filing of which the limited partnership is created, or in the affidavit accompanying the certificate, shall render the special partner liable as a general partner. The courts of New York treat the statute as remedial in nature, and consider substance rather than form in determining whether its provisions have been complied with. According to these decisions, if the provisions have been substantially complied with, so that those who are entitled to the information which they are intended to afford can suffer no detriment, a departure in literal conformity will not subject the special partner to the liabilities of a general partner. Smith v. Argall, 6 Hill 479; Fifth Avenue Bank v. Colgate, 120 N. Y. 396, 24 N. E. 199, 8 L. R. A. 712; White v. Eiseman, 134 N. Y. 103, 31 N. E. 276. Thus, the statement required in the affidavit, that the sum specified in the certificate has been "actually and in good faith paid in in cash," is held to have been substantially true when it appears that the amount was contributed by a delivery for that purpose by the special partner to the general partner of a certified check, and even by the delivery of an uncertified check when it appears that his account in the bank upon which it was drawn was good for the amount, and that the check was paid upon presentation immediately after the formation of the partnership. On the other hand, it is held that the statement was not substantially true when it appears that the contribution was in the form of goods or credits, or anything else which is not in substance and effect a cash payment. The requirement of the statement in the affidavit that the amount of the special capital has been "actually and in good faith paid in" is designed to inform prospective creditors not only that the capital has been actually paid in cash, but also that it has not been paid collusively, and that there is no secret or illicit arrangement between the general partners and the special partners whereby it is in effect a fictitious payment, or one which will not practically inure to the use of the partnership. If the amount has been paid in cash, so that it becomes a part of the capital, for use as capital may ordinarily be used by a partnership, the requirement is satisfied. In this case the partnership actually received the contribution; and this would be none the less true if Webster had paid in the amount from money borrowed from Goslin and Ammon or from the old firm. It is wholly immaterial from what

the special partner derives the money with which he makes
tribution. As was said in the case of Lawrence v. Merri-
2 N. Y. Super. Ct. 36, affirmed 73 N. Y. 590:

art of the statute regulates the means which may be used by the
partner to obtain the money he makes special capital. If they be
nt or unlawful, the remedy is not given by this statute, nor while
r demands of the statute are satisfied do these means injure the cred-
other persons."

hat case the special partner and the general partner had
partners in a pre-existing firm, and the special partner had
s interest in that firm to the general partner for cash, and
the cash as his contribution to the limited partnership, and
urt held that this was a legitimate transaction. In Van
v. Whitman, 62 N. Y. 513, the special partner was entitled
00 as his interest in a firm of which he and one White were
rs, and, in contemplation of forming a limited partner-
which White was to be one of the general partners and
ecial partner, authorized White to convert the assets of the
n into cash, and pay the amount as his contribution as spe-
rtner, and it was sought to hold him liable as a general
because the statement in the affidavit that the amount had
ctually and in good faith paid in was false. The court held
e question was whether the interest had been turned into
hich went into the capital at the time the certificate was
nd it is apparent from the opinion that if this question had
ound in favor of Whitman the decision would have been
favor. In Metropolitan National Bank v. Sirret, 97 N. Y.
was held that while the special partner, being a member of
engaged in carrying on the same business intended to be
ted by the limited partnership, may not put in his stock
old concern upon a valuation as his contribution to the capi-
the new firm, if he has paid in his share in cash the new
not prohibited from purchasing in good faith the stock of
firm, or from paying for it out of the capital so contrib-
lthough it may happen that the special partner is entitled
ive the whole of the purchase money; and this is so al-
there was an expectation on the part of the special partner
other members of the old firm at the time of the formation
limited partnership that it should purchase with the money
ributed the stock of the old firm. The court expressed the
that if in an antecedent contract between the special part-
d the other members of the old firm it had been made a
on of his contribution to capital that the new partnership
make the purchase of the old firm and pay for it out of
ount to be paid in by him, the payment could not be up-
made in good faith, in cash, as the agreement would prac-
deprive the general partners of the control of the money
ropriating it in advance. From these decisions it appears
he circumstance that the special partner has derived the
which he has contributed to the partnership from one of
neral partners is of no significance as tending to show that

his contribution was not paid in good faith. What difference can it make whether he has borrowed it or received it in payment of an obligation? In either case the effect upon the financial ability of the general partner is the same. Concededly the special partner can borrow the money for the purpose from any other person than the general partner. His financial ability is a matter of which the statute takes no notice. The learned trial judge, in some of his observations to the jury, expressed the opinion that to permit the special partner to make his contribution out of money borrowed from the general partners could not have been contemplated by the statute, because the transaction would leave the assets of the partnership just as they were before. By this he probably meant that if the general partners had not loaned the money they could have used it in the business of the partnership, and therefore the assets of the partnership would not be increased by the contribution of the special partner. But the statute does not require the amount of the capital contributed by the general partners to be stated in the certificate, and it thereby treats any information to the creditors respecting their financial responsibility as something which is not essential.

We think the trial judge erred in instructing the jury in substance that Webster had not paid in the capital in good faith if they found that he had borrowed it from the old firm or from Goslin and Ammon.

If the statute means that the contribution to be made by the special partner must be made from his own money, the statements in the certificate and affidavit were false; but if the statute only means that it must be actually paid in, so as to be in the control of the general partners free from all contingencies save those that arise from the nature of the business, then the statements were literally true. As was said in Smith v. Argyle, supra: "The amount contributed by the special partner is a vital element in determining the responsibility of the firm and in fixing its credit." But if it is of no consequence whether he borrows the money and thus becomes obligated to the lender in an equal amount, it cannot be of consequence whether his financial responsibility be large or small, and it must therefore be quite immaterial whether he be using his own money or money which in substance belongs to another.

The learned judge observed to the jury in response to a request for instructions in behalf of the defendant that the fact that Webster did not use his own money to make the contribution did not subject him to liability. He said: "He might have borrowed it from others than the firm. It might have been given to him. He might lawfully be the mere channel through which other persons furnished this money as special capital in his name." In this opinion we think he correctly stated the law of the case.

The question was not presented by the pleadings or upon the trial whether Webster was liable as a general partner because of the false statement that he was a special partner. Upon the facts proved upon the trial it is plain that this relation never existed be-

the general partners and himself. He never had any in- in the business of the limited partnership, and it was never nplated that he should have any. His only connection with that of a masquerader. But we are unable to conclude that l not actually pay in his contribution of special capital, or ne statement in the affidavit that he had paid it in good faith ot true.

judgment is reversed, with instructions to the court below er a new trial.

UNITED STATES v. DURAND.

(Circuit Court of Appeals, Second Circuit. February 28, 1905.)

No. 39.

TOMS DUTIES—CLASSIFICATION—BLOWN GLASSWARE—GLASS BLANKS.

Held, that crude, incomplete articles of glass, known as "blanks," pro- ced by blowing glass into a mold, which are suitable only to be placed the hands of glass cutters for further manufacture into finished arti- s, are not within the provision for "blown glassware" in Tariff Act ly 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 [U. S. Comp. 1901, p. 1633], but are dutiable under the provision for "all glass manufactures of glass," in paragraph 112 of said act, 30 Stat. 158 [U. Comp. St. 1901, p. 1635].

E—COMMERCIAL DESIGNATION.

The term "glassware" in the provision for "blown glassware" in Tariff t July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 [U. S. mp. St. 1901, p. 1633], is not a term of general commercial designa- n.

peal from the Circuit Court of the United States for the South- istrict of New York.

al from the decision of the Circuit Court of the United States for the rn District of New York (127 Fed. 624), affirming a decision of the of United States General Appraisers, which sustained the protest of e and reversed the decision of the collector assessing the merchandise stion, known as "blown glass blanks," as "blown glassware" under aph 100 of the tariff act of July 24, 1897, c. 11, § 1, Schedule B, 30 57 [U. S. Comp. St. 1901, p. 1633]. That paragraph is as follows:

Glass bottles, decanters, or other vessels or articles of glass, cut, en- painted, colored, stained, silvered, gilded, etched, frosted, printed manner or otherwise ornamented, decorated or ground (except such g as is necessary for fitting stoppers), and any articles of which such s the component material of chief value, and porcelain, opal and other glassware; all the foregoing, filled or unfilled, and whether their con- e dutiable or free, sixty per centum ad valorem."

importer protested, insisting that the merchandise should have been d under paragraph 112 of the same act, which reads as follows:

Stained or painted glass windows, or parts thereof, and all mirrors, eeding in size one hundred and forty four square inches, with or with- mes or cases, and all glass or manufactures of glass or paste, or of glass or paste is the component material of chief value, not specially ed for in this act, forty-five per centum ad valorem."

tat. 158 [U. S. Comp. St. 1901, p. 1635].

Frank Lloyd, Asst. U. S. Atty.

ert Comstock, for appellee.

ore WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. The imported merchandise consists of blown glass blanks produced by blowing glass into a mold and breaking off the surplus portion. In the condition in which they reach this country these blanks are crude, thick and incomplete, suitable only to be placed in the hands of glass cutters to be fashioned by them into cut glass bowls, dishes or similar useful or ornamental articles. It may be mentioned in limine that even a cursory reading of the language employed in paragraph 100 would seem to indicate that it is most inappropriate to describe the rough, unfinished articles in question. It deals with cut glass bottles, cut glass decanters and other articles of glass cut, engraved, painted, etc., or otherwise ornamented, decorated or ground "and porcelain, opal and other blown glassware." It is quite improbable that Congress intended to include among these finished products, which are enhanced in value from 20 to 500 per cent. by being cut, the crude material from which they are made. In other words, Congress did not intend to assess at the same high rate of sixty per centum ad valorem cut glass bowls and the rough blanks from which they are cut.

If this were a question of first impression, paragraph 112 seems to contain a more accurate description in the words "all glass or manufactures of glass." The question, however, is not new in the courts of this circuit. In U. S. v. Fensterer (C. C.) 84 Fed. 148, the court, in speaking of blanks precisely similar uses the following language, which appears to us to be a concise and definite statement and definition of the articles in question:

"They were of glass, and had been manufactured to some extent, and were, therefore, manufactures of glass. They were not completed for their intended use, and would be sought for by manufacturers of, and not dealers in, glassware; and they seem to be materials for glassware, rather than glassware itself."

There is no difference between the facts involved in that case and in the case at bar except that an effort has since been made to prove a general trade meaning for the term "glassware" which includes these blanks. Bearing in mind that such designations must be definite, general and uniform, we are constrained to say that the effort to prove such a meaning has not been successful. The witnesses do not agree; they contradict each other; their definitions of glassware are both broad and narrow, specific and general, some including and others excluding the blanks in question. We think it is impossible to extract an intelligible, uniform definition of the term "glassware" from this mass of testimony.

Decision affirmed.

NITED STATES v. CRUCIBLE STEEL CO. OF AMERICA.

(Circuit Court of Appeals, Second Circuit. March 2, 1905.)

No. 127.

DUTIES—CLASSIFICATION—STEEL STRIPS COLD-ROLLED, SMOOTHED Y.

he provision in paragraph 141, Tariff Act July 24, 1897, c. 11, § 1, edule C, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640], for steel strips ght to a "perfected surface finish or polish better than the grade old-rolled, smoothed only," does not require that such "better" finish polish must be produced by some process other than cold-rolling; it does not include certain steel strips of a thickness of $^{13}/_{1000}$ of inch, which have been subjected to no other process than the cold-ng (with incidental annealing, pickling, etc.) necessary to produce mall a gauge; for, a precisely similar provision in the tariff act 890 having received the same construction, it is presumed that Con-s, by re-enacting it, intended it to have the same effect, especially he absence of proof of a general, well-recognized meaning for the ls quoted that would include such articles.

al from the Circuit Court of the United States for the South-trict of New York.

cause comes here upon appeal from a decision of the Circuit Southern District of New York, reversing a decision of the of General Appraisers, which sustained the collector in as- certain imported merchandise for duty. The opinion of the Judge will be found in 132 Fed. 269.

. D. Baker, for appellant.

. Gibson, for appellee.

re WALLACE, LACOMBE, and TOWNSEND, Circuit .

OMBE, Circuit Judge. The merchandise is strip steel, has been cold-rolled, from four to five inches wide, $^{13}/_{1000}$ nch thick, and from 200 to 250 feet in length, valued above ents and not above four cents per pound, and which, after empered by the importer, is used for making car-seat springs. portation was under the tariff act of July 24, 1897, c. 11, § 1, le C, 30 Stat. 160 [U. S. Comp. St. 1901, p. 1638], which con-ne following paragraphs:

133. Sheets of iron or steel, polished, planished or glanced, by what-me designated two cents per pound: provided, that plates or sheets or steel by whatever name designated, other than the polished, d, or glanced herein provided for, which have been pickled or cleaned , or by any other material or process, or which are cold-rolled, d only, not polished, shall pay two-tenths of one cent per pound more e corresponding gauges of common or black sheet iron or steel."

conceded by both sides that the merchandise is not within ction because it is not "sheets of steel," steel strips or strips l being commercially a different article.

135. Steel ingots, cogged ingots, blooms and slabs by whatever made, * * * sheets and plates and steel in all forms and shapes

not specially provided for in this act. * * * valued above 3 cents per pound, and not above 4 cents per pound, $1^{2}/_{10}$ cents per pound."

Both sides concede that the merchandise is covered by this paragraph.

"Par. 141. * * * On all strips, plates, or sheets of iron or steel of whatever shape, other than the polished, planished, or glazed sheet-iron or sheet-steel hereinbefore provided for, which are cold-rolled, cold-hammered, blued, brightened, tempered, or polished by any process to such perfected surface finish, or polish better than the grade of cold-rolled, smoothed only, hereinbefore provided for, there shall be paid one cent per pound in addition to the rates provided in this act upon plates, strips, or sheets of iron or steel of common or black finish." 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640].

The sole question in the case is whether the importations should pay the additional duty required by paragraph 141. To decide this question it is necessary, first, to construe the paragraph, and then to apply its provisions to the facts. The Circuit Judge interpreted the paragraph as requiring that the "better" surface finish or polish must be one produced by some process other than cold-rolling. We are unable to concur in this conclusion. It does not seem to be warranted by the language used, which provides that when the steel strips—by cold-rolling, by cold-hammering, by bluing, by brightening, by tempering, or by polishing by any process—are brought to such perfected surface finish or polish as is better than the grade specified in the section they shall pay the additional duty. This seems to be the natural construction. It is strictly grammatical, it is simple and sensible, it calls for no fine-drawn distinctions, it leads to no absurdity. Moreover, when it is adopted much of the ingenious argument which has been presented by both sides becomes immaterial.

The strips in question have not been subjected to any process other than cold-rolling. They have, it is true, been pickled—put in lime bath and annealed, it may be more than once; but the evidence shows that these manipulations are always steps in the process of cold-rolling to so small a gauge as this. Cold-rolling, however, affects the surface. Cold-rolled steel has a better or poorer surface, according to the number of times it has gone through the cold-rolls. The strips in question have been through the rolls several times to secure the required thinness, and undoubtedly are, as the witnesses call it, "whiter" or brighter than strips which have not been through the cold-rolls so often. The point to be determined is whether such betterment of the surface has reached a stage where the strip is to be classed as above the standard fixed by Congress as "cold-rolled, smoothed only."

What is that standard? For a reply one naturally turns, first, to the trade witnesses to ascertain the commercial meaning of the words. But no solution of the question is to be found there. The evidence before the Board of General Appraisers abundantly sustains their finding that there is no trade understanding which includes "cold-rolled, smoothed only"; and, so far as steel strips are concerned, there is nothing in the testimony taken in the Circuit Court to modify this finding. The phrase in paragraph 141 is "bet-

than the grade of cold-rolled, smoothed only, hereinbefore pro-
ed for." No prior provision is made as to steel strips; the ref-
nce is evidently to paragraph 133, which deals with sheets of
l. That section is awkwardly phrased. It first provides a rate
sheets "polished, planished, or glanced." Polishing is a process
mproving the surface by the use of emery and buffing wheels,
planishing or glancing is apparently the same process carried
a little more elaborately. It then provides that "sheets * * *
er than polished, * * * which are cold-rolled, smoothed
, not polished," shall pay a certain other rate. If the word
lished" is used with the same meaning in both parts of this
ence, the expression is tautological. We should hesitate to
l on the bare authority of this single phrase that Congress meant
eclare that the steel sheets which are to pay the other rate of
are such only as have not been subjected to the emery wheels,
ever bright and finished their surface might become by re-
ed passes through the cold-rolls, accompanied with acid treat-
ts, lime baths, and annealing. Certainly the untrained eye,
tinizing the exhibits in this case, can see little difference in
h between the surface of steel which has been thus repeatedly
-rolled, pickled, and annealed and that which has been polished.
ving on the reference in paragraph 141 to paragraph 133, by
use of the phrase "hereinbefore provided for," the government
he Circuit Court introduced some illustrative samples of sheet
l. Of these, one (A) had been subjected to one or two passes
he cold-rolls; a second (B) to three passes and one annealing;
ird (C) to three or more passes and two annealings; no "pick-
" had been employed in any case to remove the scale. It
sought to be established that steel thus surfaced was what was
mercially known as "cold-rolled, smoothed only"; but the testi-
y to that effect is unsatisfactory. The first witness testified
o A that its commercial designation was "American Bessemer,
le pass"; that different manufacturers sometimes give it a
erent name; that it would be considered "a cold-rolled, single
, annealed, smoothed"; as to B, that it would be designated
eet steel, cold-rolled, smooth"; as to C, that its general name
he trade was "black, double annealed, cold-rolled, smoothed
t steel." The second witness testified that all three samples
e two names in trade—"cold-rolled sheet" and "cold-rolled
t, smoothed"—which are used interchangeably. This evidence
ardly sufficient to establish a general well-recognized meaning
the phrase "cold-rolled, smoothed only."

he case is a difficult one. On the one side it might be said that
n a hot-rolled rod—such as illustrative Exhibit A 10998 H—has
passed once through cold-rolls, it may fairly be described as
othed. But, on the other hand, the word "smooth" is relative,
there are roughnesses and irregularities of surface in that ex-
t greater than are apparent even in those (A, B, C) the govern-
t refers to as the standard. Under these circumstances, it
ld seem that a more satisfactory solution of the question can
ound by reference to the tariff history of this provision for addi-

tional duty. It is not found in the Revised Statutes. Its first appearance is in the tariff of 1883, c. 121, Schedule C, 22 Stat. 499. Paragraph 177 of that act provides for additional duty on "steel strips, * * * cold-rolled, cold-hammered, or polished in any way in addition to the ordinary process of hot-rolling or hammering." About this language there could be no possible obscurity. In the tariff of 1890 we find the phrase now under discussion, "strips * * * of steel * * * which are cold-rolled, cold-hammered, blued, brightened, tempered, or polished by any process to such perfected surface finish, or polish better than the grade of cold-rolled, smooth only." This provision manifestly contemplates that there is some grade of surface finish which is the dividing line between two groups of articles, and it became the duty of the customs authorities to ascertain what that grade was, and to regulate their assessment of duties thereby. During the entire period from the passage of the act of 1890 until the passage of the next tariff act (1894) the grade thus adopted was one which relegated articles such as the present importation to the group whose surface finish was not better than the grade. In the tariff act of 1894 all provision for the additional duty was omitted. When the present tariff act was under consideration Congress was again asked to lay additional duties on steel strips, etc., which had a better surface finish than some named grade. Congress did lay such additional duty, relatively to a grade which it defined in precisely the same language as that used seven years before. The substitution of "smoothed" for "smooth" is immaterial. It is fair to assume that when it thus enacted Congress fully understood what dividing grade had been adopted by the customs authorities under the earlier act, and by the use of the same language intended to provide that the same grade should be the criterion for determining in which group future importations should be classified for duty purposes.

The decision of the Circuit Court is affirmed.

KIRKPATRICK v. EASTERN MILLING & EXPORT CO.

Appeal of LOCHER et al.

(Circuit Court of Appeals, Third Circuit. May 1, 1905.)

No. 31.

1. Corporations—Receivers—Right of Pledgee to Recover Possession of Stock Certificates.

A corporation assigned to a bank, as collateral security for a loan, an underwriting agreement by which the subscribers agreed to take an issue of its bonds, and were to receive as a bonus a certain amount of its stock. The agreement and bonds were delivered to the bank, and certificates of stock in amounts corresponding to those required by the agreement were signed, but for some reason were not delivered. The corporation became wholly insolvent, and receivers were appointed in proceedings to wind it up, who came into possession of such certificates. *Held* that, as against the receivers, the bank was entitled to an order for

possession of the certificates, to enable it to tender the same to the underwriters in support of a suit on the agreement.

[Ed. Note.—Rights and liabilities of pledgees of corporate stock, see note to Frater v. Old Nat. Bank, 42 C. C. A. 135.]

SAME—APPLICATION FOR ORDER ON RECEIVERS—COLLATERAL ISSUES.

On a petition for such an order in the receivership suit, the court cannot consider or determine any defenses which the underwriters may have to their liability to the bank on the agreement.

Appeal from the Circuit Court of the United States for the Dis-ct of New Jersey.

For opinion below, see 135 Fed. 146.

Reynolds D. Brown, for appellants.

H. Gordon McCouch, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The brief of counsel for the appel-e puts the question for decision thus: "The only question here esented is whether the bank is entitled to the possession of the ock as against the receivers." This we accept as a substantially rrect proposition.

We think the Circuit Court was right in holding that the appel-nts could not in this proceeding set up any defenses which they ay have against their alleged liability under the memorandum of reement of January 29, 1903, between the Eastern Milling & Ex-rt Company and the underwriting subscribers thereto. This oceeding was not brought to enforce the alleged liability of the spondents (the appellants) as subscribers to that agreement, and question touching their liability as underwriting subscribers is terminable herein. The sole purpose of the petitioner was to ob-in possession of the stock certificates which were in the hands of e receivers. The only question here involved is the right to the ssession of the stock certificates as between the Corn Exchange ational Bank (the petitioner) and the receivers of the Eastern illing & Export Company. The relief sought is stated in the elfth section of the petition, in the words following:

"(12) That the question of the title to said certificates cannot now be prop-y determined and need not be considered, as they came into the hands of the eivers by the accident of their not having been delivered, as they should ve been, at the time of the delivery of the assignment of the contract; d, in accordance with the principles and maxims of a court of equity, ich considers that done which ought to have been done, it should now be ereed that the said certificates shall be surrendered to your petitioner, in der that its right to enforce the performance of the said contract of sub-iption shall not be defeated by the technical failure to tender the said ck; and your petitioner further shows that this order cannot prejudice impair the defense of the said respondents, if any they have, and that ey cannot reasonably and justly object to this order here prayed for."

The foregoing extract from the petition indicated the measure relief prayed for, and the conditions under which it should be corded.

Upon the facts here appearing, the petitioner, we think, was en-led to an order directing the receivers to turn over the stock cer-

tificates to the petitioner, but without prejudice to or impairment of any defense, of whatsoever nature it may be, which the underwriting subscribers may have against alleged liability.

In our view of the case, we are not called on to consider the question whether the memorandum of agreement of January 29, 1903—here designated the "underwriting agreement"—was assignable, and we express no opinion upon that question. We think the question is not properly determinable in this proceeding. This, as we have seen, the petition itself concedes. The defense grounded on the alleged nonassignability of the underwriting agreement should be left open to these appellants in any other suit or proceeding now pending or which may be instituted hereafter. We think that the court below intended to save to the respondent subscribers all their defenses, including the defense based on the alleged nonassignability of the subscription agreement. But it is suggested by the appellants that the decree is open to a different construction as respects this particular defense, and, to avoid possible misconstruction, we will amend the decree entered below by striking therefrom the words following:

"It is ordered, adjudged, and declared that the assignment of May 13, 1903, of the right, claim, and demand under a certain memorandum of agreement of January 30, 1903, between the Eastern Milling & Export Company and the subscribers thereto, was effective to carry title to the certificates of stock mentioned in the said memorandum of agreement of January 30, 1903."

And the decree of December 17, 1904, as thus amended, is affirmed.

SCHAUBLE et al. v. SCHULZ.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1905.)

No. 2,038.

1. ADVERSE POSSESSION—STATE STATUTES—RETROACTIVE OPERATION.

Rev. Codes N. D. 1899, § 3491a, providing that all titles to real property vested in any person or persons, who have been or hereafter may be in actual, open, adverse, and undisputed possession of the land under such title for a period of ten years, and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, etc., is retroactive in operation, in that it gives effect to adverse possession and payment of taxes preceding its enactment.

2. SAME—PROPERTY RIGHTS—DUE PROCESS OF LAW—REASONABLE PERIOD OF LIMITATION.

Rev. Codes N. D. 1899, § 3491a, providing for the creation of title by adverse possession for ten years, accompanied by payment of all taxes and assessments, is not unconstitutional, as a deprivation of property without due process of law, as against one who, at the time of the approval of such statute, had failed for nine years to assert any title to the premises or to pay taxes thereon, and who had at least a year after such approval in which to bring suit to recover possession; that being a reasonable time for that purpose.

3. SAME—COMPUTATION OF PERIOD.

Under Rev. Codes N. D. 1899, § 3491a, providing for the establishment of title by adverse possession of ten years, together with payment of all

taxes and assessments, the prescribed period begins with the adverse possession, and not on the date of the first payment of taxes accompanied by adverse possession.

SAME—VENDOR AND PURCHASER—CONTRACT TO CONVEY—FULFILLMENT—EFFECT.

Possession of a vendee who entered under an executory contract of sale, and who subsequently received a conveyance in fulfillment thereof, was adverse from the time of his entry as to all but the vendor, and was adverse as to him from the date of the vendee's compliance with the condition of the contract entitling him to a conveyance.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 343, 354–357.]

SAME—LIMITATIONS—SUSPENSION OF PERIOD—MINORITY OF PARTIES.

Rev. Codes N. D. 1899, § 5198, providing that the time during which one is within the age of twenty-one years shall not be a part of the periods "in this article" limited for commencing actions or making entry on real property, does not apply to section 3491a, which is not a part of such article, and provides that all titles to real property vested in any person, who may have been or hereafter may be in adverse possession under such title for a period of ten years, and shall have paid all taxes and assessments legally levied thereon, shall be declared good and valid in law, "any law to the contrary notwithstanding."

SAME—INFANTS MAY BE SUBJECTED TO SAME LIMITATIONS AS ADULTS.

The exemptions from the operation of statutes of limitation usually accorded to infants do not rest upon any fundamental doctrine of the law, but only upon express provision therefor in such statutes. It is competent for the Legislature to put infants and adults upon the same footing in this respect, and this is the effect of a statute containing no saving clause exempting infants.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 390–398.]

Appeal from the Circuit Court of the United States for the Dis-ct of North Dakota.

ubject to a mortgage theretofore executed to James Middleton, Michael Nulty was, on June 10, 1887, the owner of the south half of section 7, town-p 140 north, range 57 west, in Barnes county, Dakota, now North Dakota. that day the land was sold, subject to the mortgage, under a judgment inst McNulty rendered upon default in the district court of Barnes county a proceeding in attachment, the only notice of which was given by pub-ation. The attachment proceeding was somewhat irregular, and some the defects may have been such as to subject the judgment and sale to lateral attack. After the sale McNulty paid no attention to the land, l ceased to pay the taxes and assessments thereon. He died intestate ne 6, 1896, leaving the appellants as his heirs at law. Two of them are nors. June 15, 1888, the sheriff of Barnes county executed a deed for the d to the holder of the certificate given at the sale, and this title afterward ssed to Middleton, the mortgagee. On March 29, 1890, the appellee en-ed into possession of the land under an executory contract for its sale to n by Middleton. The contract authorized the appellee to take possession, l required him to pay all taxes and assessments subsequently levied. tober 10, 1892, Middleton, who still held the mortgage, executed to the pellee a deed for the land, with full covenants of warranty, in fulfill-nt of the contract. From the time of his original entry the appellee s had the actual, open, and undisputed possession under the title given by sheriff's deed. During the continuance of the contract his possession s adverse to every one excepting Middleton, and since the fulfillment of contract his possession has been adverse to all the world. The taxes l assessments for the years 1887 to 1889, both inclusive, were paid by Mid-ton before the contract was made. The taxes and assessments for the ars 1890 to 1900, both inclusive, were paid by the appellee from time to

time between August 13, 1891, and October 31, 1901; those for 1898 were paid September 19, 1899; those for 1899, October 31, 1900; and those for 1900, October 31, 1901. The taxes for the year 1901 were also paid by him, November 15, 1902. This suit was commenced by the appellants July 28, 1902, and its purpose seems to have been to quiet the title against all claim under the sheriff's deed, to recover the possession with damages for its occupancy by the appellee, and to redeem from the appellee as a mortgagee in possession, if he should be deemed to have that status. At the final hearing a question was raised as to the character of the suit, and the parties entered into a stipulation declaring their desire to obtain a determination of all their rights in respect of the land, both legal and equitable. The decree dismissed the bill upon the merits.

Frank McNulty, for appellants.

Edward Winterer (Herman Winterer, on the brief), for appellee.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

VAN DEVANTER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It will be necessary to consider only the defense that the title under the sheriff's deed was rendered good and valid by the appellee's continuous adverse possession of the land for a period of ten years and his payment of all taxes and assessments levied thereon during that period. A statute of the state of North Dakota, entitled "An act relating to the title to real property," which was approved March 8, 1899, and took effect July 1, 1899, declares:

"All titles to real property vested in any person or persons who have been or hereafter may be in the actual, open, adverse and undisputed possession of the land under such title for a period of ten years and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding." Laws 1899, p. 230, c. 158 (Rev. Codes 1899, § 5491a).

The words, "have been or hereafter may be," unequivocally express an intention that the statute shall have a retrospective operation in the sense of giving effect to adverse possession and payment of taxes occurring before it became a law, and this prevents the application of the general rule of interpretation that statutes are to be given a prospective rather than a retrospective operation. Osborne v. Lindstrom, 9 N. D. 1, 6, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. Rep. 516; Sohn v. Waterson, 17 Wall. 596, 21 L. Ed. 737; Stephens v. Cherokee Nation, 174 U. S. 445, 447, 19 Sup. Ct. 722, 43 L. Ed. 1041; Lamb v. Powder River Live Stock Co., 65 C. C. A. 579, 132 Fed. 434. Evidently because of the clear expression of this intention, the Supreme Court of the state, without specially discussing that feature of the statute, has held that it renders good and valid the title of one who, under an invalid tax deed, has held adverse possession of the land for ten years, and has paid the taxes and assessments for those years, although all but about eight months thereof preceded the enactment of the statute. Power v. Kitching, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691.

The important question arising upon the statute, as applied to a case like the present, is whether it extinguishes rights arbitrarily, and therefore violates the fourteenth amendment to the national

tution, which declares that no state shall deprive any person perty without due process of law. It is an essential requisite process of law that full opportunity be afforded for the as- and enforcement of the right after it comes within the pres- prospective operation of such a statute and before the extin- ment takes effect. A statute which does not afford this op- ity is arbitrary, and violates the constitutional prohibition, the opportunity be afforded, it is no objection to the statute has some regard to the past acts and omissions of the parties ned, or to conditions produced by past occurrences, and is ore not wholly prospective. Terry v. Anderson, 95 U. S. 4 L. Ed. 365; Vance v. Vance, 108 U. S. 514, 2 Sup. Ct. 854, Ed. 808; McGahey v. Virginia, 135 U. S. 662, 708, 10 Sup. Ct. 4 L. Ed. 304; Wheeler v. Jackson, 137 U. S. 245, 255, 11 Ct. 76, 34 L. Ed. 659; Turner v. New York, 168 U. S. 90, 18 Ct. 38, 42 L. Ed. 392; Wilson v. Iseminger, 185 U. S. 55, 62, . Ct. 573, 46 L. Ed. 804; Keyser v. Lowell, 54 C. C. A. 574, ed. 400; Lamb v. Powder River Live Stock Co., 65 C. C. A. 32 Fed. 434. Whether such an opportunity is afforded is y a question of the reasonableness of the time, and this de- in some measure, upon the nature of the right and of the acts nissions which condition its extinguishment.

ike ordinary statutes of limitation which convert adverse sion into perfect title after a prescribed period of years, this e contains a provision designed to encourage the payment es and assessments on land the title to which is uncertain, s a protection to one who unites adverse possession for the of ten years with the payment of all taxes and assessments ose years, it declares his title good and valid, although the of adverse possession otherwise effective under the laws of ate is twenty years. Rev. Codes 1899, §§ 5188–5192. In a d sense the statute partakes of the nature of a revenue meas- hich, consistently with due process of law, may have a more ary operation than other laws. Leigh v. Green, 193 U. S. , 24 Sup. Ct. 390, 48 L. Ed. 623. It is a matter of common edge that the obligation to pay taxes, particularly such as are le and payable at fixed times in each year, is a necessary inci- of the ownership of land, and that its neglect is usually fol- by the loss of the title in a comparatively short period. In ase coming within the terms of the statute the title of the de- ng claimant would almost certainly have been extinguished ale of the land for taxes, but for their payment by the adverse nt in possession. It is difficult to perceive why, as between ersons holding adverse titles to land, the failure of one to pay taxes or assert a right to the possession for several years not justly be made the ground of requiring a comparatively t assertion of title, at the risk of its extinguishment in favor other claimant, when, during the same years, he has paid the and has been in actual, open, adverse, and undisputed posses-

The facts of the present case are these: The statute was approved March 8, 1899, and became a law July 1, 1899. When it was approved the appellee had been in the actual, open, adverse, and undisputed possession of the land for nine years, and had paid the taxes and assessments levied thereon during the first eight of those years. The taxes for the ninth year were then payable but unpaid, and those for the tenth year were as yet not due. The appellee paid the taxes for the ninth year September 19, 1899, and those for the tenth year October 31, 1900. His adverse possession was continued in the meantime as before. The two things—adverse possession for a period of ten years and payment of the taxes and assessments levied during that period—could not concur until March 29, 1900, ten years after the adverse possession began. They did not actually concur until October 31, 1900, when the taxes for the tenth year were paid. Computing the time with reference to their possible concurrence on March 29, 1900, there remained after the statute was approved a period of a little over one year within which the appellants could have protected their title by the payment of taxes or by the assertion of a right to the possession. Either would have prevented the title of the appellee from being made good and valid under the statute. Computed with reference to what actually occurred, the remaining period within which the appellants could have protected their title was a little over one year and seven months. If regard were had to the date when the statute became a law rather than to the date of its approval, these periods would be shortened a little more than three months; but this is not permissible, because it is settled by the decisions of the Supreme Court of North Dakota that the statute was effective as notice of its prospective operation from the date of its approval. Power v. Kitching, 10 N. D. 254, 258, 86 N. W. 737, 88 Am. St. Rep. 691; Merchants' National Bank v. Braithwaite, 7 N. D. 368, 372, 75 N. W. 244, 66 Am. St. Rep. 653; Osborne v. Lindstrom, 9 N. D. 1, 8, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. Rep. 516. When, therefore, the appellants became charged with notice of the prospective operation of the statute, there remained in any event a period of one year before the appellee's title could become good and valid and theirs extinguished. In view of the conduct of the parties during the preceding nine years—the active assertion of title by one and the nonassertion of title by the other, the regard shown by one for the owner's obligation to pay the taxes levied on the land and the disregard shown by the other for that obligation—we think the time remaining was reasonable, and that it afforded the appellants full opportunity to assert and protect their title before it could be extinguished, and that of the appellee rendered good and valid under the terms of the statute. Terry v. Anderson, Wheeler v. Jackson, Turner v. New York, and Power v. Kitching, supra.

As the first payment of taxes was made August 13, 1891, it is insisted that the ten-year period cannot be reckoned from March 29, 1890, when the adverse possession began, but must be reckoned from August 13, 1891, when payment of taxes was united with adverse possession. It must be held otherwise. The same question

resented in Beaver v. Taylor, 1 Wall. 637, 17 L. Ed. 601, in
t of a similar statute in the state of Illinois, and it was held,
ing the decisions of the Supreme Court of that state, that the
ibed period begins with the adverse possession, and that it
necessary that each year's taxes be paid within that year.
rect question does not appear to have been presented to the
ne Court of North Dakota, but the inference to be drawn from
cisions of that court in Power v. Kitching, supra, and Streeter
ny v. Fredrickson, 11 N. D. 300, 91 N. W. 692, is that the re-
ient of the statute in this respect is satisfied by the payment
axes and assessments levied during the prescribed period of
e possession, and that the concurrence of adverse possession
ch payment, although ultimately essential, is not necessary
t the time to running. We think this is the reasonable and
t interpretation of the statute.

erring to the fact that the taxes for the year 1901 were due
the suit was commenced, but were not paid by the appellee
fter that time, it is urged that the case is not within the stat-
The fault in this contention is that 1901 was the twelfth year
adverse possession, and not part of the ten-year period. The
ee's title was brought clearly within the protection of the
e on October 31, 1900, when he united with ten years of ad-
possession the payment of all the taxes levied during those
No taxes were then due and unpaid, because those for the
th year, 1900, were not due until November 1st of that year.
Codes 1899, § 1256. It could hardly have been intended that a
nce rendered good and valid by adverse possession and pay-
of taxes would be invalidated or opened to attack if the taxes
e subsequent year should become due and be unpaid.

appellee's possession from March 29, 1890, to October 10,
without which the possession would not cover ten years—
nder an executory contract for the sale of the land, and the
tion is made that during this possession under the contract
pellee did not have title or color of title, and that the statute
s only where the adverse possession is under some sort of
The contract was between Middleton, the holder of the title
the sheriff's deed, and the appellee. It states that Middleton
y sells and agrees to convey" the land to the appellee upon
mpliance with certain conditions, principally relating to the
nt of the purchase price, and that the appellee agrees to com-
ith these conditions. There are also provisions giving the
ee the right to the possession and requiring him to pay all
taxes and assessments. When the contract was entered
partial payment was made upon the purchase price and the
ee entered into possession. By subsequent compliance with
nditions of the contract he entitled himself to receive the
vance which was executed October 10, 1892. The conveyance
t create a new right, but rather perfected the right existing
the contract, and, to give effect to what was plainly the in-
n of the parties, the perfected title related back to the date of
ntract. Peyton v. Desmond, 63 C. C. A. 651, 661, 129 Fed. 1.

It is now the generally accepted rule that the possession of a vendee who enters under an executory contract for the sale of land, and subsequently receives a conveyance in fulfillment thereof, is adverse from the time of the entry as to all the world except the vendor. Howland v. Newark Cemetery Association, 66 Barb. 366; Simpson v. Sneelode, 83 Wis. 201, 53 N. W. 499; Montgomery County v. Severson, 64 Iowa, 326, 17 N. W. 197, 20 N. W. 458; Clapp v. Bromagham, 9 Cow. 530, 550; Whitney v. Wright, 15 Wend. 171, 180; Bank v. Smyers, 2 Strob. 24. And from the moment the vendee by compliance with the conditions of the contract entitles himself to a conveyance his possession is adverse as to the vendor. Ward v. Cochran, 18 C. C. A. 1, 5, 71 Fed. 127; Briggs v. Prosser, 14 Wend. 227. It is also the accepted rule in the state of North Dakota that a vendee in possession under a contract like the one before us is the equitable and beneficial owner of the land, and that the vendor holds the legal title in trust for him, and as security for his compliance with the conditions of the contract. Nearing v. Coop, 6 N. D. 345, 349, 70 N. W. 1044; Moen v. Lillestal, 5 N. D. 317, 331, 65 N. W. 694. The conclusion follows that the appellee was from the time of his entry vested with sufficient title, as against the appellants, to come within the protection of the statute, which broadly includes "all titles."

Two of the appellants are minors, and it is urged in their behalf that they are excepted from the operation of the act of March 8, 1899. It is said of this act in Streeter Company v. Frederickson, supra, that it "is entirely unlike the statutes of limitations common in most of the states, and also the 20-year limitation statute of this state. In fact, it is so dissimilar that its identity as a statute of limitations is almost obscured." An examination of the state statutes shows that section 5198, Rev. Codes 1899, which is claimed to make the exception, is part of a subdivision in the Code of Civil Procedure limiting the periods within which actions can be commenced. The first section of the subdivision declares that its provisions shall be applicable "except when in special cases a different limitation is prescribed by statute"; and section 5198 provides, inter alia, that the time during which one is within the age of 21 years shall not be a part of the periods "in this article" limited for commencing actions or interposing defenses or counterclaims thereto or making entry upon real property. The act of March 8, 1899, is not part of the Code of Civil Procedure or of the subdivision or article limiting the periods within which actions can be commenced, but is a distinct and later statute, which declares that it shall have effect according to its terms, "any law to the contrary notwithstanding." It is evidently intended to be complete in itself, and to prescribe a different limitation for a special class of cases. Indeed, it is unlike the ordinary statutes of limitation, in that it contains no reference to the commencement of actions, suits, or other judicial proceedings, and makes the affirmative action of the claimant in adverse possession rather than the inaction of the other claimant the criterion of its operation upon the title. It contains no exceptions, and it so plainly indicates that in itself it fully speaks the legislative

no exceptions can be read into it. Harris v. McGavern. 31, 167, 33 L. Ed. 317; Dumphey v. Hilton, 121 Mich. 315, 1; DeMoss v. Newton, 31 Ind. 219, 223; Smith v. Macon, 7. That the absence of an exception in favor of minors ffect its validity is shown in Vance v. Vance, 108 U. S. Sup. Ct. 854, 859, 27 L. Ed. 808, where it was said by Mr. ller, in delivering the opinion of the court:

d that because the plaintiff in error was a minor when this law ation it cannot affect her rights. But the Constitution of the s to which appeal is made in this case, gives to minors no special nd others, and it was within the legislative competency of the islana to make exceptions in their favor or not. The exemptions ration of statutes of limitation usually accorded to infants and men do not rest upon any general doctrine of the law that they ubjected to their action, but in every instance upon express lan- uage statutes giving them time after majority or after cessation e to assert their rights."

e of Morgan v. City of Des Moines, 8 C. C. A. 569, 60 is also strongly in point. An act of the Legislature of ed to six months the time for commencing actions against corporations for injuries resulting from defective streets lks, unless written notice specifying the place and cir- s of the injury was served upon the corporation within ter the injury. The act contained no exception in favor and it was sought to import into it by construction a pro- he Code of Civil Procedure making such exception in re- he general statute of limitations. It was said by Judge in delivering the opinion of the court:

of February 17, 1888, is not an amendment of any previous act ct to which it relates. It is new and independent legislation, e in itself. It establishes the rule for the class of cases to which The power of the Legislature to enact the statute is not ques- would be entirely competent for the Legislature to enact a gen- of limitations putting minors and adults on the same footing uses of action, and such would be the legal effect of a statute ained no saving clause exempting infants from its operation. le has never been questioned."

be held that the minor appellants are as much within the of the statute as are those who are adults.

ree is affirmed.

UNITED STATES v. NISHIMIYA.

rcuit Court of Appeals, Second Circuit. March 2, 1905.)

No. 3,451.

DUTIES—CLASSIFICATION—SAKÉ—UNENUMERATED ARTICLE.

Japanese alcoholic beverage known as saké is dutiable as an un- ated manufactured article, under section 6, Tariff Act July 24, 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

MILITUDE—SAKÉ—STILL WINES—BEER.

ying section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 Comp. St. 1901, p. 1693], providing that any unenumerated article

"similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated * * * as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned," *held*, as to saké, a fermented alcoholic beverage resembling beer in material and use, and still wines in quality and use, that, as it has many characteristics not found in either beer or wine, and its ingredients are so unusual and its process of manufacture so unique, said provision does not apply so as to make it subject to the rate applicable to either of those articles.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decision of the Circuit Court for the Southern District of New York, which reversed the decision of the Board of General Appraisers which had affirmed the decision of the collector in the classification and assessment of duty on a certain fomented liquor known as "saké," imported from Japan. The decision of the Circuit Court is reported in 131 Fed. 650.

Charles Duane Baker, Asst. U. S. Atty., for appellant.
Albert Comstock, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, J. Saké is not specifically enumerated in the tariff act of 1897. The collector assessed it by similitude to "still wines," under paragraph 296 of the act of July 24, 1897, c. 11, § 1, Schedule H, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1654], which is as follows:

"Still wines, including ginger wines or ginger cordial and vermuth, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of absolute alcohol, forty cents per gallon; if containing more than fourteen per centum of absolute alcohol, fifty cents per gallon."

The importer filed an alternative protest, insisting that the merchandise should be assessed by similitude to "beer" or "malt extract fluid," under paragraphs 297 and 298 (30 Stat. 174 [U. S. Comp. St. 1901, p. 1655]), respectively, or, if not so dutiable, then as an unenumerated manufactured article, under section 6 of the act of July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].

Paragraphs 297 and 298 are as follows:

"297. Ale, porter, and beer, in bottles or jugs, forty cents per gallon, but no separate or additional duty shall be assessed on the bottles or jugs; otherwise than in bottles or jugs, twenty cents per gallon.

"298. Malt extract, fluid, in casks, twenty cents per gallon; in bottles or jugs, forty cents per gallon; solid or condensed, forty per centum ad valorem."

Finding the merchandise unenumerated it was the duty of the collector to examine the law to ascertain if it resembled any enumerated article sufficiently to warrant the application of the similitude clause; if it did not, the general catch-all clause would receive it as a nonenumerated manufactured article. Hahn v. U. S., 40 C. C. A. 622, 100 Fed. 635.

nilitude clause (section 7) of the act of July 24, 1897, c. at. 205 [U. S. Comp. St. 1901, p. 1693], in so far as ap- s as follows:

ch and every imported article, not enumerated in this act, which either in material, quality, texture, or the use to which it may be any article enumerated in this act as chargeable with duty, shall me rate of duty which is levied on the enumerated article which sembles in any of the particulars before mentioned."

a beverage, a product of the fermentation of rice, pro- a process similar to that employed in making beer in this ice being used instead of barley. An analysis of a sample portation in question shows it to contain 17 per cent. of .874 per cent. of solids, and .064 per cent. of ash; the re- 78.50 per cent. being water.

copic and other tests disclosed the presence of maltose, the first product of the change of starch under the action ic ferments, and indicates that the fluid was the product of earing substance.

amber colored, has a sweet taste, has no bead and is al- ted before being drunk.

ines are produced from the natural saccharine juice of do not contain starch or maltose which is a product of They are always fermented in closed casks in the absence contain from 7½ to 16 per cent. of alcohol.

brewed by a process similar to that which produces saké; lly effervescent, is cold when drunk and it contains from er cent. of alcohol.

me—saké—is apparently arbitrary and not descriptive and ittle or no intelligence to the mind. The record, too, is ger as to the points of similarity between it and the other with which it is compared; many of the characteristics of beer being untouched by the proof.

the criteria of section 7, above quoted, we find saké to be beer in material and the use to which it is applied and still wines in quality and use. A comparison in "texture" em to be inapplicable to liquids.

esembles beer in its process of manufacture and in the of maltose in the extract which is a characteristic of beer, ver found in still wines. It resembles still wines in the centage of alcohol and it has many points of similarity to e and beer. It is also true that in many particulars it is nlike anything mentioned in Schedule H of the tariff act. nilarity to still wines, based upon the large amount of ound in the imported merchandise, presents the strongest justification of the collector's classification. In other we incline to the opinion that the importer presents the argument. Taking everything into consideration there inly as many points of resemblance between saké and etween saké and still wines. If there were no alternative ect one or the other of these similitudes it is probable that on would be in favor of the appellee under the rule that re-

solves a doubtful question of tariff interpretation in favor of the importer. But saké has so many characteristics which are not found in either beer or wine, its ingredients are so unusual and the process of its manufacture so unique that it may fairly be held that it is nowhere described except by the general language of section 6.

The decision of the Circuit Court is affirmed.

SHEPARD et al. v. EXCELSIOR STEEL FURNACE CO.

(Circuit Court of Appeals, Seventh Circuit. January 13, 1905.)

PATENTS—NOVELTY—PIPE ELBOWS.

The Kemp patent, No. 607,620, for a pipe elbow of corrugated sheet metal, is void for lack of patentable novelty, in view of the prior art.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The bill was to restrain infringement of letters patent No. 607,620, issued July 19th, 1898, to William A. Kemp for improvements in pipe elbows. The bill was dismissed by the Circuit Court.

The substantial parts of letters patent No. 607,620 with the drawings, are as follows:

Fig. 1.



Fig. 2.



Fig. 3.

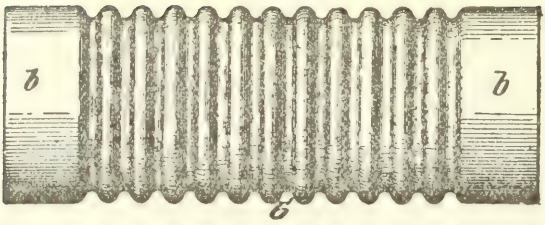


Fig. 4.

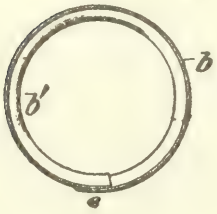
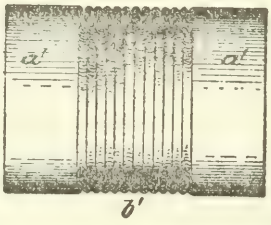


Fig. 5.



ig. 6.

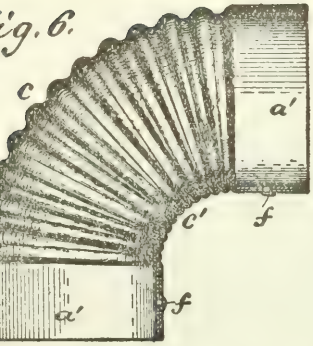
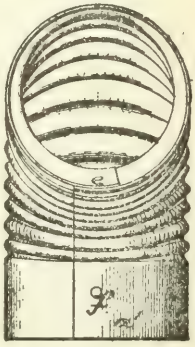


Fig. 7.



s invention relates to that class of pipe-elbows which are made of sheet particularly stovepipe-elbows, and which are radically crimped or cor-, and has the object to improve and simplify the construction of such and to produce them more expeditiously and economically than hereto-

naking my improved pipe-elbow a blank of sheet metal of proper size corrugated transversely and rather coarsely. The blank is then bent tubular form, so that the corrugations extend circumferentially around e and the longitudinal edges of the blank overlap each other. The ted part of the pipe is then compressed in the axial direction of the hereby the corrugations are brought closely together, and the lapped long the joint are secured together, and the pipe is finally bent to the an elbow with the corrugated and compressed lap-joint on the inner the elbow, whereby the corrugations are spread or distended on the circumferential side of the elbow.

he accompanying drawings, consisting of two sheets, Figure 1 is an edge the sheet-metal blank after the same has been coarsely corrugated. s a top plan view of the same. Fig. 3 is a side elevation showing the ted blank rolled into a tube or pipe. Fig. 4 is an end view of the

same. Fig. 5 is a longitudinal section of the corrugated pipe or tube, showing the corrugations compressed. Fig. 6 is a similar view showing the pipe or tube bent into the form of an elbow. Fig. 7 is an end view of the same.

"Like letters of reference refer to like parts in the several figures.

"The blank from which the pipe-elbow is made consists of a rectangular sheet of any suitable kind of metal. If the elbow to be produced is a stove-pipe-elbow, a suitable grade of sheet-iron is used. This sheet is first provided intermediate of its ends with a number of transverse corrugations *a*, which extend from one longitudinal side of the sheet to the other, leaving an uncorrugated portion of *a'* at each end of the sheet, as represented in Figs. 1 and 2. The corrugations are comparatively coarse, and while forming the same in the sheet the latter is not confined, thereby permitting of shortening the blank and avoiding stretching or weakening of the metal. The corrugated blank is next formed into a pipe or tube by bending or rolling the blank transversely, so that the end portions of the blank receive a cylindrical form, as shown at *b*, Figs. 3 and 4, and the corrugations extend circumferentially around the central portion of the pipe, as shown at *b'* in the same figures. In forming the corrugated blank into a tube or pipe the longitudinal edge portions of the blank are lapped one over the other, as shown at *c*, Fig. 4, with one end of each corrugation lying on the opposite end of the same corrugation. The corrugations are next compressed endwise and uniformly by means of any suitable compressing machine or apparatus, so that they are forced closely together around the entire circumference of the pipe, thereby shortening the pipe, as represented in Fig. 5, and firmly binding or interlocking the overlapping corrugated portions of the pipe which form the lap-joint. After the corrugations have been so compressed the pipe is bent into elbow form or so that one end stands at an angle to the other end, as represented in Fig. 6. During the operation of bending the pipe the portions of the corrugations on the outer or circumferential side of the elbow are again distended or stretched apart, as shown at *c*, Fig. 6, while the portions of the corrugations on the inner or throat side of the elbow remain in their closely-compressed condition, as shown at *c'* in the same figure. The corrugated pipe is bent with the joint or overlapping portions arranged on the inner or throat side of the elbow, so that the longitudinal corrugated edge portions of the pipe remain firmly interlocked, thereby forming a joint along the throat side of the pipe which is sufficiently tight and requires no other or additional fastening.

"This method of making pipe-elbows permits of making the same out of a low and cheap grade of sheet metal, because the metal is not stretched to any considerable extent at any stage during the manufacture of the elbow. The edges of the sheets do not require to be squared, as no seaming is required to secure the longitudinal edges together. The time required for making the elbow is reduced to a minimum, the required operations are of the simplest kind, and the elbow is in this manner produced at very low cost, while being very strong and also very attractive in appearance.

"The overlapping parts of the uncorrugated end portions of the elbow may be secured together by rivets *f*, if desired.

"I claim as my invention—

"A sheet-metal elbow having a simple lap-joint at its inner or throat side and having corrugations which extend without break circumferentially around the elbow at the outer curve thereof and which are pressed against each other at the inner or throat side of the elbow, whereby the two thicknesses of the lap-joint are clamped together while the elbow is composed of a single thickness of corrugated metal at the outer side, substantially as set forth."

Other patents cited are as follows:

No. 121,341, Nov. 28, 1871, F. Dieckmann.
No. 128,146, June 18, 1872, H. S. Hoeller and Chas. Hoeller.
No. 164,872, June 22, 1875, J. F. Piehl.
No. 313,858, March 17, 1885, T. S. Evans and H. E. Bissett.
No. 485,124, Oct. 25, 1892, O. H. Lawrence.
No. 500,119, June 27, 1893, F. Dieckmann.
No. 681,177, Aug. 27, 1901, U. D. Alexander.

The further facts are stated in the opinion.

omas A. Banning and Edward F. Hard, for appellants.
j. F. Roodhouse, for appellee.

ore JENKINS, GROSSCUP, and BAKER, Circuit Judges.

OSSCUP, Circuit Judge. The claim may be divided as fol-
A sheet metal elbow having (a) a lapped joint at its inner
oat side; (b) corrugations which extend without break, cir-
rentially around the elbow at the outer curve thereof, and
are pressed against each other at the inner or throat side of
bow; and—as a result—(c) the fact that the two thicknesses
lapped joint are thereby clamped close together, while the
remains composed of a single thickness of corrugated metal
outer side.

prior art shows that a sheet metal elbow having a lapped
s not new, and that a lapped joint, at the inner or throat side
elbow, is not new. The novelty of appellants' device, then,
ave any, consists in the specific way the lapped joint is fastened
d, viz.: by the corrugations being pressed together at the in-
throat side of the elbow.

rugations, extending without break circumferentially around
bow at the outer curve, were not new. Such corrugations
r in the Lawrence elbow, patent No. 485,124; also in the sec-
eickmann elbow, patent No. 500,119. In each of these elbows
rrugations are pressed together at the inner or throat side of
bow. In the Kemp patent, however, after the corrugations
ade, the corrugated part of the pipe is pressed in the axial
ion of the pipe, where by the corrugations are brought close-
gether, and the lapped parts, along the joint, are secured to-
r. This is done before the bending takes places, so that when
ipe is finally bent, the compression on the inner side of the
is not changed, the elbow being obtained by spreading or dis-
g the corrugations on the outer side. It is not shown that
rocess is pursued in the making of the elbows of the prior art;
is on this specific method or process of making the elbow, that
ief claim of novelty is predicated.

s to be noted, however, that these elbows are intended to carry
oke; and that smoke, under draft, unlike gas or other sub-
es acting under pressure, will carry, without leakage, through
that is loosely jointed. There is no functional purpose, there-
n the closeness of the compression obtained. The functional
se aimed at is, not imperviousness, but strength.

eping this in mind, we cannot escape the conclusion that, ex-
ossibly the process, Kemp has disclosed nothing really useful
vas not known before. He lays no claim to a process patent;
loes appellee follow his process. The appellee's elbow is
factured by a machine that, instead of in one act compressing
rrugations axially, as Kemp does, crimps or corrugates the
, serially—corrugation upon corrugation—until the elbow is
leted. True the article, as an article, is perhaps nearly the
as Kemp's. The same kind of close contact of corrugations

is obtained. But Kemp has not obtained a patent on the process; nor does appellee employ the process; and Kemp has no patent on the mere closeness of the corrugations. So in any view that can be taken, Kemp has no right to prevent appellee from manufacturing and selling the article.

The decree of the Circuit Court will be

Affirmed.

PRESSED STEEL CAR CO. v. HANSEN.

(Circuit Court of Appeals, Third Circuit. April 27, 1905.)

No. 28.

1. SPECIFIC PERFORMANCE—PAROL CONTRACT—SUFFICIENCY OF PROOF.

To warrant a decree for the specific performance of a contract, such contract must be clearly and unequivocally proved, and its terms, as to subject-matter, consideration, and all other essentials, must be specific and unambiguous.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 56, 61, 113, 387–395.]

2. PATENTS—CONTRACT TO ASSIGN—SUFFICIENCY OF PROOF.

Findings that an express contract by defendant to assign to complainant, his employer, the patent rights in inventions made by him during his employment, was not proved, and that the facts shown were not such as to warrant the presumption that such a contract existed, *held* sustained by the evidence.

3. MASTER AND SERVANT—INVENTION BY EMPLOYÉ—RIGHT OF EMPLOYER TO PATENT.

In the absence of an express contract or agreement therefor, the relation of employer and employé, under whatever circumstances, at least short of a specific employment to make an invention, does not vest the employer with the entire property right in an invention of the employé, and to the patent monopoly thereof, or with anything more than the shop right or an irrevocable license to use the invention.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 71; vol. 38, Cent. Dig. Patents, § 125.]

Acheson, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 128 Fed. 444.

William C. Strawbridge and John R. Bennett, for appellant.

George B. Gordon and D. T. Watson, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. Suit was brought by the appellant, the complainant below, the Pressed Steel Car Company, against Hansen, the appellee, to compel the assignment of six applications for patents made by him when in appellant's employ as chief engineer. The complainant was engaged in the manufacture of steel cars. As summarized by the court below, the allegations upon which the complainant based its right to the relief sought are, in substance, set forth in its bill as follows: That Hansen was for several years previous to the complainant's incorporation employed by the

oen Manufacturing Company, its successor, the Schoen Pressed
el Company, and finally became chief engineer of the last-named
npany; that complainant succeeded to the business and good
l of the Schoen Pressed Steel Company, whereupon Hansen "en-
ed your orator's employ as its chief engineer, under an agree-
nt and understanding to devote his entire time, ability and skill
your orator's business and its advancement, and that all inven-
ns and improvements that he might make during the period of
employment, and all letters patent that might be obtained there-
should be the sole property of your orator"; that "it was a con-
on of his employment, as chief engineer, and in part considera-
n of the salary paid him as such, and his employment as such
plied, and was upon the express understanding and agreement by
n, that all designs, inventions and improvements that he might
ke or develop, while in your orator's employ, and all letters pat-
that might be obtained therefor, should become and be, the sole
l exclusive property of your orator, and that for all such designs,
entions and improvements, if found or regarded as patentable,
would, from time to time, as he made or developed such de-
ns, inventions or improvements, disclose the same to your ora-
's solicitor, and, through him, and at your orator's expense, make
necessary and proper applications for letters patent, and execute
necessary and proper papers to that end, and that he would,
m time to time, as such applications were executed and filed,
ewise execute and deliver to your orator, with such applications,
perly executed assignments, of all such applications, inventions
rein specified and letters patent that might be granted thereon
l therefor, with directions to the Commissioner of Patents to
ue all such letters patent to himself as assignor to your orator,
all his right, title and interest in and to all such letters patent,
ich should be the entire right, title and interest therein; that
h being the terms and conditions of the respondent's employ-
nt by your orator, and in full appreciation and consideration
refor, and of the inventions and improvements that he might
ke and letters patent that he might obtain therefor, he was paid
your orator a salary at the rate of $4,000 per year to January 1,
0; at the rate of $5,000 per year to September 1, 1900; at the
e of $6,000 per year to October 1, 1901; and at the rate of $10,-
per year down to January 1, 1902, when he left your orator's
ploy"; that thereafter and while performing his duty as chief
gineer, he made the inventions in question and made applications
patenting the same; that he subsequently left the employ of
nplainant and refused to assign the same.

The prayers of the bill are (1) that the respondent may be or-
ed and compelled to specifically convey and assign to the com-
inant, by proper assignments and instruments in writing, each
l every of the specified pending applications for letters patent
l the letters patent to be granted thereon, and (2) that respond-
may be restrained and enjoined, pendente lite and perpetually,
m conveying or assigning to any party or parties whomsoever,
er than the complainant, the said inventions or improvements

embodied in said six pending applications for letters patent, or the letters patent that may be granted or issued therefor or thereon, either in whole or in part, or any right, title or interest therein, thereto, or thereunder. The answer of the respondent and appellee generally and specifically denies that there was any contract, express or implied, to assign these patents, or that there was any equity in the complainant, by reason of the relations between the parties or of the facts in the case to demand such as assignment. Testimony was taken at great length by both parties, and in due course went to final hearing upon bill, answer, proofs and exhibits. The case, as stated by the court below, involved three inquiries: First, whether any express contract by Hansen to transfer the patents to the complainant was proved to have been made; second, whether the facts proven were such as to warrant a presumption that a contract existed; and third, whether a contract to transfer is to be implied in law from the relation between the parties.

There is no assertion of the existence of a written contract, but the complainant did assert and attempt to prove an oral contract by the respondent to assign the applications for the patents in question, or the patents themselves, to the complainant. As to the existence of such a contract, there was much conflicting testimony. On the one hand, the president of the complainant company testified to conversations with Hansen, which, if true, tended to show that there was a mutual understanding that these patents belonged to the complainant, and that upon proper demands therefor, they would be assigned. No specific agreement in definite terms, setting forth consideration and specific promise on the part of Hansen, was proved. The principal reliance on the part of complainant to establish such a contract as its president testified to, were facts and circumstances relating to the employment of Hansen as chief engineer, and his own admissions that he had charge of all the departments, so far as operations of the works (the mechanical end of the business) was concerned, and that it was within his duties "to improve or assist in improving the manufactured products of the company," as was also "the matter of devising, designing cars, or parts thereof." Hansen himself, in his testimony, absolutely denied that any such conversations as were testified to by the president of the company ever took place, and positively asserted that no contract of any kind existed between complainant and himself, by which he was to assign to complainant the patents in question. In this respect, he was fully supported by the testimony of W. T. Schoen, president of the appellant company down to 1901, as well as organizer and president of the predecessors to complainant company. The fact is much relied upon by the complainant, that in numerous other cases applications for patents made by appellant had been transferred to the company, as a matter of course, and, in fact, all patents up to the six here in question had been so transferred. Hansen explained this, by saying that he was very young when first employed; that he was grateful to both the present company and its predecessor, which first employed him, and that out of good feeling, and as a matter of routine, he continued to assign applica-

ns made by himself for patents to his employer; that as to the applications here demanded by complainant, they were made t before the termination of his employment by complainant, the entions were worked out at his own home, and not at complain-'s shops, and he then for the first time had occasion to assert ownership. There was much other testimony bearing upon the ie, which it is needless to recapitulate.

The bill being for the specific performance of a contract, such ntract must be clearly and unequivocally proved, as stated. As ved, its terms as to subject-matter, consideration and all other entials, must be explicit and unambiguous. The court below, er an extensive review of the testimony, has reached the conclu-n (1) that no express contract by Hansen, to transfer patents, been proved, and (2) that the facts proven are not such as to rrant the presumption that such a contract existed. These find-s of fact by the court below must receive the respect and con-eration to which such findings are always entitled in a review-court. They are prima facie conclusive, and nothing but a owing that the preponderance of evidence is clearly and unmis-ably against them, would justify this court in reversing them. er a careful reading of all the testimony in the record bearing on this question, we do not discover ground for such reversal.

The important question remains, whether, from the relation of parties, there resulted to the complainant, as a conclusion of , such an equitable title to the entire patent monopoly, as would ke enforceable a conveyance of the legal title. It should be rne in mind, that what the bill claims, is the whole and exclu-e title to these inventions, and the patents therefor, and the only ef prayed would, if granted, convey the entire property right l monopoly of these inventions to the complainant, stripping the endant of all right therein. It is not sought by complainant to es-lish a shop right, or irrevocable license, for the manufacture and e of the inventions covered by the patents, or any less interest n the whole and exclusive property right therein, and it is as to existence of a specific contract to convey such entire interest, t the court below found there was a failure of proof, direct or cumstantial. Notwithstanding, complainant contends that, in absence of express understanding or agreement, the relation of ployer and employé, as established by the facts of this case, did, a legal consequence, carry absolute ownership and title in the nopoly of these patents to the complainant company, to the ex-sion of all right of the defendant therein.

The concrete proposition of complainant's counsel on this point l best be stated in their own language:

"Our contention, under this proposition, based upon our eleventh and twelfth gnments of error, is that, as conclusion of law, the title to the applications letters patent for inventions made by Hansen while in the complainant's oloy as its chief engineer, at a salary of $10,000 per year, having charge ts engineering, mechanical and manufacturing departments, and with the nitted duties of improving or assisting to improve its manufactured prod-s and of devising and designing cars or parts thereof for its benefit, such entions being within the line of manufacture for which the complainant

company was organized and which it thereafter carried on, passed to the complainant, and that, under the circumstances, the obligation to assign arose from the relation of employé and employer. This proposition is predicated upon an admitted state of facts. Hansen testifies that as chief engineer of the complainant company he had charge of the engineering, mechanical and manufacturing departments of its business, and that the matter of devising and designing cars or parts thereof came within the work of the engineering department; that his duties as chief engineer included the devising and designing of cars and parts thereof, and the improving of and assisting to improve the manufactured products of the complainant company and for its benefit; that during the period of the making of the inventions in controversy, he was in receipt of a salary of $10,000 per year; that he voluntarily resigned the office of chief engineer and retired from the complainant's employ after he had made the inventions in controversy and placed them in the hands of the complainant's patent solicitor for the making of applications for letters patent, and after such applications had been prepared and returned to him for consideration and execution, preparatory to filing; and that throughout the entire period of his employment he did assign to the complainant company all applications for letters patent with the exception of the six in controversy. And to like effect is the testimony of the defendant's witness, Charles T. Schoen."

We do not think there is any justification for this contention in the facts disclosed by the record, or for the same contention in another form, viz., that defendant is estopped, by reason of the relation of the parties and his own conduct, to deny such alleged equitable title in complainant. Both must rest upon the same basis of fact and law. Whether the complainant would have been justified in claiming what is called a shop right or a right to a license, irrevocable or otherwise, in regard to Hansen's inventions, is not the question raised by its bill. The claim is for the whole and exclusive title, and the demand is for a legal assignment of the same. A claim and demand so drastic as this, has no basis in the facts disclosed in this record.

Complainant's counsel specially relies, for the support of his contention, upon certain dicta in the opinion of the Supreme Court, in the case of Gill v. United States, 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480. Before considering these, however, it will be necessary to advert to some prior decisions in the Supreme Court, which throw an important light upon the proposition now under discussion.

Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, 30 L. Ed. 369, was a case in which a bill in equity was filed by the employer against an employé, to compel the latter to convey to the plaintiffs the title to letters patent obtained by him for an invention made while he was in their employ. The complainants, the Hapgood Plow Company, and its trustees, Hapgood et al., claimed title to the patents in question, by assignment from Hapgood & Co., a dissolved Missouri corporation. We briefly summarize the allegations of the bill. The defendant's employment by complainant was that of general superintendent of a manufacturing department, whose duties, among other things, were to devise and get up such new devices, arrangements and improvements in the plows manufactured, as should adapt them to the market, and as should be needed from time to time to suit the wants of customers. The defendant had been employed, upon his representation to the complainant that he was a man of large experience in mechanical pursuits, and was familiar

the manufacturing of plows and agricultural implements; he had devised many valuable improvements in the plows factured for concerns by whom he had been employed; and he could and would give to any manufacturer who should e his services, the benefit of his experience, in devising and ng improvements in the plows manufactured. The bill fur- stated that, in consequence of these representations, and re- upon them, the complainant employed the defendant to de- his time and services to getting up, improving and perfecting s and other goods. Some time after his employment, his in- in the corporation complainant was increased, and it was at time agreed that defendant should be released from part of uties as superintendent, so as to devote his time and services vising improvements in and getting up and perfecting plows. ew of the expected value of his services in this direction, com- ant was induced to increase his salary. Under these circum- es, the defendant devised and constructed a plow which was satisfactory to the trade. The time in which he was engaged rfecting this plow was during the regular working hours in ctory. The men who did the manual labor on the new plow all employés of and paid by the complainant, and all the ma- s used in its construction were bought and paid for in the way. After the plow was completed, and had been accepted e president as satisfactory, the defendant arranged for the ng of plows after the model. During the time so spent, he drawing his regular salary; and all his expenses, as well as rice of the models, castings and other things obtained by him, paid by the complainant. The bill alleged that, during the the defendant remained in the employ of the complainant, he made any claim of property in any of the devices and im- ements made or suggested by him in the new plow, and never l or claimed that he was entitled to a patent on any of said ovements, and never, during the term of his employment, as- l any right to a patent in his own name for such improvements. his connection with the complainant had ceased, and after lainant had been for many months, with the knowledge of the dant, engaged in the manufacture of such plows, the defend- pplied for and obtained a patent on the improvements in the The bill alleges that after this patent was issued, he, for the time, claimed that he had and has an exclusive right to man- ure such parts of the plow as are covered by the patent, and hreatened to enforce his rights under the patent as against the lainant. The bill claims that, in devising and constructing low, the defendant was only performing his duty as an em- of the complainant, in carrying out his contract with it; he was doing only what he was hired and paid to do; that esult of his labors belonged to the complainant; and that he ound, in equity and good conscience, to make an assignment e patent to the complainant. The prayer of the bill is for a e, directing the defendant to make an assignment of the patent, such interest as he may have therein, to the Hapgood Plow

Company, assignee of Hapgood & Co., or to the trustees of Hapgood & Co., in trust for the Hapgood Plow Company, and that he be enjoined and restrained from maintaining any action at law or in equity, for any infringement of the patent by Hapgood & Co., or for the use by that corporation of any of the devices or improvements covered by the patent. In its opinion, the Supreme Court say:

"The decision of the Circuit Court (11 Biss. 184, 11 Fed. 422) was placed on the ground (1) that Hewitt was not expressly required, by his contract, to exercise his inventive faculties for the benefit of his employer, and there was nothing in the bill from which it could be fairly inferred that he was required or expected to do so; (2) that, whatever right the employer had to the invention by the terms of Hewitt's contract of employment, was a naked license to make and sell the patented improvement as a part of its business, which right, if it existed, was a mere personal one, and not transferable, and was extinguished with the dissolution of the corporation. We are of opinion that the views taken of the case by the Circuit Court were correct. There is nothing set forth in the bill, as to any agreement between the corporation and Hewitt, that the former was to have the title to his inventions or to any patent that he might obtain for them. The utmost that can be made out of the allegations is, that the corporation was to have a license or right to use the inventions in making plows. It is not averred that anything passed between the parties as to a patent. We are not referred to any case which sustains the view, that, on such facts as are alleged in the bill, the title to the invention or to a patent for it passed. In McClurg v. Kingsland, 1 How. 202, 11 L. Ed. 102, the facts were in some respects like those in the present case, but the decision only went to the point that the facts justified the presumption of a license to the employer to use the invention, as a defense by him to a suit for the infringement of the patent taken out by the employé. The Circuit Court cases referred to do not support the plaintiffs' suit. In Continental Windmill Co. v. Empire Windmill Co., 8 Blatchf. 295, Fed. Cas. No. 3,142, there was an agreement that the employé should receive $500 for any patentable improvement he might make. In Whiting v. Graves, 3 Ban. & A. 222, Fed. Cas. No. 17,577, it was held that an employment to invent machinery for use in a particular factory, would operate as a license to the employer to use the machinery invented, but would not confer on the employer any legal title to the invention or to a patent for it. In Wilkens v. Spafford, 3 Ban. & A. 274, Fed. Cas. No. 17,659, the contract was that the employer should have the exclusive benefit of the inventive faculties of the employé, and of such inventions as he should make during the term of service."

We have cited this case thus fully, because the facts, as stated in the bill, show a marked similarity to those of the case at bar. In both cases, it was contended that, by reason of the relation of employer and employé, and the facts bearing upon and in connection therewith, the defendants' inventions, and their patents therefor, belonged absolutely to the corporation, and that in consequence they were bound, in equity and good conscience, to make assignment of the same to the complainants.

It will be observed that in this case there was a demurrer to the bill, which of course admitted all the facts alleged and above summarized. The Circuit Court, and the Supreme Court in affirming the decree, sustained the demurrer, on the ground that no express agreement between the complainant and defendant was set out in the bill, by which the former was to have title to defendant's inventions, or to any patent he might obtain therefor. In this respect, therefore, the situation of the complainant was the same as is

of the complainant in the case at bar. In the latter, it is estab-
d by the finding of the court below that no express contract
esting the title of defendant's inventions in the complainant
s, and in the former, the demurrer to the bill was sustained
ie ground that it contained no sufficient allegation of such an
ss contract. There being no express contract in either case,
uld seem that on facts of substantially the same nature and
the same conclusion should follow. The decision in the Hap-
Case was, in effect, that the relation of employer and employé,
nnection with the facts of an undertaking by the latter to give
me and effort, as general manager, to the devising of improve-
s in the articles manufactured under his supervision, the subse-
t raising of his salary, the decreasing of his general duties of
rvision, in order that he might devote himself to the devising
ch improvements, that he was specially requested to devote
elf to the construction of an improved plow—the subject of
ontroversy—that the device in question was developed during
vorking hours, for which defendant was paid, that he had the
tance of other employés of complainant, and that all expenses
naterials and models were paid by complainant, was not such
the equitable title in such invention, and the patent therefor,
in the employer, or that the employé, under the circumstances,
ld be compelled, in equity and good conscience, to assign the
ute title and property in the same, to his employer.
e decisions of the Supreme and Circuit Courts in this case,
nend themselves the more strongly, that neither court has ig-
d what we may term the reasonable rights of the employer in
cases, but merely denied to him the right to take to himself
ntire property and monopoly of defendant's invention, in the
nce of express contract therefor. We think reason, as well as
ority of this decision, requires a similar conclusion in the case
r. We do not think that the complainant here, in the absence
press contract to that effect, from the mere relation of employer
employé, in connection with the facts and circumstances dis-
d by this record, is entitled, in equity and good conscience,
assignment from the defendant of his whole right, title and
erty in the inventions in question. If entitled to anything,
plainant is only entitled to a shop right or license that would
le it to use these inventions without paying a royalty therefor,
ht which does not strip defendant of his entire property right
e product of his own inventive faculty. It is by distinguish-
etween claims for mere shop rights or license, and claims for
ntire and exclusive property right in the inventions of the
oyé, that the cases cited are to be profitably read. This distinc-
has been observed in many cases, both federal and state. Mc-
g v. Kingsland, 1 How. 202, 11 L. Ed. 102; Dalzell v. Due-
Watch Case Mfg. Co., 149 U. S. 315, 13 Sup. Ct. 886, 37
d. 749; Lane & Bodley Co. v. Locke, 150 U. S. 193, 14 Sup. Ct.
7 L. Ed. 1049; Bensley v. N. W. Horsenail Co. (C. C.) 26 Fed.
Herman v. Herman (C. C.) 29 Fed. 92; Boston v. Allen, 91

Fed. 248, 33 C. C. A. 485; Joliet Mfg. Co. v. Dice, 105 Ill. 649; Fuller & Johnson Mfg. Co. v. Bartlett, 68 Wis. 73, 31 N. W. 747, 60 Am. Rep. 838.

The decision of the Supreme Court in the case of Dalzell v. Dueber Watch Case Co., supra, is especially applicable to the case at bar. The pertinent point in this decision is correctly stated in the following paragraph from the syllabus:

"A manufacturing corporation which has employed a skilled workman for a stated compensation, to take charge of its works, and to devote his time and services to devising and making improvements in articles there manufactured, is not entitled to a conveyance of patents obtained for invention made by him while so employed, in the absence of express agreement to that effect."

We think the case of Solomons v. United States, 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667, cited by the complainant, well illustrates the distinction which we have dwelt upon, between the claim by an employer to an entire property right in an invention of an employé and for a conveyance of a patent monopoly thereto, and the right to a user or irrevocable license resulting from the relation of employer and employé. Solomons was the assignee of one Clark, an employé of the government as Chief of the Bureau of Engraving and Printing. While acting as such chief, he was called into consultation with a subcommittee of the committee of ways and means of the House of Representatives, the Secretary of the Treasury, and Commissioner and Deputy Commissioner of Internal Revenue. As a result of these consultations, Clark was assigned the duty of devising a self-canceling revenue stamp. At these consultations, it was mutually understood that Clark was acting in his official capacity as Chief of the Bureau of Engraving and Printing. No bargain, agreement, contract or understanding was ever entered into or reached between the officers of the government and Clark, concerning the right of the government to use the invention, or concerning the remuneration, if any, which should be paid for it. Before the final adoption of the stamp by the Commissioner, Clark stated to him that the design was his own, but that he would make no charge to the government therefor, as he was on a salary by the government and had used the machinery and other property of the government in the perfection of the stamp. No express license to use the invention was ever given by Clark to the government, nor any notice prohibiting its use or intimating that he would demand a royalty. After the stamp had gone into use by the government, Clark obtained a patent for his invention, and asked for compensation from the government for the use thereof. To this demand no response was made. Afterwards, Solomons, as assignee of Clark, brought suit against the government in the Court of Claims, to recover compensation for the use of the stamp. Upon its findings of fact, as above stated, the court entered judgment in favor of the government, and from this judgment appeal was taken to the Supreme Court. Mr. Justice Brewer, delivering the opinion of the Supreme Court, said in part:

"The case presented by the foregoing facts is one not free from difficulties. The government has used the invention of Mr. Clark and has profited by such

was an invention of value. The claimant and appellant is the owner atent, and has never consented to its use by the government. From ts, standing alone, an obligation on the part of the government to rally arises. The government has no more power to appropriate a perty invested in a patent than it has to take his property invested state; nor does the mere fact that an inventor is at the time of his in the employ of the government transfer to it any title to, or in- it. An employé, performing all the duties assigned to him in his nt of service, may exercise his inventive faculties in any direction es, with the assurance that whatever invention he may thus con- perfect is his individual property. There is no difference between rnment and any other employer in this respect. But this general ubject to these limitations. If one is employed to devise or perfect ment, or a means for accomplishing a prescribed result, he cannot, cessfully accomplishing the work for which he was employed, plead eto as against his employer. That which he has been employed and ccomplish becomes, when accomplished, the property of his employer. rights as an individual he may have had in and to his inventive nd that which they are able to accomplish, he has sold in advance ployer. So, also, when one is in the employ of another in a certain ork, and devises an improved method or instrument for doing that d uses the property of his employer and the services of other em- develop and put in practicable form his invention, and explicitly the use by his employer of such invention, a jury, or a court trying , is warranted in finding that he has so far recognized the obliga- service flowing from his employment and the benefits resulting from f the property, and the assistance of the coemployés, of his employer, ve given to such employer an irrevocable license to use such inven-

s because Clark had "notified the government that he would o charge if it adopted his recommendation and used his and for the express reason that he was in the government and had used the government machinery in perfecting his that the Supreme Court decided that he was estopped from g compensation or royalty from the government for the his patent, and from denying an irrevocable license to the nent for the use of the same. Complainant's counsel spe- elied upon the following language of Mr. Justice Brewer, e quoted:

which he had been employed and paid to accomplish becomes, when shed, the property of his employer. Whatever rights as an individ- nay have had in and to his inventive powers, and that which they to accomplish, he has sold in advance to his employer."

ust seem very clear to one reading the whole of the above that the language of Mr. Justice Brewer, just quoted, must n in connection with what precedes and follows it. The ty" of the employer is his right to use the invention of his é; and what the employé "has sold in advance to his em- was the "irrevocable license to use such invention." This g becomes still more clear in the light of the question ac- ecided by the court, which was that the owner of the patent right to compensation for the use thereof against the gov- t. In this view, the government was the owner, for its own s, of the invention.

significant, too, that the case of McClurg v. Kingsland, 1 02, 11 L. Ed. 102, cited as in point and discussed at length

by the learned justice, was one in which suit was brought by an employé against the employer for the use of an invention made during his employment under circumstances not unlike those of the case at bar, and in which the court below was sustained in submitting to the jury to decide, whether the facts were such as would justify the presumption of a license or special privilege to the defendants to use the invention. In the Solomons Case, no question of the right of the employer to own or have a conveyance of the entire patent monopoly was raised or discussed in either the circuit or the supreme courts. The only right discussed was, as we have seen, the property right of the employer in the use of the invention in the line of its own business.

Granting the contention of complainant's counsel, however, that Mr. Justice Brewer, in the language above referred to, meant to assert that the employer acquired the entire property right in the invention and patent of the employé, it is manifest that such assertion must be confined to the case, as stated, where "one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result." This is the statement of an express contract between employer and employé. The employé, by acceptance of such employment at a stated compensation, has contracted to devise a specific thing for his employer. This may, under circumstances, be equivalent to an express agreement to assign the patent for his invention to his employer, but that this cannot be predicated of the general relation of employer and employé, is manifest from the numerous cases that have been cited, as well as from the Solomons Case itself, and in the case at bar there is a specific finding of fact by the court below, that no express contract is proven, and none is to be inferred from the facts in the case.

We now come to the case of Gill v. U. S., supra. This, also, like the Solomons Case, is one where the complainant was employed by the government, and claimed compensation or royalty from it for the use of an invention made by the employé while in the government's service. The complainant was a foreman machinist and draftsman in the Frankford arsenal. His engagement required him to perform manual labor and to exercise mechanical skill in the service of the government. There was no special contract for the exercise of his inventive genius in such service. While so employed, complainant invented certain improved machines, which were perfected and constructed at the arsenal by government employés under his supervision. The cost of preparing patterns and working drawings and constructing working machines, was borne exclusively by the government. The improvements in each case were suggested by complainant to the commanding officer, who, after due examination, authorized their construction. When so constructed, they were used by the government in the arsenal, with the claimant's knowledge and consent before he filed an application for the patent. Mr. Justice Brown, in delivering the opinion of the court, thus states the question before it:

"This case raises the question, which has been several times presented to this court, whether an employé, paid by salary or wages, who devises an im-

l method of doing his work, using the property or labor of his employer his invention into practical form, and assenting to the use of such imnents by his employer, may, by taking out a patent upon such invenecover a royalty or other compensation for such use."

e conclusion that complainant had no right as against the govent, was reached by an application of the doctrine of "estop- pais," the learned justice saying:

e ultimate fact to be proved is the estoppel, arising from the consent by the patentee to the use of his inventions by the government, without d for compensation. The most conclusive evidence of such consent is press agreement or license, such as appeared in the McAleer Case, 150 124, 14 Sup. Ct. 160, 37 L. Ed. 1130; but it may also be shown by parol ony, or by conduct on the part of the patentee proving acquiescence on rt in the use of his invention. The fact that he made use of the time ols of his employer, put at his service for the purpose, raises either an nce that the work was done for the benefit of such employer, or an ation of bad faith on the patentee's part in claiming the fruits of labor technically he had no right to enlist in his service. There is no doubt ver of the proposition laid down in the Solomons Case, that the mere fact person is in the employ of the government does not preclude him from g improvements in the machines with which he is connected, and obg patents therefor, as his individual property, and that in such case the ment would have no more right to seize upon and appropriate such ty, than any other proprietor would have. *On the other hand, it is y clear that, if the patentee be employed to invent or devise such imnents his patents obtained therefor belong to his employer, since in g such improvements he is merely doing what he was hired to do.* l, the Solomons Case might have been decided wholly upon that ground, ective of the question of estoppel, since the finding was that Clark had ssigned the duty of devising a stamp, and it was understood by everyhat the scheme would proceed upon the assumption that the best stamp he could devise would be adopted and made a part of the revised e. In these consultations it was understood that he was acting in his capacity as Chief of the Bureau of Engraving and Printing, but it was nderstood or intimated that the stamp he was to devise would be pator become his personal property. In fact, he was employed and paid the very thing which he did, viz., to devise an improved stamp, and been employed for that purpose, the fruits of his inventive skill be as much to his employer as would the fruits of his mechanical skill."

s upon the language we have italicized in this extract from the on of the court, that complainant principally relies for the supof his contention in the case before us. It is admitted by counnat the proposition here stated is obiter dictum, as no question e ownership of the patent was involved in the decision of the The estoppel applied to the complainant went no further to prevent his denying the right of his employer (the govern-) to use the patented machines, which, with his consent and escence, the government had at great expense constructed rected for its own use. No suggestion is made in the opinion e court, that the complainant had not, subject to this license to overnment, the ordinary property right in his invention and t, so that he might use it himself or permit others to use it such terms as he chose. Conceding the respect due to even um of the Supreme Court, we think the language of Mr. Justice n, in this passage, is properly confined to such a case as he ives the Solomons Case to be, where the patentee is employed

specifically to invent or devise the particular improvement in question. So viewed, an express contract to assign the patent may, as we have already said, well be inferred from the acceptance by the employé of the specific employment. This view is strengthened by the immediate application of the proposition to the facts of the Solomons Case, the learned justice saying that:

"Clark had been assigned the duty of devising a stamp. * * * In fact, he was employed and paid to do the very thing which he did, viz., to devise an improved stamp; and, having been employed for that purpose, the fruits of his inventive skill belonged as much to his employer as would the fruits of his mechanical skill."

That no such general proposition, as is contended for by complainant's counsel, was intended to be stated by the Supreme Court, is made still more clear by the language which immediately follows that above quoted:

"So, if the inventions of a patentee be made in the course of his employment, and he knowingly assents to the use of such inventions by his employer, he cannot claim compensation therefor, especially if his experiments have been conducted or his machines have been made at the expense of such employer."

The court then continues by quoting from the Solomons Case as "pertinent in this connection," the following:

"So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practical form his invention, and expressly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from the use of the property and the assistance of the coemployés of his employer, as to have given to such employer an irrevocable license to use such invention."

We thus come back to the real point decided in Gill v. United States, correctly stated in the syllabus, as follows:

"An employé, paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, cannot entitle himself, by taking out a patent for such invention, to recover a royalty or other compensation for such use. A person looking on and assenting to that which he has power to prevent is precluded from afterwards maintaining an action for damages."

We see nothing in the reasoning of the opinion by Mr. Justice Brown that establishes any other proposition than that above stated, or anything in the case that contravenes the doctrine laid down in Hapgood v. Hewitt, and other well considered cases of the federal and state courts hereinbefore cited. We have been referred to no case, nor have we been able to discover one in which, apart from express contract or agreement, and upon the mere general relation of employer and employé and of the facts and circumstances attending it, the employer has been vested with the entire property right in the invention and patent monopoly of the employé, or with anything other than a shop right, or irrevocable

nse, to use the patented invention. Such a right in the em-ver, the employé may be estopped to deny, by the fact of his ployment and his conduct in relation to the use of his inventions his employer, and to that extent and no further have the cases e.

he decree of the court below is affirmed.

CHESON, Circuit Judge (dissenting). Of course, the mere re-onship of employer and employé, in and of itself, does not pre-t the employé from making improvements in the machines or manufactures upon which he is engaged, and obtaining patents the same for his own benefit. But the evidence here discloses ch more than the mere relation of employer and employé be-en the plaintiff below (the appellant) and the defendant, Han-

The proofs demonstrate that Hansen was the plaintiff's chief ineer, and was paid by the plaintiff a salary at the rate of $6,000 ear prior to October, 1901, and afterwards at the rate of $10,000 ear, and that in the performance of his duties as chief engineer, while so engaged, he made the improvements here in question, applied for letters patent therefor. Now it indisputably ap-rs by positive and uncontradicted evidence that Hansen's duties hief engineer included the inventing of new steel cars and parts ars, and improvements relating to the manufacture of steel cars, the benefit of the plaintiff company. Hansen himself testified , as chief engineer, he had "charge of the engineering and me-nical departments of the company's business"; and, being asked e regarded it as one of his duties to "improve or assist in im-ving the manufactured products," answered, "That was part of work I looked after." In response to the question, "Did the ter of devising, designing cars, or parts thereof, come within work of the engineering department?" he answered, "Yes, sir; id." Charles T. Schoen, a witness for Hansen, speaking from sonal knowledge, testified as follows:

XQ. 90. As chief engineer, did Mr. Hansen do anything in the way of gning or devising new parts or structures to be used in the manufacture teel cars? A. Yes. XQ. 91. Was that part of his duties? A. Yes, sir. 92. And he did frequently devise and design new parts for cars while he chief engineer? Is that correct? A. Yes. XQ. 93. Did he do that for benefit of the Pressed Steel Car Company, or for competitors of that com-? A. He did it for the Pressed Steel Car Company."

he proofs, I think, bring this case squarely within the just prin-e enunciated by the Supreme Court in three recent cases—that, ere a person is employed and paid to devise improvements, his entions and patents obtained therefor belong to his employer.

he first of these cases is Solomons v. United States, 137 U. S. 346, 11 Sup. Ct. 88, 89, 34 L. Ed. 667, where the Court, speak-by Mr. Justice Brewer, said:

But this general rule is subject to these limitations: If one is employed evise or perfect an instrument or a means for accomplishing a prescribed lt, he cannot, after successfully accomplishing the work for which he was loyed, plead title thereto as against his employer. That which he has

been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers and that which they are able to accomplish, he has sold in advance to his employer."

The second case is McAleer v. United States, 150 U. S. 424, 430, 14 Sup. Ct. 160, 37 L. Ed. 1130, where the court, speaking by Chief Justice Fuller, cited as authoritative the above-quoted paragraph from the opinion in Solomons v. United States.

And the third case is Gill v. United States, 160 U. S. 426, 435, 16 Sup. Ct. 322, 326, 40 L. Ed. 480, where the court, speaking by Mr. Justice Brown, said:

"There is no doubt whatever of the proposition laid down in Solomons' Case—that the mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor, as his individual property, and that in such case the government would have no more right to seize upon and appropriate such property than any other proprietor would have. On the other hand, it is equally clear that, if the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do."

Upon the proofs it is manifest that, in making the inventions which are the subject of the bill of complaint, Hansen was doing merely what he was hired and paid by the plaintiff to do. And as the court said of Gill, so may it be said of Hansen, "The fruits of his inventive labor belonged as much to his employer as would the fruits of his mechanical skill."

It is a most significant fact that Hansen assigned to the plaintiff all his previous applications for letters patent for improvements such as those here in question which he had made while acting as chief engineer of the plaintiff. He thus repeatedly recognized that his inventions relating to steel cars devised during the course of his employment with the plaintiff as its chief engineer rightfully belonged to his employer.

I would reverse the decree of the court below, and remand the cause, with directions to enter a decree in favor of the plaintiff.

HAMILTON v. DIAMOND DRILL & MACHINE CO.

(Circuit Court of Appeals, Third Circuit. April 27, 1905.)

No. 32.

PATENTS—VIOLATION OF INJUNCTION—CONTEMPT.

Evidence *held* to sustain a decree adjudging a person guilty of contempt for aiding others who had been enjoined from infringement of a patent in evading the injunction by taking over and conducting the business in his name with actual knowledge of the injunction.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion showing the facts, see 130 Fed. 893.

orace Pettit, for plaintiff in error.
m. C. Strawbridge, for defendant in error.
efore ACHESON, DALLAS, and GRAY, Circuit Judges.

ER CURIAM. The ground upon which the Circuit Court ad-ed Hamilton, the plaintiff in error, guilty of contempt in violat-the injunction decree of the court, was that in the matters in bedience of the injunction complained of he acted as the agent he enjoined defendants, or in their behalf. The learned judge w found that Hamilton actually knew of the injunction early 903, although he was not served with a copy of the writ until 16, 1904; that he had been acting throughout in collusion with enjoined defendants to help them evade the injunction; that, e he may not have been their paid agent, he knowingly did acts hich they profited, and that he gave the defendants his deliber-id. On behalf of the plaintiff in error it is urged that the find-were not supported by the evidence, but we cannot adopt view. We think there was evidence to support the court's lusions, and upon those findings of fact there was no error ljudging Hamilton guilty of contempt and imposing upon him e of $100, with costs.
he decree of the Circuit Court is affirmed.

VAN EPPS v. UNITED BOX BOARD & PAPER CO.

(Circuit Court, N. D. New York. May 18, 1905.)

No. 7,026.

NTS—INFRINGEMENT—PULP-SCREENING MACHINE.
The Victory and Remington patent, No. 417,451, for a pulp-screening machine, was not anticipated by anything in the prior art, and discloses patentable invention. Also *held* infringed.

Equity. Suit for infringement of letters patent No. 417,451 for lp-screening machine, granted to Edmund Victory and Charles emington December 17, 1889. On final hearing.

sley & Love (E. H. Risley, of counsel), for complainant.
sgood & Davis (Francis T. Chambers and John C. Pennie, of sel), for defendant.

AY, District Judge. This is a suit in equity for an injunction an accounting, based on the alleged infringement by defendant hat is known as the Victory letters patent, No. 417,451, dated ember 17, 1889. The defenses set up and urged are "noninge-ement, lack of patentable subject-matter," and "anticipation by patents and publications, as set up in the answer." This t has had this patent and its validity under consideration on former occasions (see Van Epps v. International Paper Co. C.] 124 Fed. 542), and by reason of the insistence of the defend-

ant here and of the large number of pending cases has felt bound to give a most careful and deliberate consideration of the new evidence and of all the questions presented.

The claims of the patent (title not being in dispute) alleged to be infringed are 1 and 2, reading as follows:

"(1) In a pulp-screening machine, the combination of the series of separate screens, 18, the series of independent bellows-plates, 5, having the flexible bellows-joints, 6, at their sides and ends, the drive-shaft, 7, having the eccentrics 8, 9, alternately arranged upon it, and the connecting-frames, 10, substantially as set forth.

"(2) The combination, in a pulp-screening machine, of the body-frame 2, having the parallel cross-bars, 3, the series of independent reciprocating bellows-plates, 5, having the flexible bellows-joint, 6, at their sides and ends, the flexible packing-strips, 13 and 14, extending around the ends and sides of each bellows, and the top, 15, having the series of parallel cross-bars, 17, and the screen-plates, 18, substantially as set forth."

It would not be profitable to give here in detail the contention of the respective parties as to the proper construction of these claims. The machine is for the screening of wood pulp for paper-making—an art, if it may be so called, at the date of the Victory patent in its infancy; not in age, but as compared to its present development. This pulp mixed unevenly with a very large quantity of water when discharged upon is to be run through the screen plates of the machine, and when thus screened is to run into some proper receptacle. It is evident that the wood fiber in the fluid will speedily clog the screen unless some action of the screen, or of some thing or substance coming in contact with the screen, so acts as to keep these fibers from collecting upon the upper side of the screen. This may be done in various ways and by various agencies, but none were ever suggested that seemed practicable and efficient. Resort was had to jarring and shaking the screen plates as we would shake and vibrate the screens in an old-fashioned fanning mill, but this was not practicable. Various machines for doing the work were devised and put in operation, some in this country and some in England and Scotland. Among these we may mention the five closest references which in the opinion of defendant's chief expert negative in whole or in part the alleged novelty embodied in claims 1 and 2 of the Victory patent, viz., Richardson and Glenny British patent, No. 4,669 of 1880; the Engineer No. 1, built under the Miller British patent No. 3,620 of 1880; the Kron United States patent No. 315,420 of 1885; the Russell & Cragin United States patent No. 359,943 of 1889; and the Rogers British patent No. 4,073 of 1887. It will be noted that all of these, except the Russell and Cragin, long antedate the Victory. Hence the Patent Office at Washington must have had them in view when it allowed the Victory. It saw differences and patentable invention in what it did patent, and it certainly patented what is fairly embraced in claims 1 and 2 and the specifications and drawings accompanying. That these claims must be interpreted in view of the original claims made and filed and rejected or amended is conceded. The complainant cannot claim broadly anything that was rejected by the Patent Office, un-

finally allowed in the same language. But as I read the original
ns and those finally allowed in the Victory patent, I find noth-
inconsistent with the view that the Victory embraces (claim 1)
following elements in combination: (1) A pulp-screening ma-
(2) a series of separate screens, the series of independent bel-
-plates having flexible bellows joints at their sides and ends,
ve shaft having the eccentrics alternately arranged upon it, and
ecting frames. Also (claim 2), in combination in a pulp
ening machine, the body frame (shown in the drawings and spe-
ations) having parallel crossbars, the series of independent re-
ocating bellows-plates having the flexible bellows joints at
r sides and ends, the flexible packing strips extending around the
s and sides of each bellows, and a series of parallel crossbars
he top, and also screen plates, all "substantially as set forth."
se connecting frames are shown in the drawings, and numbered,
the claim refers to them as "the connecting frames 10," and so
ther elements mentioned they refer to the figures in the draw-
, and the claim ends with these words, "substantially as set
n." I do not understand that the complainant is confined to the
s of construction shown in the drawings. If that be true, then
tentee must be particular to have drawings of every conceivable
n of structure, or be particular to mention that the form of con-
ction shown is but one of many. This would only lead to con-
on, and in the end to injustice.

Van Epps v. International Paper Company (C. C.) 124 Fed.
which the defendant concedes was correctly decided on the
ence before the court, and in fact says on that evidence could
have been decided otherwise, this court said, in describing the
ory patent: "All the elements form a new and useful com-
tion to produce a new result, where each compartment is sealed
s to obtain alternately an upward pressure of air and a partial
uum in each compartment." Much time and expense and many
es of record and of argument have been expended in an attempt
atisfy this court that pneumatic action has nothing to do with
clearing of the screen plates, or the forcing or drawing of the
ure to be screened through the plates; that this is done wholly
ydraulic action alone. The case, in the opinion of this court,
s not turn upon the correctness or incorrectness of this proposi-
. There must be air-tight and fluid-tight compartments, one
more, below the screen plates, in which the "bellows plates"
rate, excepting, of course, the place through which the screened
erial flows. If not, then the vertical or up and down movement
he "bellows plates" would effect nothing. But if these com-
ments connect in a way the one with another, and there is a bel-
s plate operating in each, the mode of action and effect and the
ciple is the same, as we are thus far only increasing the size
he compartment. But if we would secure the good effect of
ng smaller screen plates and compartments corresponding, and
ral of them (at least more than one), so as to continue the
ening operation when there is, for any reason, but a limited

flow of pulp upon the top of the plates, a supply not sufficient to cover a large plate, we must have the compartments below the plates, each, when in operation, sealed in some manner. The Victory patent has sealed each in the manner described in the specifications. It is said that by having partitions reaching to near the bottom they may then communicate with each other below such partitions, and work the same. This is true when the compartments are so deeply filled with material that the openings from the one to the other are closed, sealed, by the fluid contained therein. This is a difference of construction, not of principle, or in mode of operation or results. In such case the compartments are so separately sealed that, if the plate above the one is covered with pulp to be screened, which we may call "stuff," and the other is not, the one covered will continue to operate, while the other will not. The inrush of air through the apertures of the one not covered cannot affect the other, as the air cannot reach this other because of the fluid at the bottom which closes or seals the connection. When nothing but air covers the screen plates the "up and down" motion of the bellows plates effects nothing except to drive the air out of the compartment through the slits or openings in the plates. The up motion expels, the down motion permits a return. The moment "stuff" to be screened is run upon the plates, it will seek the lower level, and pass through the openings into the compartment below; but soon the wood fiber will clog the plates, and then the "stuff" will cease to run through because the openings are obstructed. If now, by raising the bellows plates in the compartment, we force the air out through the slits or openings in the screen plates and into the unscreened pulp on the upper side thereof the obstructions will be displaced and the mere pressure of air upon the "stuff" on the screen plates will press it through into the compartments, or the "stuff" will seek and find the lower level. As the compartments below the screen plates fill with screened material, and before, and even after, the outflow through the flow boxes commences, and the bellows plates rise and fall, the screened material coming through into the compartments will be churned, so to speak, into a foaming, boiling mass containing or made up of air, water, and wood fiber, and this boiling, foaming mass will rise to the screen plates, and some of it will be forced through upwardly with each up stroke or movement and drawn down by suction, or pressed down by the atmospheric pressure, or both, with each down stroke or movement; but as there is in the Victory construction a small space between the upper side of the bellows plates and the screen plates, and very soon the screened material commences its outflow, the material from above the plates is constantly coming through rapidly in quite large quantities as compared with that pressed back in the operation of clearing the plates. Air forced into water, beyond the normal quantity found therein at all times, will release itself, rise to the surface, and in so doing will cause the water to boil and bubble. Pouring water from one receptacle into another carries air into and mixes it with the lower body, and so in the operation of

Victory machine there is no doubt that air is constantly present
e compartments below the screen plates when in operation.
court can see the boiling agitated mass in the compartments
w the plates, and how quickly it settles to a level a little dis-
e below the screen plates the moment the bellows plates cease
ove—that is, the moment the cause of the agitation is removed
eases to act—even when the outflow of screened material is
sted at the same moment the action of the bellows plates ceases.
truth is:

e try to explain all things by the action of wind and wave. Yet in
ir there is a force which is not the wind, and in the waters a force
h is not the wave. That force, both in the air and in the water, is
ium. Air and water are two nearly identical liquid masses entering
the composition of each other by condensation and dilation, so that to
he is to drink. Effluvium alone is fluid. The wind and the wave are
impulses; effluvium is a current. The wind is visible in clouds; the
is visible in foam; effluvium is invisible. From time to time, however,
ys, 'I am here.' Its 'I am here' is a clap of thunder."

When the bellows plates move downward, the tendency is to cre-
a vacuum, but no vacuum is created because of the immediate
nrush or inrush of material from above. That this brings air
greater quantities than is ordinarily mixed with water cannot be
cessfully questioned. This court is satisfied that no pulp of any
ount would be screened in one of these machines if so construct-
hat the bellows plates rise and fall in a mass of screened material
ng the compartments to and necessarily above the screening
tes.

t is contended that the Victory patent is but a following of the
or art and contains nothing new or patentable in view of that art.
th that contention this court cannot agree. In Van Epps v. In-
national Paper Co., supra, this court considered the Kron patent,
. 315,420, of 1885; two British patents—Miller, No. 3,620 of
80, and Rogers, No. 4,073 of 1887; and also had before it and
nsidered the Richardson and Glenny British patent No. 4,669 of
80, and Russell and Cragin United States patent No. 359,943 of
89. The two last may not have been in evidence, but they were
ed on the final hearing. It was not, however, seriously claimed
at these, or several others in evidence showed anticipation of the
ims as finally allowed by the Patent Office. Claims 1 to 4 of
e original application read as follows:

"(1) In a paper-screening machine, the combination, with a series of screen
tes, of a series of independent bellows working beneath said screens;
bstantially as set forth.
"(2) In a paper-screening machine, the combination, with a series of screen
ates, of a series of alternately reciprocating bellows; substantially as set
rth.
"(3) The combination, with the series of screen plates, of the independent
llows, the drive shaft having the series of eccentrics alternately arranged
on it and the connecting frames; substantially as set forth.
"(4) The combination of the body frame having the cross-bars, the recipro-
ting bellows plates having the bellows joints, the packing around each
llows, and the top having the crossbars and the screen plates; substantially
s set forth."

Comparing these with the claims of the patent allowed, already set out, and we find the combinations are different. It is not contended that all the elements of the Victory patent were new, but that the combination was new, and produced a new and useful result; that no such combination of these elements had been made before, and that the results—a vast improvement in the mode of screening and amount of work accomplished—were what had been contended for by many, but not before attained. This court agrees with this contention. That defendant infringes is hardly questioned. Indeed, while it does not copy details, it has taken the gist of the Victory patent and the whole of it. If Victory is not new and useful, it was not worthy of being copied, followed, infringed. It is some evidence of patentable invention in the Victory that it, and not the others, claimed to have anticipated it, has been followed and copied since.

The Victory patent in question is valid, and shows patentable invention and subject-matter; was not anticipated by prior patents or publications; and, fairly construed in view of the action of the Patent Office, has been infringed by the defendant.

A decree accordingly and for an accounting will be entered.

CENTRAL LIGHTING CO. v. NORTHERN LIGHT CO. et al.

(Circuit Court, E. D. New York. May 2, 1905.)

PATENTS—INFRINGEMENT—GAS BURNERS.

The Denayrouze patent, No. 673,705, for an improvement in Bunsen burners for incandescent gas lights, which consists substantially in surmounting the tube of such burner with a mixing-chamber having a height approximately equal to the height that would be assumed by the dark inner core of a flame issuing from said tube, and expanding to a diameter equal to the greatest diameter of such flame, and closing the top of the chamber with a gauze screen, an ordinary mantle being placed above the chamber, must be limited to a structure having a chamber of a conoid shape, as described in the original specification and in prior foreign patents embodying the invention in which the shape is explicitly claimed, and is not infringed by the use of a cylindrical chamber; nor are the claims which include as an element a chimney substantially inclosed at its bottom to prevent a material direct access of air infringed by a burner having a chimney mounted on a gallery perforated with a large number of holes for the admission of air.

In Equity.

Briesen & Knauth (Antonio Knauth, of counsel), for complainant.

Joseph L. Levy (O. Ellery Edwards, Jr., of counsel), for defendants.

THOMAS, District Judge. The bill is filed to enjoin the infringement of letters patent No. 673,705, issued to Louis Denayrouze, of France, May 7, 1901, upon an application filed July 8, 1897. The patent relates to improvements in Bunsen burners for incan-

t gas lights. The letters state that the object of the patent obtain, by the patentee's improvements in gas burners with ory mantles, such as the Welsbach mantles, a more brilliant vith a smaller consumption of gas, and that the result is ef- by supplying to the mantle an intimate mixture of gas and pared by novel means.

diagrams accompanying the letters are as follows:

FIG. 1.



FIG. 2.

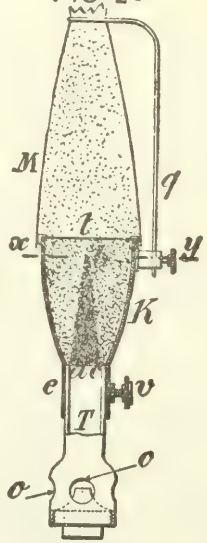


FIG. 3.

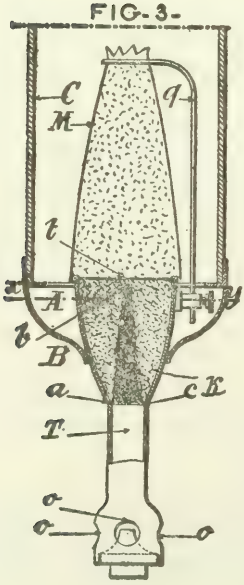
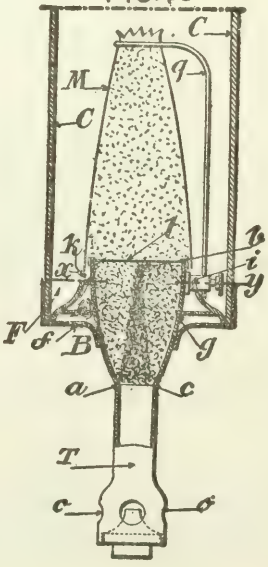
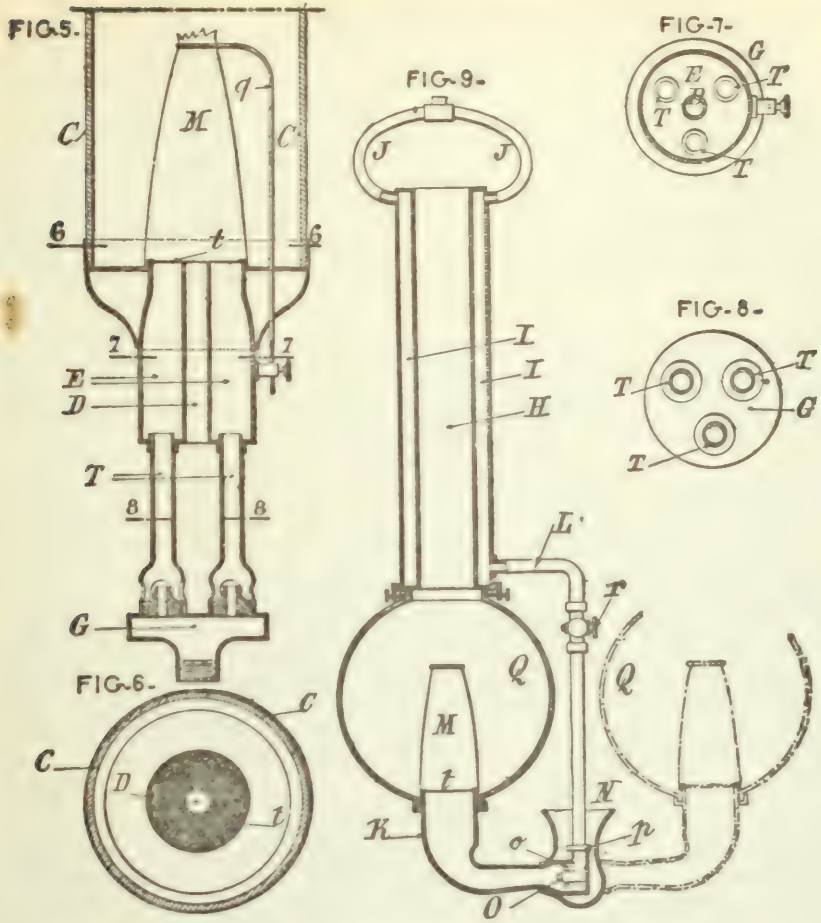


FIG. 4.





The specification states:

"My invention is based upon a discovery which I have made resulting from a study of the flames of Bunsen burners. Referring to Fig. 1, which shows an ordinary Bunsen burner and the flame issuing from the tube, T, thereof, it is seen that this flame expands toward the middle of its height and terminates in a point at its top. In the center of the body of the flame is a relatively dark bluish-green conical core, a b c, having for its base substantially the opening of the tube, T, and varying in height with the length of the tube, and approximately of the same length as the tube. Around the dark core is a brighter zone, a d d c, confined by a translucent surface of rotation of a conoid form, its length depending on the length of the blue core. The dark core, a b c results from an incomplete mixture of the gas and the air which it draws with it, and this mixture is incomplete from the base of the flame to the level of a plane, x y, at about the top of the dark core. The mixture of gas and air becomes more and more intimate as it rises from the base of the flame to the level, x y. I have found that if the mixture is not permitted to burn until reaching this level, x y, where it becomes complete, and if only the portion above this plane acts on the incandescent mantle, the illuminating power of the mantle, with a given consumption of gas, is

d from three to four times. To attain this remarkable result in ruction of a practical incandescent burner, I inclose the portion of the flame in an envelope, forming a chamber, which I will call ng chamber,' which chamber has a height equal, or approximately t of the dark core, a b c, and which expands from the diameter of the Bunsen tube, T, to a cylindrical diameter equal, approximately, l diameter of the flame shown in Fig. 1, and I prevent any ignition ses while flowing through this chamber by covering over the top ith a screen of gauze of sufficiently fine mesh. Thus the flame is the portion above the level, x y, and has no dark or nonluminous sponding to that shown in Fig. 1, with the result that the heating he flame thus restricted is so augmented and concentrated upon the hich incloses this flame that its illuminating effect is multiplied or four times that which is ordinarily obtained from the same f gas.

shows one mode of applying my invention in connection with an in- t burner, T being, as before, the induction tube or injector of an Bunsen burner, and K being the mixing-chamber, t being the gauze sing its top, and M designating the Welsbach mantle. The mixing- preferably has a contour corresponding to that of the lower part, of the flame in Fig. 1, or of gradually increasing area of cross-sec- its bottom upward; but this is not essential, as it may be given eal form. Its cylindrical diameter at top should, however, at least greatest diameter of the flame in Fig. 1. It thus has a height at al to or approximating that of the dark core, a b c, of such flame, r indicated in Fig. 2, where, by way of illustration, this core is d from Fig. 1, it being, however, understood that, in fact, there ne or ignition within the chamber, K, but that the dark core shows r quantity and position of the unmixed gases, gradually tapering as the gases rise and become more intimately mixed, attaining com- geneousness at the apex of the core, and that the flame is confined ace above the gauze, t, and within or against the mantle, M. The ay be suspended in any ordinary manner—as, for example, by a stened by a set-screw to the side of the chamber, K."

pecification further describes means for decreasing or in- the space in the mixing-chamber, and states:

ube, T, and chamber, K, may be permanently connected by soldering ming them in one piece; but where the burner is to be used with r varying pressures it is desirable that the chamber should be ad- n height, and to this end I form it with a socket or neck, e, fitting tube, T, and adjustably fastened thereon by a set-screw, v, so that e chamber may be set higher or lower to accommodate it to dif- essures. When the whole device acts with a chimney, as herein ed, the admission of air and its velocity may be varied by raising ng the chamber, K, which permits the point of the core of unmixed kept a little beneath the gauze, t, and the base of the mantle."

pecification then states:

urner, in which the gas and air issue in a condition of perfect will burn without a chimney. In most cases, however, I prefer to mney, in which case I arrange it so that its base is closed, or sub- so, in order that the suction due to the chimney shall act mainly air entering through the holes, o o, of the Bunsen burner, so as to nprove the mixture of gas and air and increase the velocity thereof he mantle. Fig. 3 shows one suitable means for applying such a or globe. The chimney, C, is placed upon a closed socket, B, con- a practically airtight manner to the chamber, K, so that little or n enter the chimney except through the Bunsen burner. Thus the wn in forcibly through the holes, o, and the mixture effected in the K, is more perfect, while the velocity of the issuing gases is in-

"The application of aspiration of air in the Bunsen apparatus by a chimney, as in Fig. 3, causes a rapid heating of the socket, B, by conduction, so that it may be used as a regenerator, as shown in Fig. 4. The socket is there shown provided with a regenerating chamber, F, and a partition, h. The bottom of the socket, B, has oblique holes, f, which direct the external air against the chamber, K. The air passes along the outer surface of the chamber, the partition, h, still following the chamber, so that the air passes out at i to the whole circumference of the lower end of the mantle, M. This heated air completes the combustion of the particles of gas traversing the meshes of the mantle incompletely burned, and thus the incandescence of the mantle is intensified."

The application as originally filed makes no reference to foreign patents, except that in the oath it is stated:

"That the said invention has been patented in France, No. 259,985, of 4th of September, 1896; in Belgium, No. 123,753, of 20th of September, 1896; in Austria, No. 46-4466, of 4th of November, 1896; in Italy, No. 42,772, of 4th of October, 1896; and that no patent on said invention has been granted to him, or to any other person or persons with his knowledge or consent, in any country other than those herein above named."

Reference may be had to the French patent for the purpose of discovering the scope of the patent in suit. This patent, after stating the object to be attained and the beneficial result, states:

"As a result of this observation, I devised, as shown in figure 2, the surrounding of the outer surface, the zone, AB, XY, by a solid (imperforate) envelope or chamber, K, following practically the shape of the flame, and having, as will be understood, its upper edge at the level of the apex, Z, of the dark cone in the plane, XY. On top of this sort of preparatory chamber, I place a Welsbach burner, M (by burner the patentee means mantle) or one of this type. * * *

"In order to obtain the proper direction, care should be taken that the chamber, K, while being substantially of the external shape of the ovoid (flame-body) below the plane, XY, should be slightly contracted in volume at its base, and spread gradually and become cylindrical toward its upper edge, in the neighborhood of XY.

"In this manner the good mixture, leaving the chamber at the level, XY, and coming from a core of elastic gases, the streams of which are slightly deviated toward a vertical direction by means of this little correction of the form which they would have taken of themselves, then conforms extremely well to the well-known shape of the mantles on the market."

The claims of the French patent are as follows:

"(1) The combination with an ordinary Bunsen burner of an additional chamber made of metal or other resistant material, the essential and distinctive double characteristic of which is: First, that it should extend in height from the orifice of the tube to at least the level of the interior blue cone of the flame, which the Bunsen burner would give if properly adjusted and burning free; and, second, that it should follow the ovoid form of the flame, contracting the same, up to the said level, the orifice of said chamber being provided with a metallic netting at the place where the mantle fits the same.

"(2) The adaptation of this additional chamber to the tube of a Bunsen burner to form a part thereof, or the adjustment of this chamber by means of a sleeve, so as to enable its position to be regulated so that its extremity will always be on the level of or slightly above the interior blue cone of the flame, at which level the conditions of thorough mixture, of pressure, and of velocity are best fulfilled."

The bill charges the infringement of each of the 15 claims of the patent in suit, but the brief waives infringement of all claims except

8, 9. For the present the discussion is confined to claim 1, as follows:

combination with a Bunsen burner of a mixing-chamber surmount-
be thereof, having a height approximately equal to the height that
assumed by the dark core of a flame issuing from said tube, and
to a diameter equal to the greatest diameter of such flame, and
reen covering the top of said chamber, said chamber being free
obstruction to the vertical flow of the gases, whereby the flame is
the space above said gauze and the flame is solid or devoid of a
"

bvious that the patentee, in fact, found that the mixing-
should be large enough to envelop the core and the flame
ing it, and, lest it should too much exceed such core
, he directed that the mixing-chamber should have approx-
he height of the core; and, lest it should too much exceed
e in diameter, he directed that it should have a diameter
the diameter of the flame. The French patent, and the
on as originally filed in the United States, show that the
intended to make the shape of the mixing-chamber a part
vention. The French patent states that the chamber, K,
ow "practically the shape of the flame"; that it shall have
r edge at the level of the apex, Z, of the dark core in the
Y"; that "care should be taken that the chamber, K, while
bstantially of the external shape of the ovoid (flame-body)
e plane, XY, should be slightly contracted in volume at its
l spread gradually and become cylindrical towards its upper
the neighborhood of XY." The claim states as among the
characteristics:

that it [the additional chamber] should extend in height from the
the tube to at least the level of the interior blue cone of the flame;"

"that it should follow the ovoid form of the flame, contracting the
to the said level."

application first filed in the United States the shape of the
hamber is carefully preserved, both in the description and
The file wrapper shows that all the claims were rejected,
after some further proceeding the application was amend-
rasing the entire specification and claims, except the sig-
and signing clause, and that in the substituted specifica-
claims no change pertinent to the question of dimensions
n is noticed, except the statement in the specification that
ng-chamber may have a cylindrical form is made in sub-
y the language now appearing in the specification as above
The date of the amendment does not appear, but the letter
ttorney accompanying it is dated December 3, 1898, and
rtinent papers are dated in September. Hence it is con-
hat it was not until the fall of 1898 that the patentee made
ific claim to a mixing-chamber of a cylindrical form.

w of this history, it is concluded (1) that the patentee in
nal application did not contemplate a cylindrical chamber,
the defendants use, but rather a chamber substantially as
d therein; (2) that the conception of a cylindrical chamber

was suggested by the patentee in the fall of 1898. What effect does this conclusion have upon claim 1? It shows that the patentee filed an application for a mixing-chamber of a prescribed shape; that in the shape the invention in part resided; and that he asked to obtain a patent coincident in this respect with the French patent. The patentee must be charged with unduly broadening the invention in the Patent Office, or claim 1 must be confined to a chamber of the shape specifically described. The last alternative is consonant with the language, spirit, and description of the French patent and of the United States application as originally filed. It seems illogical and unjust to hold that the patentee may in specific language claim for a mixing-chamber of designated contour, and thereupon contend that such shape was not an essential of his patent, in order to accuse of infringement one using a cylindrical mixing-tube, and base such accusation upon an amendment to the specification made over a year after the application was filed, and in antagonism both to the original application and the foreign patent, which it is alleged to embody. And then, too, the evidence tends to show that the defendant Alton had, before the time of the amendment, devised a cylindrical sliding mixing-chamber, in general accordance with that now alleged to be an infringement. But without passing upon Alton's contention, the facts presented enforce the conclusion that the first claim is limited to the shape described, and that the defendants by using a cylindrical mixing-chamber do not infringe it. Greene v. Buckley (C. C. A.) 135 Fed. 531. The second claim differs from the first in the provision for a mantle, and as to that the same conclusion is reached. The third claim differs from the first in the provision for a "chamber adjustably attached to said tube so as to be adjustable vertically thereon." If the conclusion reached as to the first claim is correct, the third claim is not infringed. The complainant's brief waives infringement of the remaining claims, except 7, 8, and 9. The ninth claim falls under the same conclusion, and is also subject to the discussion of claims 7 and 8, which may now be had.

Claim 7 provides for (1) a Bunsen burner having a mixing-chamber, (2) a mantle, (3) a chimney inclosing said mantle, substantially closed at its bottom to prevent any material direct access of air, and to substantially confine the entering air to that which passes through the Bunsen burner, and of relatively large diameter to form an expansion-chamber, adapted to permit the burning gases to expand laterally through the mantle, and continued upward to form a draft-tube of reduced diameter adapted to cause a strong suction acting to draw the gaseous products from said expansion-chamber, and to draw a mixture of air and gas through the Bunsen burner.

Claim 8 provides for (1) a Bunsen burner, (2) a mixing-chamber, (3) a mantle, (4) a chimney of relatively large diameter inclosing said mantle, having an elongated draft-tube of reduced diameter forming an upward continuation of said chimney, said chimney being proportioned relatively to the mantle to afford an extended free space above the mantle and between it and the base of said

pe, and to form an expansion-chamber adapted to permit ing gases to expand laterally through the mantle, and sub- y closed at its bottom to prevent any material direct access ch as to impair such lateral expansion, and to substantially the entering air to that which passes through the Bunsen

understood that this claim is practically the same as claim t that it emphasizes the expansion-chamber relatively to tle.

9 is understood to be like claim 8, except that it provides ixing-chamber "of a height approximately equal to the hat would be assumed by the dark core of a flame issuing h burner, and expanding to a diameter approximately equal reatest diameter of said flame, with a gauze screen covering of said chamber."

efendants' burner shows a chimney inclosing the mantle, stantially closed at its bottom to prevent any material di- ess of air and to substantially confine the entering air to ich passes through the Bunsen burner," but shows in the that supports the globe some 51 holes of approximately n inch in diameter. The combined area of these holes con- a large opening into the gallery, and it is not understood an be reasonably asserted that a construction showing such pening falls within the limits of claims 7, 8, and 9. Tuttle, plainant's expert, states that he closed the holes in defend- rner without injury to the illumination, but that certain enlargement thereof did effect impairment of the light.

vidence simply illustrates that a chimney not "substantially t its bottom" is as useful as one "substantially closed," and urner in this respect quite different from that described in n will cause or permit as desirable light. The fact that de- ' burner causes as perfect combustion and as high degree of tion as the complainant's does not prove that the former s covered by the claim. The complainant's patent does not rfection of illumination, but rather specific means for pro- t. Therefore, for the reasons stated it is concluded that ndants' burners do not infringe any of the claims, and it is ssary to pass upon the question whether infringement is ab- ccount of such variation as there may be between the height neter of the defendants' mixing-chamber relatively to the f the inner core and the diameter of the surrounding flame, rated by the experiments of Tuttle and the experiment in urt. But respecting the dimensions of the mixing-chamber out by the patentee, it may be justly said that the patentee's s for dimensions furnish a useful guide. What rights he t is not necessary to decide. The bill is dismissed entirely ground of noninfringement, because the claims are limited pecific form and arrangement of parts described in the

KENNEY MFG. CO. v. J. L. MOTT IRON WORKS.

(Circuit Court, S. D. New York. May 2, 1905.)

1. PATENTS—INFRINGEMENT—WATER-CLOSET VALVES.
The Cooper patent, No. 371,431, for a water-closet valve, *held* valid, and infringed as to claims 1 and 2.

2. SAME—VALIDITY—OPERATIVENESS OF DEVICE.
It is sufficient to sustain a patent for a valve against the objection of inoperativeness if the combination of parts shown forms a workable device when attached to a structure for which it was evidently intended.

3. SAME—CONSTRUCTION OF CLAIMS.
Where the field of invention has been narrowed by many prior devices in the same art, a patent for a new combination must be narrowly construed, and limited to the precise structure shown.
[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 245.]

4. SAME—INFRINGEMENT—WATER-CLOSET VALVES.
The Kenney patent No. 566,770, for an improvement in water-closet cisterns, which consists in an alleged novel combination of parts by which the closet is flushed, claim 1, in view of the prior art, must be narrowly construed. As so construed, *held* not infringed.

In Equity. Suit for infringement of letters patent No. 371,431, granted to William S. Cooper October 11, 1887, and No. 566,770, granted to David T. Kenney September 1, 1895, both relating to improvements in water-closet valves. On final hearing.

Frank L. Crawford and J. Adriance Bush, for complainant.
W. P. Preble, Jr., for defendant.

COXE, Circuit Judge. This action is based upon two letters patent, granted to William S. Cooper and David T. Kenney, respectively, for improvements in water-closets. Claims 1 and 2 of the Cooper patent, No. 371,431, were sustained by this court upon a record substantially similar to the one at bar. Kenney v. Newton (C. C.) 135 Fed. 101. This decision should be followed, but as the Cooper patent expired in October, 1904, the decree can only be for an accounting.

The Kenney patent, No. 566,770, granted September 1, 1895, is for improvements in water-closet cisterns consisting of alleged novel combination of parts by which the closet is flushed. The defenses are defect of title, lack of invention, noninfringement and invalidity of the claim in controversy, for the reason that it does not disclose an operative structure. It is unnecessary to discuss the question of title as the answer expressly admits the title to be in the complainant.

The first claim is the only one involved. It is as follows:

"(1) The combination, with a hollow and substantially buoyant main valve, of a casing inclosing the main valve and provided with a water inlet at its lower part and a water passage connecting its upper and lower parts, a weighted vent valve slidable in the said main valve and operating to depress it after having closed, and a stem operating positively to raise first the vent valve and then the main valve, substantially as set forth."

The claim is for a valve having the following elements: First. A hollow and substantially buoyant main valve. Second. A casing

the main valve provided with a water inlet at its lower
a water passage connecting its upper and lower parts.
weighted vent valve slidable in the main valve and operat-
press it after having closed. Fourth. A stem operating
to raise first, the vent valve and then the main valve.
awing shows this valve attached to the lower end of a
for water, hung a little above the closet by means of a
racket secured to the wall, the outer valve casing being
ed by water.
t denied that the combination is inoperative when separat-
s environment, but this may be said of any valve, whether
for water, air or steam. If the claim shows a combination
orming a workable device when attached to a structure for
is evidently intended, it is enough. Taylor v. Sawyer
Co., 75 Fed. 301, 309, 22 C. C. A. 203. The engineer's
ve is inoperative until connected with the air system of
but any one skilled in the art would know at once how
uch connection. The question is whether the combination
im, if in other respects patentable, can be used, without
changes, in other water-closet systems?
nney closet is flushed by depressing the hand lever which
vent valve. The main valve, thus relieved of the pres-
e it, is then raised. As soon as the main valve begins to
ater rushes under it, buoys it up, and passes directly from
in the periphery of the casing through the main-valve
e water above the main valve is forced from the upper part
sing past the slidable vent valve and into the downward
f water. When the lever has been depressed one full
e handle is released and the two valves descend automatic-
e weighted vent valve closes first by gravity, the hollow
ve being buoyed up by the water passing under it. When
valve has closed its weight depresses the main valve slow-
rmits water, sufficient to flush the closet, to pass through
small annular passage around the main valve permits the
be sucked up into the space above it by the weight of the
g valves." The compressed air in the receptacle or cistern
forcing the water through the flushing pipe into the

any valves were made in exact accordance with the patent,
y be said that no structure embodying all the details of
ing was ever constructed; certainly no structure having
ended cistern was a commercial success. In practice it
d necessary to make several changes in the Kenney valve.
ve been added a regulating ring, intended to cut down the
ater under high pressure, a relief screw, a "controller"
ll hole in the side of the casing. These are minor changes
furnish a fair presumption, at least, that the device of
t, if commercially operative at all, could not be transported
-called T-fitting in the condition shown and described in
ication.

Water-closets have been known for more than a century and the art of flushing them is very old. Numerous devices have been used for this purpose employing a great variety of valves. Many of these are shown in the record. For twenty years the defendant has been using the so-called "Premier valve," which is said to be, and certainly appears to be, the Kenney valve inverted. There are differences but they do not seem more radical and essential than the differences between the Kenney valve and the alleged infringing device.

The Premier shows a spring acting upon the vent valve. Kenney employs a weight; the one is the equivalent for the other. Indeed, the interchangeable use of weights and springs is the stock illustration for equivalents. Of course, minor differences are pointed out; they always are; but it cannot be that patentable novelty can be predicated of the substitution of a weight for a spring in a water-closet valve.

Craigie, in 1872, invented a slow-closing conical vent valve for water-closets, flattened on one side to permit a leakage into the variable chamber, in combination with a piston and a main valve. The weight of the vent valve is supplemented by a coiled spring.

The patent to Donnelly (1875) is for an improvement in valves for water-closets. It shows a hollow valve very similar to the "hollow and substantially buoyant main valve" of the Kenney structure and accomplishes the same result by means differing in details but not fundamentally.

The Quinn patent (1878) was cited in the Patent Office and in order to avoid the reference the Kenney structure was distinguished as follows:

"Applicant's valves are not closed by the pressure of the water above them as there can be no pressure above them until they have closed. Quinn's main valve is raised by the pressure of the water under it when the vent valve is raised, and this makes its action uncertain. Applicant's main valve is operated positively by the collar on its stem H."

The examiner was not convinced by this attempted distinction and disallowed claim 6 "on the same ground as before, as the term 'weighted' is not sufficiently distinctive to distinguish applicant's device from the device shown in the patent to Quinn, whose vent valve is weighted to a certain extent."

The main difference now pointed out—the same as that suggested to the Patent Office—is that the Quinn vent valve is not a weighted vent vale. The answer is also the same—"It is weighted to a certain extent" and it did not amount to invention to increase the weight.

The Quinn valve accomplishes the same general result as the Kenney valve, the principal difference being that in the latter the stem raises first the vent valve and then the main valve, while in the former the stem raises the vent valve only, the main valve, being buoyant, is raised by the pressure of water under it.

The Cooper patent (1872) has a spring weighted vent valve pushed up by a stem. When the valve is raised the water rushes out of the water chamber through an annular passage into the space

below the valve. A ring of rubber, or other equivalent material, is carried up by the stem and when the stem is released the rubber ring serves to retard the downward motion of the valve until it is gradually forced by water pressure to its seat.

The Gale patent (1877) shows an apparatus having a hollow and substantially buoyant main valve operating with other members to accomplish the same result as the Kenney device.

The operation of the combination is described as follows:

"The valve is connected inside of the chest or receiver, and pressure being applied to the lower end of the stem K by a lever and handle, (not here shown, but of any well-known construction,) the small plug valve at L is easily raised, while the cylinder G and its valve at E remains at rest on the seat at D. But as soon as the chamber G is opened at the top the water above in the valve chamber will flow into the chamber G, and the pressure being thereby relieved above, the pressure in the pipes at B will instantly raise the chamber, and thereby open the valve at D, and thereby cause the sluicing action to begin, and the action will continue until the water in the chamber above has accumulated again through the small plug cock at R, and thereby make the pressure the same on both ends of the cylinder G, when it will gravitate to its seat at D, and in doing so will slowly pass the inlet slit at B, and thereby so slowly cut off the flow as to prevent hammering in the pipes from the reaction of the flow. In the meantime the water in the cylinder G will escape at the holes O and P, through the hollow stem K, and the chamber will be thereby emptied ready for the next action."

The discussion of the prior art might proceed indefinitely, but enough has been said to show that the field of invention was an exceedingly narrow one when Kenney entered it. If the claim be upheld at all it must be limited to the instrumentalities as described and shown. A wide range of equivalents is out of the question; a broad construction of the claim is not permissible. Pomace Holder Co. v. Ferguson, 119 U. S. 335, 7 Sup. Ct. 382, 30 L. Ed. 406; Mast, Foos & Co. v. Stover Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856; Miller v. Eagle Co., 151 U. S. 186, 207, 14 Sup. Ct. 310, 38 L. Ed. 121; Harwood v. Railway Co., 11 H. L. Cas. 654; Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689.

The defendant's valve differs in several important particulars from the valve of the claim. The Kenney main valve is a loose-fitting chamber having a water passage between it and the casing. The defendant's main valve is a small cup having four holes in the side and four in the bottom and a guiding and retarding ring at the top. Defendant's vent valve is a very small affair, as compared with the similar valve of the claim, and operates in a different manner. In itself it is not a weighted valve in the sense of the Kenney patent. This is conceded in the complainant's brief. But it is said that being attached as it is to the operating lever the additional weight of the handle makes it a weighted valve. Assuming this to be so it is not the weighted valve of the patent, the change being an ingenious improvement which the complainant is not entitled to claim as an equivalent.

It is unnecessary to discuss the minor differences.

The court cannot resist the conclusion that the complainant is seeking to expand the first claim of the Kenney patent, which cov-

ers a crude and not particularly successful device, into a broad claim which will enable the complainant to levy tribute upon the entire art.

It follows that there should be a decree for the defendant upon the Kenney patent, and for the complainant, for an accounting, upon the first and second claims of the Cooper patent, but without costs to either party.

WESTERN UNION TEL. CO. v. PITTSBURG, C., C. & ST. L. RY. CO.

(Circuit Court, N. D. Illinois. April 20, 1905.)

No. 26,601.

1. TELEGRAPHS — LINE CONTRACTS — ENFORCEMENT — ADEQUATE REMEDY AT LAW.
   A bill by a telegraph company to have certain right of way contracts with certain railroads declared to be in force, and for specific performance, was not demurrable on the ground that complainants had an adequate remedy at law.

2. SAME—EQUITY—FEDERAL COURTS—JURISDICTION—PARTIES.
   On a bill against a consolidated railroad corporation to obtain specific performance of right of way contracts between complainant telegraph company and defendant's constituent companies, the mere fact that the federal court in which the suit was brought could not enforce its orders in another district, except by contempt or other personal proceedings, was not conclusive in determining what parties were before the court.

3. SAME.
   In a suit in equity in the federal courts for specific performance of telegraph right of way contracts with certain consolidated railroad companies, the necessary parties being subject to the court's jurisdiction, it was immaterial that a portion of the property affected was beyond the court's territorial jurisdiction.

4. SAME—CONTRACTS—CONSOLIDATION.
   Where an operating contract consolidating various right of way contracts between complainant telegraph company and certain railroads did not attempt to annihilate or merge the various underlying agreements, further than to provide for a practical operating agreement for a period of 25 years, and thereafter until terminated by one year's notice by either party, and such notice was duly given, the termination of such contract did not deprive complainant of its rights under the underlying agreement and certain condemnation proceedings, though no relief could be granted under such operating agreement.

5. SAME—VALIDITY OF CONTRACT—ILLEGAL PROVISIONS—DEFENSES.
   In a suit by a telegraph company to obtain specific performance of right of way contracts with certain railroads, defendant was not entitled to object that the contracts were unenforceable because they contained certain provisions in violation of Act Cong. Aug. 7, 1888, c. 772, 25 Stat. 382 [U. S. Comp. St. 1901, p. 3582], conferring certain rights in subsidized railroad and telegraph lines on the United States, and prohibiting interference therewith, etc.

J. F. Dillon, Rush Taggart, Henry D. Estabrook, and Percy B. Eckhart, for complainant.

Loesch Bros. & Howell, for defendant.

KOHLSAAT, Circuit Judge. Complainant is a New York corporation. Defendant is a corporation of the states of Pennsylvania,

lo, Indiana, and Illinois. Its constituent roads are the Pitts-g, Cincinnati & St. Louis Railway Company, the Indiana Cen- Railroad Company, the Cincinnati & Chicago Air Line Railroad mpany, the Chicago & Great Eastern Railroad Company, the edo, Logansport & Burlington Railroad Company, and the ion Junction & Logansport Railroad Company. The bill asks that complainant be decreed to be the owner of, and entitled to ntain and operate, certain telegraph lines therein set out; (2) t certain agreements and rights therein set out between com-nant and said several underlying companies be declared to be l in force, and that defendant be required to perform them; (3) t if complainant is not entitled to construct, maintain, and oper- on the right of way of defendant without compensation, the rt shall ascertain and decree the amount of compensation to be l under the terms of the act of Congress approved July 24, 1866, 30, 14 Stat. 221, and the further act approved June 10, 1872, 17 t. 308, c. 335, § 201, and under the Constitution and laws of l four states, and that, if it is held that such compensation should fixed by legal proceeding, upon such proceeding being had the rt will decree a perpetual injunction restraining defendant from erfering with the location, maintenance, and operation of such s on said right of way; (4) that the court will perpetually en- defendant from violating any of the provisions of said con-cts, condemnations, and consents which the court shall require endant to perform specifically, and from interference in loca-, construction, or operation of same as provided in the arrange-nts with the underlying companies; (5) that a temporary in-ction be granted, etc. The cause comes now before the court demurrer. The grounds alleged are want of equity and juris-tion, and that complainant has a plain, adequate, and complete nedy at law.

The various facts set out are too voluminous to be here repeated. appears that both of the parties hereto have been created by the s consolidating various short lines or systems. In adjusting the ms upon which the railroad and telegraph lines were placed in co-eration, various agreements and condemnation proceedings were orted to. These are shown as exhibits to the bill. Some of m name no time within which they shall be terminated, some uire mutual consent, while some name definite periods, which several cases have expired.

Considering the grounds of demurrer out of their order, I see no is for the contention that complainant has a full and adequate nedy at law, and do not deem the point seriously urged.

t is insisted by defendant that the court is without jurisdiction enter or enforce any order against the defendant, except as to t part or portion thereof situated within this district. That an sting consolidated railway corporation is a separate corporation each state, although it has one capital stock, board of directors, l name, is now an established principle of law. Cook on Corpora-ns, vol. 3, 910; Nashua & Lowell R. Co. v. B. & L. R. Co., 136 U. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363; Ohio & Miss. Ry. Co. v.

Wheeler, 1 Black, 286, 17 L. Ed. 130; In re Bank of Augusta, 13 Pet. 519, 10 L. Ed. 274; C. & N. W. Ry. Co. v. Whitton, 13 Wall. 270, 20 L. Ed. 571; Fitzgerald v. Missouri Pac. Ry. Co. (C. C.) 45 Fed. 812; St. Louis, etc., Ry. Co. v. James, 161 U. S. 561, 16 Sup. Ct. 621, 40 L. Ed. 802. This, however, is held by the courts mainly for the purpose of jurisdiction. If the defendant in this case is, for the purposes of jurisdiction, a citizen of this district, manifestly it is the consolidated company that is now before the court, not merely that part thereof which is located in Illinois. The mere fact that this court cannot enforce its orders in another jurisdiction except by contempt or other personal proceedings would not be conclusive in determining what parties are before the court. In Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, it is held that a state court may compel persons over whose persons it has jurisdiction to execute instruments in pursuance of contracts respecting property outside the court's jurisdiction, "in such form and with such solemnities as to transfer the title." In Phelps v. McDonald, 99 U. S. 298, 25 L. Ed. 473, the court holds that:

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the lex loci rei sitæ, which he could do voluntarily, to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree in personam according to those equities, and enforce obedience to their decrees by process in personam."

This was held in Penn v. Lord Baltimore, 1 Ves. 444, and approved in Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181. For these reasons, I do not deem the objection to the jurisdiction of the court well taken. See Morawetz on Corporations, § 996; Bead on Private Corporations, § 764.

Complainant—so defendant claims—is endeavoring by the bill to obtain specific performance of the contract made by complainant and defendant's assignor, the Pittsburg, Cincinnati & St. Louis Railway Company, dated September 1, 1869. This contract seems to have been entered into for the purpose of simplifying the rights of the parties growing out of the several contracts and condemnations then existing between the defendant and its various predecessors and the complainant and its predecessors. These rights covered the several lines of railroad and telegraph now brought into alignment and correlation by the parties hereto, respectively. To deal with them as separate corporations, and meet all the requirements of the many different contract conditions, would have been oppressive. So the contract of September, 1869, was made. It does not attempt to annihilate the various underlying agreements, further than to provide for a practical operating agreement for a term of 25 years, and thereafter until terminated by one year's notice of its expiration, given by either one of the parties thereto. Such notice was given. From all that appears in the record, this contract was duly terminated, and the court would be powerless to grant complainant any such relief thereon as prayed. The rights,

ever, of complainant under the contracts and condemnation
eedings brought into system by said contract, still exist, as
gh said operating contract had not been entered into. These
racts and condemnations—21 in number—are set out as exhib-
the bill, and are very voluminous. I do not deem it necessary
is time to analyze them, being satisfied that, as to some of them,
plainant is entitled to go to a hearing.

here remains to be considered defendant's claim that this suit
ld be dismissed for the reason that the contracts sought to be
rced by complainant contain illegal provisions, which will pre-
the specific performance of the same in equity. Citing the
of U. S. v. Union Pacific Ry. Co., 160 U. S. 1, 16 Sup. Ct. 190,
. Ed. 319. That was a case instituted by the government un-
the act of Congress of August 7, 1888, c. 772, 25 Stat. 382 [U. S.
p. St. 1901, p. 3582], and was brought in the manner provided
he act which made it the duty of the Attorney General of the
ted States, by proper proceedings, to prevent any unlawful
rference with the rights and equities of the United States under
and previous acts. This suit is not brought by the govern-
t, and the defendant cannot assert such a right for the govern-
t. Moreover, some of the contracts in question antedate the
act. It appears, also, that other considerations passed, and
defendant cannot in this manner avail itself of that provision of
statutes under the facts of this case. Harrison v. Glucose Sugar
ning Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; Star
wery et al. v. United Breweries, 121 Fed. 713, 58 C. C. A. 133;
stern Union Telegraph Co. v. B. & S. W. Ry. Co. (C. C.) 11 Fed.
Gilbert v. Am. Surety Co., 121 Fed. 499, 57 C. C. A. 619, 61 L.
. 253; Western Union Tel. Co. v. Penn. Co., 129 Fed. 849, 64
. A. 285.

he rights of the parties under the act of Congress of July 24,
. have been disposed of by the decision of the Supreme Court
ne case of Western Union Tel. Co. v. Penn. Co., 195 U. S. 540,
up. Ct. 133, 49 L. Ed. 312. The right of complainant to take by
lemnation is also disposed of by the Supreme Court in that case,
the case of same complainant against defendant herein. 195
. 594, 25 Sup. Ct. 150, 49 L. Ed. 332. The parts of the bill cov-
g matter within the scope of these decisions of the Supreme
rt, supra, are thus now eliminated.

appears from the bill that certain of the contracts relied on
e expired by their several terms. The bill contains no allega-
s of any extension thereof. As to these the demurrer must be
ained. As to those matters which pertain to contracts which
e not expired by their terms, and those matters which pertain
contracts which are unlimited in time, and to those matters
ch pertain to contracts requiring mutual consent, and to such
ts as have been acquired by condemnation, and all other claims
aid bill, the demurrer is overruled.

JOHNSON v. CITY OF ST. LOUIS.

(Circuit Court, E. D. Missouri, E. D.)

1. PARTIES—ACTIONS AGAINST CITIES—MISSOURI STATUTE.

Act Mo. March 12, 1901 (Sess. Laws 1901, p. 78), which provides that when a city of a certain class shall be sued on a cause of action arising from the wrongful or unauthorized acts or negligence of another, who is also subject to an action therefor, such other person or corporation, if subject to service in the state, may be required by the city to be made a party, does not apply to an action against a city to recover for damage to plaintiff's property resulting from the performance by the city of a public duty, such as the making of an improvement, without negligence on the part of the contractor by whom the work was done, but merely as an incident of such work.

2. MUNICIPAL CORPORATIONS—LIABILITY FOR DAMAGE TO PROPERTY BY PUBLIC IMPROVEMENT—MISSOURI CONSTITUTION.

Const. Mo. 1875, art. 2, § 21, providing that "private property shall not be taken or damaged for public use without just compensation," as construed by the Supreme Court of the state, entitles an owner of a building to recover from a city for damage resulting thereto, without his fault or negligence, by reason of the construction of a sewer by the city so close to the foundations of the building as to cause them to settle.

At Law. On motion to require plaintiff to bring in a new party.

Thomas K. Skinker, for plaintiff.

Chas. W. Bates, W. F. Woerner, and C. R. Skinker, for defendant.

ADAMS, District Judge. This is a suit instituted against the city of St. Louis to recover damages alleged to have been sustained by plaintiff as a result of the construction of a sewer by defendant city underneath an alley adjacent to plaintiff's lot of ground. It is alleged that the sewer was constructed pursuant to the provisions of a municipal ordinance and a contract made by the city with the Buehler-Cooney Construction Company; that the construction company, in the performance of its contract pursuant to plans and specifications therein contained, excavated a deep tunnel in the alley, with shafts and inlets reaching from the surface down into the tunnel, and afterwards constructed in the tunnel so excavated a sewer of brick and cement; that the tunnel was so excavated and the sewer so constructed close to the lines of plaintiff's lot, and almost immediately under the foundation walls of plaintiff's building situate thereon, and that, as a consequence of the making of the tunnel, inlets, and sewer, the soil of plaintiff's lot broke and sunk, and the foundation walls of his building sunk and gave way, to plaintiff's damage in the sum of $20,000. In due course of procedure the defendant city appeared and filed a motion to require plaintiff to make the Buehler-Cooney Construction Company a party defendant. This motion was made pursuant to the provisions of the act of the Legislature of Missouri approved March 12, 1901 (Sess. Acts 1901, p. 78). This act provides that:

"Whenever a city of over one hundred and fifty thousand inhabitants shall be sued in any court in this state and the cause of action on account of which said city is sued shall arise from the wrongful or unauthorized acts or carelessness and negligence of any person or corporation subject to service in this state, and such wrongful or unauthorized acts or carelessness and negligence shall also make such person or corporation liable to an action by

e plaintiff on the same account as such city is sued for, such city may thin fifteen days after the first day of the next term of court after the rvice of the writ of summons, file a motion in writing, in said case, notify- g the plaintiff therein to make such person or corporation a party defend- t in said suit in accordance with the facts constituting the liability of ch person or corporation, which facts said city shall set forth in said no- e, and shall verify the same by affidavit."

The plaintiff resists the motion to require him to join the construc- on company on the ground that his cause of action against the city es not arise from the wrongful or unauthorized acts or carelessness d negligence of the construction company, for which it is liable. aintiff's counsel contends that the cause of action arises under the nstitution of Missouri (article 2, § 21). This section ordains "that ivate property shall not be taken or damaged for public use without st compensation," etc. The contention is that the petition makes no se of negligence, but, rather, a case ex contractu, growing out of a ntract between the citizens of the state, as expressed in their organic t. Plaintiff's counsel seems to me to be right about this matter. A reful consideration of the petition discloses that there is no allegation negligence on the part of the city or on the part of the construction mpany. Plaintiff rests his case, so far as the petition is concerned, the proposition that the city of St. Louis, while properly engaged in e performance of one of its public functions (constructing a sewer r the public use), without negligence on its part, but merely as an cident to the performance of such duty, damaged plaintiff's property; d, on this state of facts, he claims that the Constitution of the state nfers upon him a right of action for the damages so sustained. If s petition states any cause of action, it is certainly not for negligent nstruction of public works by the city which resulted in an injury plaintiff. For, as already stated, there is no charge of negligence and in the petition. If it were not for the constitutional provision voked, a demurrer would certainly lie to the petition.

Having reached this conclusion, I might properly enough deny de- ndant's motion to require plaintiff to make the construction com- ny a party defendant, without saying more. But as counsel have haustively argued the question whether the damage alleged to have en sustained by plaintiff's counsel in the way and manner stated in his tition comes within the purview of the Constitutional provision in estion, I have concluded I may properly dispose of that question w, without waiting for a more formal presentation of it by a de- rrer.

The constitutional provision prohibiting the damaging of private perty for public use without just compensation is an advance step the progress of protecting individual rights against the exercise of wer for the public good. The first Constitution of this state, opted in 1820, declared that "no private property ought to be taken applied to public use without just compensation." The Constitution 1864 also retained this declaratory provision, employing the same guage; but the Constitution of 1875 enlarged the scope of the pro- ion, and became more explicit. It ordains, in language of com- nd, "that private property shall not be taken or damaged for public e without just compensation." It contemplates that the compensa-

tion either for property taken or damaged should be determined and paid before the appropriation of such property to any public use. But notwithstanding the provisions of law conferring a remedy by injunction to restrain the appropriation or damage of property until the same should be paid for, it is well settled that the provision in question is self-enacting and self-enforcing, and confers upon any person injured the right to proceed by suit for the recovery of such damages as he may have sustained. He may, at his election, enjoin the prosecution of public work until his damage should be ascertained and paid, or he may wait until the work is done, and then sue for the damages which he may have sustained. Hickman v. City of Kansas, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; Markowitz v. Kansas City, 125 Mo. 485, 28 S. W. 642, 46 Am. St. Rep. 498. The plaintiff in this case adopts the course last suggested.

I cannot agree with defendant's counsel that the Constitution of 1875 contemplates only such a direct and necessary damage as would in effect be only a "taking" of property, or that the damage there contemplated must be such as necessarily and inevitably flows from the passage of an ordinance or law providing for the public work. On the contrary, I believe the provision in question was intended to have a practical and real meaning—was intended to provide a remedy for all damages proximately resulting to property from the doing of work for public use. Such is the plain and ordinary signification of the language employed: "Private property shall not be damaged for public use without just compensation." This is a command couched in very plain and unambiguous language. Whether the damage necessarily and inevitably arises from the doing of public work, or whether it results as an ordinary or likely incident thereto, is, in my opinion, immaterial. The policy of the organic law is that, when property is damaged for the benefit of the public, the public, which is the party benefited thereby, shall pay for that damage, rather than the individual who is not benefited by it, and who is in no way responsible for it. This means, of course, the public as represented by the corporation at whose instance and for whose benefit the work is done. This may sometimes be, as in the case at bar, a municipal corporation, which stands for the whole public within its territorial limits, or it may be a quasi public corporation, which has the right, by reason of the public interest involved, to exercise a part of the sovereign power. I am unable to conceive of a case where the remedial provisions of the new Constitution are more applicable than the one presented by the petition in this case. Can it be that when the public interest demands the building of a sewer in a large municipality, and when the construction of that sewer, without fault on the part of the property holder, destroys or damages his building, his property is not damaged for public use? I think not. If any effect is to be given the new Constitution, it seems that this case falls within its provisions. The reason for the provision "that private property shall not be damaged for public use without just compensation" is stated by the Supreme Court of Missouri in the Hickman Case, supra, as follows:

"Prior to the adoption of the Constitution of 1875. * * * it was uniformly held that any damage resulting to an abutting property owner from a

e of grade was damnum absque injuria, for which the municipality was able, unless the injury could be shown to have resulted from the negli- or improper manner in which the work was done. * * * To uproot octrine, and provide for compensation when property is damaged as well hen it is taken for public use, the eminent domain clause in the Con- ion of 1865 was amended by the Constitution of 1875 to read as quoted, ince [then] it has been considered the settled law in this state that property is damaged by establishing the grade of a street, or by raising vering the grade of a street previously established, it is damaged for use, within the meaning of the Constitution."

ny cases are there cited, showing that a municipal corporation issouri, when, in exercising its power to make streets, it has caused ge to the owners of abutting property by changing the grade of a established street, is held responsible for such damages, under the itutional provision in question. I am unable to perceive any rence or sound distinction between the damage done to a lot of nd fronting on a given street by the change of grade in the street n does not touch the lot, and damage done to the walls of a build- y the construction of a public sewer in close proximity to it. But upreme Court of Missouri has very nearly, if not quite, ruled upon very similar to that now under consideration. The case of Smith dalia, 152 Mo. 283, 302, 53 S. W. 907, 912, 48 L. R. A. 711, con- the construction of a sewer in the city of Sedalia, which dis- ed into a creek, causing damage to an abutting owner below the of discharge. In that case the Supreme Court makes use of the ving language:

it is a public necessity that the plaintiff's land be taken or damaged der to dispose of the sewage of the defendant city, it may be so con- ed according to law, but the city must first pay him the just compensa-

e court there held that the city was liable for the damage caused rning its sewer into a natural stream flowing through private prop-

the case of Mining Company v. City of Joplin, 124 Mo. 129, 27 . 406, the Supreme Court of Missouri had under consideration m for damages by the owner of property fronting upon the waters creek which had been polluted by emptying of sewage into it. court there says:

hether this damage would amount to the taking of private property for e use is not important to inquire, for our Constitution declares that te property shall not be taken or damaged without just compensation. e discharge of the sewer matter into the creek will decrease the value e plaintiff's land through which the creek runs, then the damage thus is clearly within the constitutional provision, and the plaintiff must have ensation therefor."

e views expressed in these cases and others cited therein by the eme Court of Missouri are reasonable and convincing, and, in my on, fully warrant the conclusion reached in this case.

ave considered all the other cases cited by counsel on either side, without further reference to them, merely say that I find nothing em in disharmony with the conclusion already stated.

gument is made by defendant's counsel touching the effect upon case of the failure on the part of the defendant to shore up his

building during the progress of the public work, and also as to the effect of actual negligence by the construction company in doing the work. These questions are not now properly before the court, and it may be that they never will be raised. When they are, they will be met and disposed of.

It results that the defendant's motion to require the plaintiff to make the Buehler-Cooney Construction Company a party defendant must be denied.

THE TENEDOS.

(District Court, S. D. New York. April 28, 1905.)

1. SHIPPING—DAMAGE TO CARGO—UNSEAWORTHINESS FROM LEAKING PORT.

If a ship starts on a voyage with a port negligently left open, causing damage to cargo, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage, and are not protected by section 3 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), on the ground that the fault was one in navigation or the management of the vessel, although proper appliances for closing the ports were furnished; and this rule is especially applicable where the ports were so located as to be submerged when the vessel was fully loaded.

2. SAME—LIABILITY OF OWNERS—FAILURE TO EXERCISE DUE DILIGENCE.

A steamship originally constructed for passengers, but later used for the carriage of goods, had ports in the lower between-decks, which were submerged when she was fully loaded. These were equipped with glass bull's-eyes, and shutters for properly closing the same. On commencing to load cargo at Batoum the ports in a compartment were examined and found properly closed, and the compartment was then partially filled with wool. The vessel stopped at a number of other ports on the Black Sea and the Mediterranean, and took on more cargo; the hatchway leading to such compartment being used, and finally closed when she started on the voyage for New York. Shortly afterward water was discovered in the hold under such compartment, and on examination it was found that one of the glass bull's-eyes had been stolen, and that the water had entered through such port and damaged the cargo. The brass pins holding the bull's eyes in a number of the other ports had also been removed. No inspection of the ports had been made after the loading commenced at Batoum. *Held*, that due diligence on the part of the owners to render the vessel seaworthy when she commenced the voyage required that such inspection should have been made the last thing before access to the ports was cut off, and that the damage to cargo was due to unseaworthiness for which the vessel was liable.

In Admiralty. Suits to recover for damage to cargo.

Black & Kneeland (Lawrence Kneeland, of counsel), for libelants Stephenson & Craft, Galanopulo, National Board of Marine Underwriters, and William H. Harris.

Ritch, Woodford, Bovee & Butcher (Frederick C. Tanner, of counsel), for libelant Hills Bros. Co.

Wing, Putnam & Burlingham (Harrington Putnam, of counsel), for the Deutsche Levante Linie, claimant of SS. Tenedos.

HOLT, District Judge. These suits are brought to recover for damages to a portion of the cargo of the steamship Tenedos, caused by water leaking through a port. The Tenedos was originally

or a passenger steamer, and subsequently used as a freight
r. She had four hatches. No. 3 hatch had four compart-
At the bottom was the hold; then the lower between-
then the upper between-decks; then the spar deck. In the
between-decks compartment of this hatch there were ten
-five on each side—placed within a few inches of the floor
They were constructed in the usual manner of ports on
n vessels. The port was circular, and fitted with a glass
eye, with a brass rim, opening horizontally on a hinge, to
light and air. The port was also fitted with an iron disk or
which, when the port was not used, was placed in the bottom
porthole, flush with the outside of the ship, and slightly fast-
vith red-lead putty. Against this disk the glass bull's-eye
osed and bolted fast. Then over the glass bull's-eye was
it down an iron shutter, swinging from a hinge above the
nd that inside shutter was bolted at the bottom. The shut-
s smaller than the bull's-eye, so that, when closed, the brass
the bull's-eye was visible. The ports in No. 3 lower between-
were 21 feet 6 inches above the keel, and the vessel, when
oaded with cargo, drew a little more than that, so that when
ssel was fully loaded these ports were submerged. All the
n the vessel were overhauled and put in good order at Ham-
n May, 1903. The vessel thereafter came to New York, and
a cargo of grain, which she discharged at Alexandria in good
She then proceeded light to Batoum. When she arrived
oum a careful examination of the ports was made by the first
and the carpenter, to see that they were tight and secure, and
ere found to be so. Two or three days afterwards wool in
vas loaded into No. 3 lower between-decks, until that com-
ent, except the hatchway, was substantially full; but, the
oeing of different sizes, there were spaces between the top
wool and the floor above, varying from one to two feet, over
a person could crawl until he came to the side of the vessel,
the ports there. After leaving Batoum, the vessel called at
s ports on the Black Sea and the Mediterranean. At some
se ports she loaded cargo into the hold of No. 3, and it was
ntil she was nearly ready to sail for New York that No. 3
was so full that no one could get through it into the between-
compartment. She completed her cargo at Patras, Greece,
iled from there for New York on September 30th. On Oc-
5th ten feet of water was discovered in the hold of No. 3
The ship thereupon started her pumps, and ran for Algiers,
she arrived the next day. There it was found upon exam-
n, after removing the cargo from No. 3, that from nine of the
rts in the lower between-decks compartment the brass pin
which the hinge of the bull's-eye turned had been removed;
n various ports were marks and scratches apparently made by
sharp tool or instrument; and that in the after port, on the
ard side, the bull's-eye itself was missing, the inner iron shut-
ving been afterwards closed again and bolted. This left no
rt for the outer iron disk or plate, and it had worked loose

and fallen in against the inner iron shutter, permitting the water to leak through the port; thus damaging a large portion of the cargo in the hold and the lower between-decks. There is no direct proof in this case how this bull's-eye and the brass pins were removed. I think that the necessary inference is that they were stolen by a thief, who probably was not a member of the crew, after the ports were inspected at Batoum.

The bull's-eye could not have been removed after the hatches were closed. It follows that it must have been removed before the Tenedos sailed from Patras for New York. She was therefore unseaworthy when she sailed. The question, therefore, both under the bills of lading and the Harter act, is whether her owners used due diligence to make her seaworthy. The burden of proof upon that question, unseaworthiness at the time of sailing being established, is on the owners. The Edwin I. Morrison, 153 U. S. 199, 215, 14 Sup. Ct. 823, 38 L. Ed. 688; The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. The diligence imposed upon a shipowner to see that the vessel is seaworthy before starting upon a voyage is spoken of in the case of The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130, as the utmost care and diligence; and, clearly, due diligence calls for especial attention at those points where the likelihood or possibility of unseaworthiness is most obvious. The port in question was submerged when the ship was fully loaded with cargo. It seems to me clear, therefore, that the shipowners were bound to exercise a very high degree of diligence to make sure that such a port, which would be submerged during the whole of her return voyage to New York, was secure. The owners of the Tenedos provided entirely proper ports. They were properly overhauled and put in perfect order at Hamburg, and they were properly examined at Batoum, and found to be then in perfect order and securely fastened. Two or three days passed at Batoum before the wool was loaded in the lower between-decks of No. 3 hatch, and the compartment, except the space of the hatchway, was then filled with wool up to within one or two feet of the floor above. The vessel then sailed from Batoum, calling at a number of other ports, at some of which cargo was placed in the hold of No. 3 hatch. The hatch does not seem to have been filled up so that no one could get into No. 3 lower between-decks until shortly before the Tenedos sailed from Patras for New York. Cargo was loaded in the hold of No. 3 at Constantinople, Smyrna, Kalamata, Patras, and Katakolo. The claimant contends that the theft of the brass pins and the bull's-eye did not take place at Batoum, but probably took place at Patras or some other of the Greek ports last visited, because there were other thefts of articles on the ship at Patras, and the Patras merchants loaded their goods there with their own men, which was not the custom at other ports. But I do not see that there is any adequate proof that this theft took place in any particular port, and it seems to me that it could have been more easily accomplished at Batoum, during the two or three days after the ports were inspected, and before the wool was put in, than at any of the later ports, after the No. 3 lower between-decks was filled

vool. If the theft took place at Batoum, before the wool was
, I think it clear that due diligence was not used to discover
ertainly it seems to me that due diligence is not shown in
ning the ports of a vessel, if, at the end of the work of filling
ompartment in which the ports are, a careful search is not
to see that the ports have not been opened, and are in good
ion and are properly secured, and particularly if the ports are
uated that when the ship is loaded they will be submerged.
theft took place after the wool was placed in the lower be-
-decks, the omission to inspect the ports further before sail-
undoubtedly not so obvious an omission of due diligence.
estified that when cargo was being loaded there was always a
man on duty about the compartment, and an officer tallying
rgo, and that the hatches were always put on at night, and
chman on duty on deck. But at all the ports at which cargo
ut in No. 3 hold, under the wool, the hatchway was open, with
n ladder leading down to the hold. A man going to or com-
om the hold could step off upon and crawl over the wool in
wer between-decks to the ports, and although it may be ad-
l that the officers of the Tenedos were not bound to be on the
for such an extraordinary and unprecedented theft as occur-
this case, it does not seem to me too strict a rule to hold
hey were bound, before finally closing the hatches and start-
n a voyage across the Atlantic, to make a final inspection of
orts—particularly those that would be submerged—in order to
re that they were secure. Such ports are sometimes opened
orkmen for air or light. If they were not fastened securely,
of course, would admit water to the ship, and they were the
obvious source of danger in that respect. While, therefore,
not think that the officers of the Tenedos were negligent in
ng to suspect thefts of the kind which occurred, I think that
lid not exercise due diligence in sailing for New York with-
aking a final inspection of the ports, from the inside of the
, before finally closing the hatches in each compartment. If
had done so, with proper light, either from the open hatch or
ern, they could hardly have failed to notice the absence of
ass rim of the bull's-eye, which must have caused the interior
rance of the port from which the bull's-eye had been stolen to
ticeably different from the others. At all events, it cannot
sumed that they would not. I think the evidence shows, too,
he absence of the brass pin from the bull's-eye hinge in all
ports but one in that compartment could have been seen upon
tion, and, although it is possible that, if such an inspection
een made, the thefts would not have been discovered, it never-
s seems to me that the entire neglect of any inspection of
ports after the inspection made the first day the ship arrived
toum shows that due diligence was not exercised to make this
seaworthy.

dence was given for the Tenedos, by three experienced cap-
which is claimed to show that there was as much examination
ports made in this case as on other vessels. But the fact that

shipowners are not in the habit of using precautions which would demonstrate unseaworthiness is immaterial. They are bound to use them. The Edwin I. Morrison, 153 U. S. 217, 14 Sup. Ct. 823, 38 L. Ed. 688. Of the witnesses called, however, two admitted that they considered it the duty of the officers of such a vessel to examine the ports at each stage of a voyage before leaving port. No such examination took place in this case after the vessel left Batoum, although she stopped at a number of different ports in the Levant. In cases in which ports have been negligently left unclosed by the crew before sailing, it has been held that due diligence was not shown by proof that they were inspected and found in order before the work of loading ended, but that they should have been inspected the last thing before the hatches were closed or the voyage begun. International Nav. Co. v. Farr & Bailey Co., 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830; The Manitoba (D. C.) 104 Fed. 145.

The claimant's counsel argues that the owners did their duty in furnishing proper ports, and that the omission of the officers to keep them properly closed, or to discover that they had been tampered with, was a fault in the navigation or management of the ship, within the meaning of the third section of the Harter act (Act Feb. 13, 1893, c. 105 [U. S. Comp. St. 1901, p. 2946]). This view was apparently held at one time by the United States Supreme Court. The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. But that court later distinguished that case, and it is now well settled that if a ship starts on a voyage with a port negligently left open, causing damage, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage. International Nav. Co. v. Farr & Bailey Co., 181 U. S. 218, 21 Sup. Ct. 591, 45 L. Ed. 830. And I think that, in the case of ports situated so low in the vessel as to be submerged when the vessel is fully loaded, such a rule is especially applicable. Such ports can have, under such circumstances, no function as ports. They are simply part of the side of the ship, and must be made as secure against leakage as the rest of the hull.

My conclusion is that the libelants are entitled to a decree, the amount of the damage to be ascertained upon a reference.

THE MARIE.

(District Court, E. D. New York. May 1, 1905.)

PPING—PERSON UNNECESSARILY USING CARGO SKIDWAY—ASSUMPTION OF RISK.

Where libelant, in going upon a vessel while discharging at a dock, used a cargo skidway laid by the stevedores, instead of a safe passenger gangway, of which he had knowledge, he assumed the risk, and the vessel cannot be held liable for his injury by falling from it into the water.

n Admiralty. Suit for personal injury.

Villiam Adams Robinson, for libelant.

Parker Kirlin and Charles R. Hickox, for claimant.

HOMAS, District Judge. The libelant was a tally clerk, emved during the discharge of cargo from the steamship Marie, now sues to recover damages for injury to himself and to his perty from falling into the water while he was crossing the go planks supporting the skid that had been laid from the dock he ship. The libelant did not go aboard the ship for any pure connected with the use of the temporary gangway. He was employed by the ship, and his employer states that it was no t of his business to go aboard the vessel, but that he was to limit self to duties on the dock in connection with the weighing of cargo. But, assuming that his duty did call him aboard the o for the purpose of delivering the health certificate, as he claims, that was a service quite foreign to any for which the skid was structed, or for which it was intended to be used. This tempoy gangway was constructed by the stevedores, who had a conct for discharging the vessel, with the intention that the cargo uld be hoisted out of the vessel and landed on the skid, and nce taken to the pier. With such construction, or with the mal supplied therefor, the vessel had no connection. It appears ond question that there was a safe passenger gangway at aner point, and that libelant had knowledge of it. He must have wn that one gangway was for cargo and that the other was enly for the passage of persons, and, if he preferred to use the gway devoted to cargo, instead of the one supplied as a more e means of entrance, he did so at his own risk, and not at the risk he ship. There is nothing to justify the conclusion that a per employed as he was in connection with the work, was in any misled by the conditions that existed. There is rather a preption that he had full knowledge of the gangways and the uses which they were placed.

The libel is dismissed.

FOLSOM et al. v. GREENWOOD COUNTY.

(Circuit Court of Appeals, Fourth Circuit. May 9, 1905.)

No. 578.

1. RAILROADS—AID BONDS—TOWNSHIPS—COLLECTION—REMEDIES.

Where a statute incorporated a township to enable its people to issue railroad aid bonds, and provided that the county auditor and treasurer should assess and collect taxes, the levy of which was provided for in the act that authorized the issuance of the bonds, to pay the same, the state had no power to deprive the bondholders of the remedy so provided, unless equally efficacious remedies were substituted therefor.

2. SAME—COUNTIES—CHANGE OF BOUNDARIES—EFFECT.

Where a statute incorporated a township, authorized it to issue railroad aid bonds, and declared that the county auditor and treasurer should levy and collect taxes for the payment thereof, on the change of the boundaries of such county, so as to place the township within the boundaries of another county, the duty of levying and collecting taxes for the payment of such bonds devolved on the officers of the latter.

In Error to the Circuit Court of the United States for the District of South Carolina.

For opinion below, see 130 Fed. 730.

H. J. Haynsworth and R. E. L. Montcastle, for plaintiffs in error.

F. B. Grier, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

PRITCHARD, Circuit Judge. This is a writ of error from the Circuit Court of the District of South Carolina, wherein the demurrer of the defendant in error to the complaint of the plaintiffs in error was sustained.

This action was brought to enforce the collection of certain bonds and coupons which were issued by Ninety-Six township, in the state of South Carolina, in the year 1886. At the time the bonds and coupons were issued Ninety-Six township was a body corporate and politic and one of the townships of Abbeville county. In the year 1897 Greenwood county, defendant in error, was formed from territory theretofore belonging to the counties of Abbeville and Edgefield. At that time the territory comprising Ninety-Six township was transferred to Greenwood county, and was at the commencement of this action a territorial division of that county. On the 3d of February, 1903, the Constitution of the state of South Carolina was amended so as to provide that the corporate existence of Ninety-Six township should be abolished and the corporate agents and officers thereof be removed. Plaintiffs in error bring this suit for the purpose of obtaining a nominal judgment against Greenwood county, to be discharged by a levy of taxes against the property of the people of Ninety-Six township for the purpose of satisfying such amounts as may be ascertained to be due on the coupons and bonds upon which this action is based.

Every question relating to the validity of the bonds for which suit

brought in this instance has been settled in favor of the bondhold- in the Circuit Court and affirmed by the Supreme Court of the ited States. Folsom v. Ninety-Six Township, 159 U. S. 611, 16 p. Ct. 174, 40 L. Ed. 278. Therefore we are only called upon to cide whether there is a legal remedy for the enforcement of the hts of the plaintiffs in error.

The act which authorized the issuance of the bonds in question, ong other things, provided that the territory embracing Ninety- township should be incorporated for the purpose of enabling e people of that territory to enter into a contract with the railroad mpany for the benefit of which the bonds were to be issued. It o provided that the county commissioners of Abbeville county ould issue the bonds for and on behalf of the people residing in nety-Six township. It was further provided that the county ditor and treasurer respectively should assess and collect the tax- the levy of which was provided in the act that authorized the uance of the bonds.

The several provisions of this act are in the nature of a remedy af- ded to the bondholders to enable them to contract with the peo- of the territory embraced in Ninety-Six township and to provide e means by which the people of that territory should issue and liver the bonds in the event it should be decided by popular vote subscribe the amounts for the construction of the railroad which d been submitted to them for their consideration. The pro- ions which constituted the county commissioners of such county e corporate agents of the township of Ninety-Six were not only ended to afford the bondholders the means by which the bonds ould be issued and delivered, but they were necessarily intended afford a remedy or a means by and through which the bondhold- , in the event of default of payment, could proceed against the ople of that territory for the enforcement of the obligations which ey assumed at the time the bonds were issued and delivered. ese provisions became a part of the contract between the town- ip of Ninety-Six and the bondholders, and any legislative or con- tutional enactment which undertakes to deprive the bondhold- of the remedies which were thus afforded them without provid- g other remedies equally as efficacious is an impairment of the ligations of a contract, and therefore unconstitutional.

In the case of Hicks v. Cleveland, 106 Fed. 459, 45 C. C. A. 429, dge Simonton, in discussing this phase of the question, said:

"The Supreme Court of the United States deals with provisions of statutes e this as creating a trust which the state, the donor, cannot annul, and ich the officers to whom the power is given are bound to execute. So ther the state nor the corporation can any more impair the obligation of the ntract by repeal of the act than they can in any other way."

Broughton v. Pensacola, 93 U. S. 266, 23 L. Ed. 896; Von Hoff- an v. Quincy, 4 Wall. 553, 18 L. Ed. 403; Mount Pleasant v. Beck- th, 100 U. S. 514, 25 L. Ed. 699.

In the case of Von Hoffman v. City of Quincy, 4 Wall. 535, 553, L. Ed. 403, among other things Mr. Justice Swayne, who deliv- ed the opinion of the court, said:

"It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition, and to that extent void."

When the territorial division of Ninety-Six township was transferred from the county of Abbeville to that of Greenwood, the status of the people of that territory was not changed in so far as their relation to the bondholders was concerned; and, when such territory became a part of Greenwood county, that county eo instante assumed the same relation to the people of the newly acquired territory as the county from whence they came had sustained by virtue of the statute which authorized the issuance of the obligations upon which this suit is brought.

The authority by which Greenwood county was created and by which it acquired the territory of Ninety-Six township, was derived from the same source which authorized such township to issue the bonds in controversy. Counties are territorial divisions of the state, organized for the convenience of the people, and as such are treated as governmental agencies of the state for the purpose of local government.

In the case of Wood v. Oxford, 97 N. C. 230, 2 S. E. 655, Justice Merrimon, in discussing this subject, said:

"Municipal corporations, such as counties and incorporated cities and towns, are instrumentalities of the state government. They serve its political and civil purposes more or less generous in their nature and extent, and more particularly where they are located. They are public in their nature, and the Legislature has control over them. It may determine and establish their powers, and enlarge or modify their powers and authority, from time to time; it may create new ones, prescribing their powers and authority, as public necessity and convenience require."

In this instance the Legislature had the power to transfer the territory of Ninety-Six township from the county of Abbeville to that of Greenwood, provided that in doing so it did not place them in a position where they were unable to discharge the obligations which they assumed at the time the bonds were issued. The same people, the same territory, and the same property are still in existence, and the only difference between their status now and when a territorial division of Abbeville county is that instead of being a territorial division of Abbeville county they are now a portion of the territory of Greenwood county, but occupying identically the same relation to the county of Greenwood which they occupied as a part of the territory of the county of Abbeville. Such being the case, it necessarily follows that the county of Greenwood, as a corporate entity, is under the same obligation to act for and in behalf of the people of such territory, in so far as the provisions of the act which authorized the issuance of the bonds are concerned, as was the county of Abbeville before the enactment of the constitutional provision.

It is insisted by the defendant in error that the county of Greenwood cannot be sued for the purpose of obtaining a nominal judgment on an obligation which Ninety-Six township voluntarily assumed prior to the time that it became a part of the territory of that county; that inasmuch as the people of township Ninety-Six have by legislative and constitutional enactment been lifted bodily out of Abbeville county, and transferred to the county of Greenwood, the effect of such transfer was to afford the township of Ninety-Six immunity from the payment of honest obligations which were assumed by the people of such territory after the matter had been submitted to them and ratified by a majority of the voters thereof.

The act of the Legislature in the first instance, constituting the county commissioners of Abbeville county as the agents of Ninety-Six township for the purpose of signing and delivering the bonds authorized to be issued thereunder, and the acceptance and acquiescence on their part as the agents of the county by exercising the power conferred, was a contract with the bondholders that such county, through its duly constituted agents, would act as a trustee for such township for the purposes therein contemplated.

The fact that the system of county government in that state has been radically changed cannot relieve the people of Ninety-Six township from the payment of the obligation thus assumed, nor the county of Greenwood from the obligation which originally rested on the county of Abbeville, to wit, from acting as the trustee of the township against whom suit could be instituted for the purpose of obtaining a nominal judgment, to be ultimately discharged by the assessment and collection of a sufficient tax by the auditor and county treasurer on the property of the people of such territory for the payment of any judgment which might be thus obtained.

If the payment of obligations could be avoided by constitutional or legislative enactment, it would leave the holders of such securities without a remedy; the credit of public corporations, such as cities, counties, and towns, would be destroyed, and the people of such communities would be unable to secure funds with which to make the improvements necessary to keep abreast with the industrial development of the country.

The framers of the Constitution, with a prophetic vision, foresaw that occasions might arise wherein it would be sought to repudiate honest obligations, and, in order to meet such contingencies, among other things, provided that no state should pass any law impairing the obligation of contracts. Const. art. 1, § 10.

It is insisted by defendant in error that it will be a great hardship to require the people of Ninety-Six township to pay these bonds under the circumstances. While such is the case, at the same time these bonds are in the hands of innocent purchasers who were not parties to the original contract, and it would likewise be a hardship for them to lose the money which they invested after ascertaining the fact that the bonds had been issued in accordance with the requirements of the act of the Legislature which authorized the issuance of the same.

It was within the power of the Legislature to have provided that these bonds should not be issued until the road had been completed, but for some reason such safeguard was not provided, and as a result the taxpayers of that community are compelled to suffer. The Legislature having provided the means by which these bonds were to be issued, and the people having voted the authority to issue them, it is the duty of the courts, when called upon, to enforce their collection through the instrumentalities provided by the Legislature for that purpose.

For the reasons stated the judgment of the Circuit Court sustaining the demurrer to the complaint is reversed. The cause will be remanded to the Circuit Court, with instructions to proceed with the trial of the cause in accordance with the views herein expressed.

Reversed.

McGOWAN v. KNITTEL et al.*

(Circuit Court of Appeals, Third Circuit. May 11, 1905.)

No. 34.

1. BANKRUPTCY—INSOLVENCY—BURDEN OF PROOF.

Where, on an involuntary bankruptcy petition, defendant traversed the allegation of insolvency, and prayed a trial by jury, as provided by Bankr. Act July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], and he appeared in court with his books, etc., as required by section 3, the burden of proving insolvency was on the petitioners.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 137.]

2. SAME—EVIDENCE—JUDGMENT.

Where a judgment in a state court against an alleged involuntary bankrupt had been opened, and the bankrupt permitted to appear generally and defend, without conditions, such judgment was inadmissible as an established indebtedness against the bankrupt on an issue of his insolvency.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 134 Fed. 498.

Samuel Scoville, Jr., and Charles H. Edmunds, for plaintiff in error.

Samuel W. Cooper and Wm. F. Johnson, for defendants in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. An involuntary petition in bankruptcy was exhibited against the appellant, in which it was alleged that he was insolvent. He traversed this allegation, and prayed a trial by jury. Such trial was had, and a verdict finding the fact of insolvency was rendered. It is here averred that the rulings and charge of the court upon that trial were in several particulars erroneous; but in our opinion the record discloses but one reversible error, and to its consideration solely this opinion will be directed.

The trial was conducted in accordance with section 1, subd. 15,

* For dissenting opinion, see 137 Fed. 1015.

Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]), upon the theory that the existence or nonexistence of the insolvency alleged was to be ascertained by determining whether "the aggregate amount of his [the alleged bankrupt's] property" was, "at a fair valuation, sufficient in amount to pay his debts." This was the precise issue, and, as the alleged bankrupt appeared in court with his books, etc. (section 3 of the act), the burden of proving that his property would not suffice to pay his debts rested upon the plaintiffs. This burden they assumed by offering evidence to show, in detail, what debts were owing by McGowan, and of what his property consisted, and the value thereof. Under the first head, they produced the record of a judgment of the court of common pleas No. 4 of the county of Philadelphia for $1,693.38, wherein Frank J. Nealis was plaintiff, and John A. McGowan and Arlington S. Wolfe were defendants; and this record the court admitted in evidence, notwithstanding the objection of counsel for McGowan, that it appeared therefrom (and the fact was admitted) that the judgment disclosed by it had been opened by the court in which it had been entered. In overruling this objection, the learned judge, referring to the record adduced, said: "It is admissible at present. The effect of it is a question to be determined hereafter. The offer is admitted." He, however, did not, at any time during the trial, again allude to the subject, and therefore the final result of his action was to accord to an opened judgment evidential, if, indeed, not conclusive, weight upon an inquiry as to whether one of the defendants therein was liable for the demand upon which the judgment had been founded. In the opinion on the motion for new trial it is suggested that "it was a subsisting claim, and if he [McGowan] had a defense to the claim as a subsisting one against his estate in bankruptcy he could have made it before the jury." We are unable to concur in the view indicated by this suggestion. The question for the jury was not whether a claim was pending, but whether the debt claimed really existed; and the burden of proof as to that question, which, as we have seen, rested at the outset upon those who alleged the insolvency of McGowan, could not be shifted by the production of a judgment which had been so dealt with as to preclude its acceptance, even by the court of its origin, as tending to establish an indebtedness by the defendants therein. So far as is disclosed by the record before us—and the appellees have in no way alleged the fact to be otherwise—this judgment was opened generally and unconditionally. It is true that in the brief of the plaintiff in error it is said that it "was obtained on a bond the consideration of which was illegal and void, and when the facts were presented to the court of common pleas this judgment was opened, the court ruling that a judgment would not lie on such a bond." But even if this statement could properly be regarded as an admission, which, as such, should be dealt with as if it were contained in the record itself, yet we think it would be immaterial. We are concerned only with the action of the common pleas court, and not with the grounds upon which its action was based. It might have opened the judgment on

terms, and, perhaps, it ought to have done so; but having opened it without conditions, the consequence is that the burden of proof on the pleadings (which it neither limited nor prescribed) was on the plaintiff, and not on the defendant. "The judgment was opened generally, and the defendants let into a defense without restriction. Under such an order the judgment remains as a security for whatever may be found due, but in all other respects the trial must be had as if no judgment had been entered." Dennison v. Leech, 9 Pa. 164; West v. Irwin, 74 Pa. 258. In the case of Cannell v. Crawford County, 59 Pa. 200, the judgment had been opened on terms, confining the defendant to the plea of "payment, with leave to give the special matter in evidence," and what was decided is that upon such plea the burden is upon the defendant. But in the later case of Collins v. Freas, 77 Pa. 493, where the judgment, as in this instance, had been opened generally, the Supreme Court of Pennsylvania said:

"The trial then was to be had as if no judgment had been entered. The same burden of proof was imposed on the plaintiff. It gave to the defendant the same defenses that were open to him at the commencement of the suit. * * * The record was therefore inadmissible."

These authorities seem to us to be conclusive upon the point we have discussed, and to require that the judgment of the court below shall be reversed, with direction to grant a new trial.

It is so ordered.

UNITED STATES v. CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. March 1, 1905.)

No. 107.

1. SALVAGE—CLAIMS AGAINST UNITED STATES—JURISDICTION OF DISTRICT COURT.

Tucker Act March 3, 1887, c. 359, §§ 1–7, 24 Stat. 505, 506 [U. S. Comp. St. 1901, pp. 752–755], conferring jurisdiction upon District Courts over certain claims against the United States, gives such courts authority to entertain petitions for a salvage award where the government has been benefited by salvage service.

2. CUSTOMS DUTIES—DAMAGED MERCHANDISE—AUTHORITY OF SECRETARY OF THE TREASURY TO ABATE DUTIES.

Under section 2984, Rev. St. [U. S. Comp. St. 1901, p. 1958], under which "the Secretary of the Treasury is hereby authorized * * * to abate or refund the amount of impost duties paid or accruing" upon imported merchandise damaged or destroyed accidentally "while in custody of the officers of the customs," the Secretary may not refuse to allow the refund arbitrarily or capriciously. Where all the facts enumerated in said section were presented to him undisputed, it would be assumed that that would satisfy him that the case was within the terms of the section.

3. SAME—SALVAGE—DUTIES SAVED TO THE UNITED STATES.

Where imported merchandise while in customs custody on board a vessel was saved from destruction by fire, *held* that these facts brought the case within section 2984, Rev. St. [U. S. Comp. St. 1901, p. 1958], under which the government would have been liable to refund the duties already paid on the merchandise if it had been destroyed; that the gov-

nment had an interest which should respond to those whose services evented the loss which it would have sustained through refund; and at the salvors were entitled to a salvage award on the basis of the nount that had been thus put at risk.

Wallace, Circuit Judge, dissenting.

Error to the District Court of the United States for the South- District of New York.

cause comes here upon writ of error to review a judgment of the t Court, Southern District of New York (130 Fed. 480), in favor of the ant in error, which was plaintiff below. The claim against the United was prosecuted under the Tucker act of March 3, 1887, c. 359, 24 Stat. Supp. Rev. St. 559 [U. S. Comp. St. 1901, p. 752]), which confers con- t jurisdiction upon the Court of Claims and the several District and Courts in suits against the United States for "all claims founded he Constitution of the United States, * * * or upon any contract sed or implied with the government of the United States, or for dam- iquidated or unliquidated in cases not founded in tort in respect of claims the party would be entitled to redress against the United States in a court of law, equity, or admiralty if the United States were ."

hur M. King, Asst. U. S. Atty.

D. Benedict, for defendant in error.

ore WALLACE, LACOMBE, and COXE, Circuit Judges.

COMBE, Circuit Judge (after stating the facts). The facts f which the claim arises are these: The firm of B. H. Howell, & Co. imported a lot of sugar into the port of New York, and e act of importation became indebted to the government for ms duties thereon. The market value of the sugars in that on January 9, 1901, was $18,127.74, which included the duties sed at $6,000. The sugar came into the possession of the ms officers, the government having a lien upon the same for uties. The duties were paid, but the sugar had not been de- d to the consignee, remaining in the custody of the officers e customs on January 9, 1901. It was on board a certain r called the "Bangor," in the waters of the port of New York, n the day named was in danger of being destroyed by fire; eupon the tug R. G. Townsend, belonging to the plaintiff be- at great risk and peril saved the lighter and the cargo of sugar destruction by said fire. Thereafter the owners of the Bangor d with the steamboat company for salvage services, and the amed company brought a libel in the District Court, Eastern ict of New York, against "1,883 bags of sugar lately on board ghter Bangor" to recover for salvage services rendered to the . The cause came on for trial. It was found that libelant ntitled to salvage, and the award was fixed at 10 per cent. of alue of the property saved. The court was satisfied that had argo been destroyed consignees would have been entitled to a e of the duties paid ($6,000), under section 2984, Rev. St. U. S. . Comp. St. 1901, p. 1958], and therefore, concluding that the rnment was interested in the sugar to that amount, awarded 10 ent. against the consignee only on the balance left after deduct-

ing that sum from the market value. No award was made against the United States in that proceeding in rem in admiralty, presumably because the court was satisfied that it had no jurisdiction to bring the government in as a party to such suit. The Davis, 10 Wall. 16, 19 L. Ed. 875.

Thereupon the plaintiff filed under the Tucker act a petition, the equivalent of a complaint, bill, or libel, setting forth the facts above recited. Defendant demurred; demurrer was overruled, with leave to answer; answer was served, but was subsequently withdrawn, and the case submitted to the court upon the pleadings for a written opinion setting forth the specific findings of fact and conclusions of law, and rendering judgment thereon in conformity to the practice under that act.

If it be assumed that the government had such an interest in the sugar as to be directly benefited by the salvage service, the District Court, under the Tucker act, would have jurisdiction to entertain petition for a salvage award. It is unnecessary to add anything to the discussion of this subject which will be found in the opinion of the Court of Appeals for the Fourth Circuit (U. S. v. Morgan, 99 Fed. 570, 39 C. C. A. 653). The important and fundamental question in the case is as to the construction of section 2984. It reads as follows:

"Sec. 2984: The Secretary of the Treasury is hereby authorized upon production of satisfactory proof to him of the actual injury or destruction, in whole or in part, of any merchandise, by accidental fire, or other casualty, while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, * * * or while in custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs to abate or refund, as the case may be, out of any moneys in the treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon; and likewise to cancel any warehouse bond or bonds, or enter satisfaction thereon in whole or in part, as the case may be."

Provision for such abatements or refunds is made in section 3689 [U. S. Comp. St. 1901, p. 2460]:

"There are appropriated, out of any moneys in the treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same respectively; and such appropriations shall be deemed permanent annual appropriations. * * * For refunding duties paid or accruing on goods, wares, or merchandise injured or destroyed by accidental fire or other casualty while in the custody of the officers of customs, in any public or private warehouse, * * * or after their arrival within the limits of any port of entry of the United States, and before the same have been landed under the supervision of the officers of the customs."

It is contended by plaintiff in error that under these sections there is confided to the Secretary of the Treasury an absolute and irreviewable discretion to refund or to refuse so to do; that "if the sugar had been entirely destroyed by fire there was no legal obligation on the part of the Secretary of the Treasury to refund the duties paid, even though manifest justice indicated that a petition for refund should be granted." In support of this proposition there is cited the decision of the Court of Appeals for the Sixth Circuit in

Ferry & Co. v. U. S., 85 Fed. 550, 29 C. C. A. 345. In that
in this imported merchandise which had paid duty was de-
by fire while in the custody of the customs officers, and peti-
as filed under the Tucker act to obtain a refund of duties.
ared that more than a year before the passage of that act a
or the same refund had been presented to the Secretary of
easury and by him rejected. This was sufficient to defeat the
f, because the section of the Tucker act which gave jurisdic-
the courts expressly provided that nothing therein "shall be
ed as giving to either of the courts therein mentioned juris-
to hear and determine * * * claims which have hereto-
en rejected or reported on adversely by any court, depart-
or commission authorized to hear and determine the same."
urt of Appeals, however, discussed section 2984 at consider-
ngth. It held that Congress might, if it saw fit, make the
ry the final arbiter in any class of cases arising under the
e laws to determine in a quasi judicial manner whether by
of those laws any claim against the government has arisen
r of the petition, and that, "as neither section 2984 nor any
art of the revenue laws gave to the federal courts appellate
to revise the decision of the Secretary of the Treasury, under
tion he was made the final judge or tribunal to decide upon
idity of the claim in question." Undoubtedly it is the Secre-
ot the court, who is to pass upon the proofs; it is his judg-
not the court's, which is to be satisfied that the facts author-
efund exist. In the Ferry Case he rendered a decision that
e facts stated the petitioner did not bring his case within the
, and that therefore the petition filed under the section must
cted." The court had no power to review or revise that de-
and therefore threw out the claim. But if, on the other
he facts stated by the petitioner brought his case within the
, and such proof was presented that the Secretary became
d of the existence of those facts, we do not find in the Ferry
uthority for the proposition that nevertheless the Secretary
refuse to allow the refund arbitrarily and capriciously. On
trary, there is high authority the other way. In Supervisors
S., 4 Wall. 435, 18 L. Ed. 419, the court considered a statute
provided that a board of supervisors "may, if deemed ad-
," levy a special tax to pay certain indebtedness. It held
nguage to be peremptory, saying:

conclusion to be deduced from the authorities is that where power is
public officers in the language of the act before us, or in equivalent
e, whenever the public interest or individual rights call for its exer-
e language used, though permissive in form, is in fact peremptory.
ney are empowered to do for a third person the law requires shall be
The power is given, not for their benefit, but for his. It is placed
e depositary to meet the demands of right and to prevent a failure
ce. It is given as a remedy to those entitled to invoke its aid, and
ould otherwise be remediless. In all such cases it is held that the
of the Legislature, which is the test, was not to devolve a mere dis-
but to impose a positive and absolute duty."

also, City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560.

An interesting case to the same effect, where the language construed was, "whenever it shall be shown to the satisfaction of the * * * commissioners that the city sold * * * and received value therefor, * * * and it shall appear equitable to them to make such conveyance," is found in Provisional Municipality v. Lehman, 57 Fed. 324, 6 C. C. A. 349. In U. S. v. Thoman, 156 U. S. 353, 15 Sup. Ct. 378, 39 L. Ed. 450, where a consideration of the full text of the statute led the court to the conclusion that the use of the word "may" was intended by the Legislature to be permissive only, they quoted with approval from Minor v. Mechanics' Bank, 1 Pet. 46, 7 L. Ed. 47, the statement that: "No general rule can be laid down upon this subject further than that that exposition ought to be adopted in this as in other cases which carries into effect the true intent and object of the Legislature in the enactment."

It seems quite apparent that the intent and object of the Legislature was to afford relief to unfortunate importers who might be able to satisfy the Secretary by sufficient proof that they came within the terms of the section. So careful was the Legislature to secure that relief that it provided a perpetual annual appropriation from which the repayments might be made. It would certainly defeat that object if, after being satisfied that the proofs established all the prerequisite facts which the section called for, the Secretary might nevertheless arbitrarily refuse to make the payment.

In the case at bar all question as to whether the proof produced of actual injury, etc., by accidental fire while in the custody of the customs officers was satisfactory to the Secretary is eliminated. The case is presented on a demurrer which concedes all the facts averred. It must therefore stand conceded that had the salvors not intervened a loss would have occurred under circumstances which would have brought the importer within the provisions of section 2981. It cannot be supposed that the Secretary would find the undisputed facts otherwise than as they were proved to him to be; it may fairly be assumed that undisputed facts would be susceptible of convincing proof; and since all the facts enumerated in the section are conceded it must be presumed that their presentation to the Secretary would satisfy him that the importer was within the terms of the section.

The next question is whether, by reason of its liability to refund the $6,000 duties in case of the destruction of the property, the United States had such an interest in that property that salvors, who by saving the property save the government from paying out such sum, may be entitled to a salvage award on the basis of the money thus put to risk.

Counsel for the petitioner calls attention to an English authority where the proposition established was in principle the same as that presented here. Five Steel Barges, 15 P. D. Rep. 142. In that case salvage services were rendered to five barges built by defendant for the government, and which were being towed from Chepstow to Portland. At the end of the towage two of the barges were given up to the government. An action of salvage in personam was brought against defendants in respect to these two barges, and in

gainst the remaining three. It was argued that plaintiffs ot entitled to recover as against the two barges, because they ot asserting their right as a maritime lien, but had instituted tion in personam. The court said:

> the two which have been given up to the government, I think it is clear, on the authorities, that an action in personam lies against ers of a vessel saved, even though the property has been transferred s and the lien lost. In this case, however, the property does not ap- have been in the defendants, because it would, I think, under the , be in the government. But on this point I am of opinion that the sue in personam is not confined to the case of the defendant being the egal owner of the property saved. I think it exists in cases where ndant has an interest in the property saved, which interest has been y the fact that the property is brought into a position of security. sdiction which the court exercises in salvage cases is of a peculiarly e character. The right to salvage may arise out of an actual con- ut it does not necessarily do so. It is a legal liability arising out of that property has been saved; that the owner of the property, who the benefit of it, shall make remuneration to those who have con- he benefit upon him, notwithstanding that he has not entered into tract on the subject. I think that proposition equally applies to the o has had a benefit arising out of the saving of the property. In e the defendants were under contract with the government to supply ith barges at a certain price. Payment was to be made by certain ents, of which only one remained unpaid at the time of the services. if * * * these installments were all paid on condition that the should be delivered all within twelve months of the date of the con- would follow that, if defendants had not been in a position to de- e barges within the twelve months, then either they would have been damages for not performing the contract, or liable to make restitu- the installments which had been paid them on conditions not fulfilled . It appears to me then that they had substantially an interest to the ount of the barges at the time of the services, and that the same bligation to which the law has given force in the case of an owner to those who have an interest in the property. This is certainly ness-like view of the matter."

he Port Victor, 9 Asp. Mar. Law Cas. (N. S.) 163, where ment stores were being carried at the risk of charterers, the rers were held to a personal liability to pay salvage because were directly interested in the preservation of the goods and vage service was a direct benefit to them." Justice Jeune he Five Steel Barges with approval, holding that "a man who d a benefit arising out of the saving of property is liable to a for salvage no less than the actual owner of it." The Port was affirmed and the principle laid down in The Five Steel s favorably commented on by the Court of Appeals in 9 Asp. aw Cas. (N. S.) 183.

are of opinion that the government in the case at bar had an t in the sugar to the extent of the duties, it had a lien on the till the duties were paid, and, since they were paid under a which provided for their refund in case of the destruction of gar by accidental fire, they had an interest which should in ness respond to the individuals whose salvage services pre- the loss which the government would sustain by making efund.

judgment of the District Court is affirmed.

WALLACE, Circuit Judge (dissenting). I cannot concur in the judgment of the court. I think that the statute (Rev. St. § 2984 [U. S. Comp. St. 1901, p. 1958]) is permissive, and not mandatory, and was intended to authorize the Secretary of the Treasury to remit any duties which in justice and according to his judgment the importer ought not to lose. If it is mandatory the Secretary has no discretion, and the government may become liable to refund duties on merchandise injured or destroyed without the fault of any of its officers, and in their custody merely for the accommodation of the importers, and under circumstances in which the loss should properly and reasonably fall upon the importer rather than upon the government. The intention of Congress to subject the government to such a liability in cases where the importer would have no legal claim against an individual under the same circumstances is not to be inferred in the absence of any more significant evidence than the phrase, "the Secretary of the Treasury is hereby authorized." The words "hereby authorized" are equivalent to "may." Even when the word "shall" is used in statutes, it is, as against the government, to be construed as "may," unless a contrary intention is manifested. R. R. Co. v. Hecht, 95 U. S. 169, 24 L. Ed. 423. Clearly "may" should not be construed as against the government as "shall," unless this meaning is compelled by the nature of the power confided, or because the exercise of the power to its fullest extent is a plain duty to those interested in it.

HULITT v. OHIO VALLEY NAT. BANK.

(Circuit Court of Appeals, Sixth Circuit. May 11, 1905.)

No. 1,386.

1. NATIONAL BANKS—ASSESSMENT AGAINST SHAREHOLDERS—OWNERSHIP OF STOCK.

As a general rule, the question of liability for an assessment on the shares of an insolvent national bank depends upon who was the actual owner of the stock when the operations of the bank were suspended.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 916–918.]

2. SAME—PLEDGED STOCK.

For the purposes of the national banking act, the pledgor of stock not transferred on the books is to be regarded as the owner until and unless something further transpires which operates to transfer the ownership to another.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 920.

Rights and liabilities of pledgees of corporate stock, see note to Frater v. Old Nat. Bank, 42 C. C. A. 135.]

3. SAME—LIABILITY OF PLEDGEE—DIVESTING OWNERSHIP OF PLEDGOR.

Defendant bank held stock of a national bank as collateral security for a note at the time the maker of the note died leaving it unpaid. Subsequently defendant caused the stock, which was indorsed in blank by the pledgor, to be transferred on the books of the bank to one of its employés who was irresponsible, and who paid no consideration for the transfer, but in fact held the stock for defendant. Defendant then

de an indorsement on the note of a sum as proceeds of a sale of the ck made on the day of the transfer, and proved the balance due the note against the estate of the pledgor, and was paid dividends reon. *Held*, that such transaction operated to transfer the owner- of the stock from the pledgor's estate to defendant, which was liable an assessment thereon on the subsequent failure of the issuing bank.

Error to the Circuit Court of the United States for the South- strict of Ohio.

ry M. Huggins, for plaintiff in error.
Muir and Robert Ramsey, for defendant in error.

ore LURTON, SEVERENS, and RICHARDS, Circuit s.

VERENS, Circuit Judge. This suit was brought by the plain- error, who is the receiver of the First National Bank of Hills- Ohio, to recover an assessment levied by the Comptroller of rrency upon the shareholders of the bank on account of their rdinary liability to creditors, the bank having become in- t. The defendant in error is charged as the owner of 20 of the stock of the Hillsboro bank. To the petition the de- t filed an answer making a general denial of the plaintiff's tions in respect to its ownership of the stock. The case was in the court below upon an agreed statement of facts, which odied in a bill of exceptions, and is as follows:

n March 18, 1893, one Overton S. Price procured a loan from the nt in the sum of ten thousand ($10,000) dollars, giving his promis- te therefor, together with certain collateral securities recited in the said note, a copy of which note, with all indorsements thereon, is attached, made part hereof, and marked "Exhibit A."

n December 25, 1893, said Price deceased, leaving said note at that ast due and unpaid. No payments have ever been made upon said cept as hereinafter set forth. There is still a balance remaining due paid upon said note.

n June 18, 1894, the defendant made a formal transfer of the pledged f the First National Bank of Hillsboro, Ohio, and the Dominion Na- Bank of Bristol, Va., to one Henry Oetjen, an employé of the defend- no was pecuniarily irresponsible. Said shares were transferred upon ks of said banks, respectively, and new certificates therefor issued in ne of said Oetjen, and delivered to him on July 7, 1894. No money ration passed to the defendant for said transfer, and none was ex- nor did the defendant at that time credit said note with any sum by of said transfer, nor was any credit at that time indorsed upon said entered in defendant's books. Said Oetjen indorsed in blank the ates of stock which were issued to him.

aid transfer was made upon the understanding and agreement be- said Oetjen and the defendant that the former should hold said stock rity for the indebtedness of the estate of said Price upon said note, g any amounts which he might realize from said stock as credits upon ote; that in pursuance of this agreement and understanding said subsequently paid the defendant, on account of said note, a sum of received by him from said Dominion National Bank on account of a on in the capital stock, and also the amount of certain dividends he received from time to time upon said Dominion National Bank until the same was finally sold by said Oetjen, whereupon the pro- of said sale were likewise applied by him upon said note.

That on February 19, 1896, the defendant prepared proof of claim t the estate of said Price, and at that time, believing the stocks trans-

ferred to said Oetjen to afford a reasonable security for said Exhibit A to the amount of forty-four hundred and eighty-four ($4,484.00) dollars, indorsed the credit for that amount upon said note, which appears upon Exhibit A, and filed its proof of claim against said estate for the balance of the indebtedness upon said note; that no consideration was paid for said credit and the same was not entered upon defendant's books; that all dividends arising upon said distribution of the estate of said Price were applied upon said note.

(6) That said First National Bank of Hillsboro, Ohio, continued to do business until July 16, 1896; that from the date of said transfer the stock in said bank at all times appeared on the books of said bank in the name of said Oetjen; that there was nothing on the books of said bank at any time to connect this defendant with said stock or to indicate that this defendant had any interest whatever in the same; that defendant at no time performed any act of ownership of said stock, or exercised, or attempted to exercise, any of the rights of a stockholder of said bank or of the Dominion National Bank of Bristol, Va., unless the acts above set forth were, according to legal intendment, of that character. Defendant caused said shares to be transferred to said Oetjen because it was unwilling to assume the risk of the statutory liabilities of a stockholder in respect to said shares.

Exhibit A.

"$10,000. X. Cincinnati, O., March 18th, 1893.

"Ninety days after date I promise to pay myself or order, ten thousand dollars for value received, payable at the office of A. C. Conklin & Co., having deposited or pledged as collateral security for the payment of this note,

50 shrs. Citizens' Nl. Bk. Stock, Hillsboro, O	shrs.	$100
20 shrs. First Nl. Bk. Stock, Hillsboro, O	shrs.	100
40 shrs. Hillsboro Gas Light Co. Stock	shrs.	50
30 shrs. Dominion Nl. Bk. Stock, Bristol, Va	shrs.	100
100 shrs. Bk. of Camden Stock, Camden, O	shrs.	100
200 shrs. Bk. of Lynchburg Stk., Lynchburg, O	shrs.	50

"And I hereby give to the holder thereof full power and authority to sell or collect at my expense all or any part or portion thereof, at any place, either in the city of Cincinnati, or elsewhere, at public or private sale at holder's option, on the non performance of the above promise, and at any time thereafter, and without advertising the same or otherwise giving to me any notice. In case of public sale, the holder may purchase without being liable to account for more than the net proceeds of such sale.

"O. S. Price."

Indorsed: "O. S. Price."

"Forty-four hundred and eighty-four ($4,484.00) dollars paid on account of within note June 18, '94, being proceeds of sale of 30 shares stock Dominion Natl. Bank and 20 shares of stock 1st National Bank of Hillsboro, O."

The court gave judgment for the defendant, to which the plaintiff excepted. No opinion was filed by the trial judge, but counsel assumed, and we suppose correctly, that the conclusion of the court was that the defendant was not the owner of the shares. That is the essential question in the controversy. The proposition that, in the absence of exceptional circumstances, the question to be settled is, who was the actual owner of the stock at the time when the operations of the bank were suspended, is established by repeated decisions of the Supreme Court. Recent decisions to this effect are: Pauly v. State Loan and Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844; Rankin v. Fidelity Insurance, etc., Co., 189 U. S. 242, 23 Sup. Ct. 553, 47 L. Ed. 792.

In dealing with the present case we are limited to the facts contained in the agreed statement. We can infer no other facts unless they are necessary inferences from those agreed. It has been often

t that which is necessarily implied is as much a part of the ent as if it were written into it. And this rule of interpreta- pplied to the most solemn instruments, inter partes, as well atutes. But the implication must be one arising from legal nent, and not merely a deduction of fact.

he purposes of the banking act the pledgor of stock is to be d as the owner until and unless something further transpires perates to transfer the ownership to another. The pledgee ithout himself becoming liable to the contingencies of own- have the stock transferred in blank by the pledgor, as was this case; but in such case the pledgor does not cease to wner in the sense intended by the law, and until the owner- in some way divested from the pledgor the latter continues l for the stock.

suit of this character we are required to have regard to the s of those who are concerned with the stock and their deal- th it, and to ascertain who, as between such persons, is the wner of it, provided, of course, there is no transfer to the on the stock book of the bank, and no fraud upon credit- und in their conduct. From the facts agreed, we think that y, upon the authority of Anderson v. Philadelphia Ware- o., 111 U. S. 479, 4 Sup. Ct. 525, 28 L. Ed. 478, it should be at the defendant did not become the owner of the stock and e to be assessed on account of it, down to the time of the tion which occurred during the settlement of the estate e in the probate court. After the death of the pledgor, nd on June 18, 1894, the defendant, transferred the stock en without consideration given or expected. It was trans- o him on the stock book of the Hillsboro bank. Oetjen in- the new certificates in blank. He was an employé of the nd irresponsible, and in fact the defendant continued to con- stock notwithstanding the formal transfer to him.

e the Hillsboro national bank was continuing to do business, February 19, 1896, the defendant filed a claim against the of Price, in the proper probate court, for the amount due note, less the sum of $4,484, which it had indorsed as a sum n account of within note June 18, '94, being proceeds of sale nares stock Dominion Natl. Bank and 20 shares of stock 1st al Bk. of Hillsboro, O." The date, June 18, '94, was the date ransfer of the stock it made to Oetjen. It is to be inferred e claim was allowed, as it is stated not only that the claim was ut "that all dividends arising upon said distribution of the of said Price were indorsed upon said note." Afterwards, 6, 1896, the Hillsboro bank ceased to do business.

stated in the agreed statement of facts that the transfer of ck to Oetjen was made upon the agreement and understand- ween him and the defendant that he should hold the stock curity for the indebtedness of the estate of said Price upon the ut it is not stated that this agreement was made known to resentative of Price's estate. Nor is it stated that the act defendant in applying dividends from the estate upon the

note was made known to said representative of the estate. And the maxim applies, "De non apparentibus et non existentibus eadem est ratio."

Counsel for the defendant in their brief advance the following argument:

"It is said that this indorsement was evidence tending to show that the defendant had intended the transfer to Oetgen to be a sale absolute, and not merely by way of security. If that claim were sound, still the court has found that there was no intent of that character."

But the statement of the facts could not be affected by a finding of the court any more than could a special verdict. It is, however, a mistake to say that the court found any facts. The record states that "the court, upon consideration of the pleadings, evidence, and arguments of counsel, finds the issues joined in favor of the defendant." But this means nothing more than that the court found the issues of law in favor of the defendant. The case in all particulars is like that of Supervisors v. Kennicott, 103 U. S. 554, 26 L. Ed. 486, where the court said:

"It is true that in the judgment as entered it is stated that the court found the issue in favor of the plaintiffs; but that, when read in connection with the bill of exceptions, is no more than a declaration that the court found the law to be in favor of the plaintiff on the case as stated."

In presenting and obtaining the allowance of its claim, the defendant represented that it had sold the stock and that it had appropriated the proceeds to the payment of the note, and the adjustment of its claim was made upon that footing. When it is said in the agreed statement "that no consideration was paid for said credit," meaning the indorsement of the $1,181, the interpretation must be that no other consideration "was paid" than such as the transaction itself imports. And granting that, notwithstanding the defendant's representation, there had in fact been no actual sale of the stock, we think the result of the proceedings in the probate court upon the defendant's representation and claim was, as between the Price estate and the defendant, to transfer the ownership of the stock to the defendant for the consideration represented in the indorsement, and that the defendant could not thereafter claim against the estate that it had not appropriated the stock in satisfaction pro tanto of the sum due on the note. It may be that the representative of the Price estate might once have had some remedy to recover the stock, but he has made no claim for relief against the transaction, and it is manifest that he would now have no motive for doing so. The stock has become worse than useless. Whatever the undisclosed motive of the defendant may have been, we think the legal import of what was actually done was that it acquired the stock, and that the estate of Price no longer held it either for the benefits or burdens of ownership. No one could believe that the defendant when its claim was adjusted by the probate court expected to make further answer to the estate for this stock, or intended anything else than a conversion of it into its own property at the price for which it reported the stock sold. It would be unjust for

w to cast what has proved to be a disadvantage upon the party m it dispossessed. The burden of the assessment must fall one of these parties, and we think the receiver has made the selection.

he judgment should be reversed, with costs, and direction given he court below to enter a judgment for the plaintiff for the unt of the assessment, with interest from May 27, 1897, the when it became payable.

UNITED STATES v. LAWRENCE, SON & GERRISH.

(Circuit Court of Appeals, Second Circuit. February 24, 1905.)

No. 3,297.

OMS DUTIES—FOREIGN CURRENCY—VALUATION—CONSULAR CERTIFICATE.

In estimating the value of foreign merchandise exported to the United States, according to the value of the currency of the country of exportation, as proclaimed quarterly by the Secretary of the Treasury, under the requirements of section 25, Tariff Act Aug. 28, 1894, c. 349 (28 Stat. 552), the date of the consular certification of the invoice is conclusive evidence of the date of exportation for the purpose of determining the quarter the proclamation for which is applicable.

ppeal from the Circuit Court of the United States for the South- District of New York.

or decision below, see 127 Fed. 750, reversing a decision of the rd of United States General Appraisers which had affirmed the ssment of duty by the collector of customs at the port of New k on merchandise imported by Lawrence, Son & Gerrish. e, Wood v. U. S., 72 Fed. 254, 18 C. C. A. 553.

. A. Wise, for appellant.
. W. Smith, for appellees.

efore WALLACE, LACOMBE, and COXE, Circuit Judges.

ER CURIAM. The collector, in classifying the importations ontroversy (Chinese floor mattings), determined their value xceeding 10 cents per square yard, and therefore subject to duty er paragraph 333 of the tariff act of July 24, 1897, c. 11, § 1, edule J, 30 Stat. 180 [U. S. Comp. St. 1901, p. 1662] at 7 cents per are yard and 25 per cent. ad valorem. Concededly, their value ended upon the value of the Mexican dollar, that being the cur- cy of the invoice, at the date of the exportation of the mer- ndise. The merchandise was exported upon an invoice certi- by the United States consul at Hongkong, and the certifica- was dated October 10, 1900. The importers claim that the rchandise was exported prior to October 1, 1900, at which date value of the Mexican dollar, as proclaimed by the Secretary of Treasury, was such that it would have reduced the invoice value he merchandise below 10 cents per square yard.

It is provided by the customs administrative act of June 10, 1890, c. 407, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], as follows:

"Section 19. That whenever imported merchandise is subjected to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of the exportation to the United States in the principal markets of the country from which it is imported," etc.

By the tariff act of August 28, 1894, c. 349, § 25 (28 Stat. 552) it was provided that:

"The value of the standard currency in circulation of the various nations of the world shall be proclaimed quarterly by the Secretary of the Treasury on the first day of January, April, July and October in each year."

The section further provides as follows:

"And the value so proclaimed shall be followed in estimating the value of foreign merchandise exported to the United States during the quarter for which the value is proclaimed, and the date of the consular certification of any invoice shall for the purpose of this section be considered the date of the exportation."

This section of the act has never been repealed, and its language is so explicit as not to leave any doubt about its meaning. Generally, the market value or wholesale price of imported merchandise is to be fixed by its value or price at the time of exportation, and this time presents a question of fact which may not be controlled by the date of the consular certification of the invoice, although such certification may afford evidence of the time; but, for the purpose of estimating the value when that value depends upon the value of the currency of the invoice, it is imperative, and the date of the certification is made conclusive evidence of the time of the exportation.

We conclude, therefore, that the court below erred in reversing the decision of the Board of General Appraisers, and that the decision should be reversed, and the decision of the board affirmed.

Ordered accordingly.

WILLIAMSON et al. v. BEARDSLEY.

SAME v. SCHOPPE.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1905.)

Nos. 1,998, 1,999.

1. EXECUTORS—REAL ESTATE—SALE—CONVEYANCES—VACATION—FRAUD—BILL.
In a suit to set aside conveyances of real estate by an executor in probate proceedings, mere allegations that the sales were fraudulent, and that the proceedings were fraudulently conducted, without an averment of substantive facts justifying the charge of fraud, was insufficient.
[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 37; vol. 39, Cent. Dig. Pleading, § 28½.]

2. SAME.
Where an executor applied for permission to sell real estate, and fully and truthfully stated in detail the condition of the estate and his previous conduct of its affairs, the fact that the sales were irregular, or even void, did not establish that the executor was guilty of fraud.

ME—GROUNDS OF ATTACK—RECORD—KNOWLEDGE.

Where the grounds on which certain conveyances by an executor were attacked were matters of record, and complainants had notice of the pendency of the administration proceedings sufficient to excite their attention and to put them on guard as to the course thereof, they would be deemed to have had actual knowledge of the contents of such records.

ME—LACHES.

Rev. St. Utah 1898, § 2810, declares that title to a specific legacy passes by the will, but that possession can only be obtained from the personal representative, and that he may sell the property devised or bequeathed in the cases provided. Section 2870 declares that no action shall be brought to recover any estate sold by an executor in probate proceedings by a person claiming under the decedent unless commenced within three years next after such sale, but that such an action may be maintained within three years from the discovery of the fraud or other lawful grounds on which the action is based. *Held*, that where complainants brought suit to set aside certain conveyances by an executor in probate proceedings nearly 18 years after the admission of the will to probate, nearly 6½ years from the entry of the orders on which in part the orders of sale were based, and more than 4½ years after the order of sale in one case and 5 years in the other, and the grounds of attack consisted of defects in the proceedings apparent on the record, they were barred by laches, though nonresidents.

ME—MINORS.

The three-years limitation prescribed by Rev. St. Utah 1898, § 2870, within which an action may be brought by a person claiming under a decedent to set aside an executor's conveyance in probate proceedings, runs during the minority of the complainant.

ppeal from the Circuit Court of the United States for the Dis- of Utah.

Villiamson and others sued Prudence Beardsley and Mary A. ppe to set aside and cancel certain orders of sale of the district rt of Salt Lake county, Utah, probate division, and executor's ls which were executed and delivered pursuant to sales made er such orders. The property involved consisted of two tracts nd in Salt Lake City, formerly owned by Jonathan N. William- who died testate, and whose will was probated in 1883. The plainants, now appellants, claimed under express devises of the ; the defendants claimed as purchasers and grantees of the cutor. The administration of the estate of the testator was first un in the probate court of Salt Lake county whilst Utah was a itory, but upon its admission as a state, and in accordance with nstitutional provision, jurisdiction thereof devolved upon the rict court of the same county. In the bills of complaint it was rred that various defects existed in the proceedings of the local rt, all of which were apparent upon its records; that the acts he executor were fraudulent as to the complainants, and that did not discover such fraud or defects until shortly before the s were instituted. The defendants demurred to the bills of plaint, the demurrers were sustained by the Circuit Court, and ees were rendered accordingly. The complainants prosecuted e appeals.

ichard B. Shepard and Harrison O. Shepard, for appellants.

enner X. Smith (Frank B. Stephens and Charles C. Dey, on brief), for appellees.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The purpose of the suits was the annulment of the orders of sale of the state court and the deeds of the executor. The suit against Prudence Beardsley was instituted in the court below on March 25, 1902, more than four years and nine months after the sale and the delivery to her of the deed from the executor. The suit against Mary A. Schoppe was instituted March 26, 1902, more than five years after the sale and the delivery to her of the executor's deed.

Among the grounds specified in the demurrers to the bills of complaint were the bar of the statute of limitations and the laches of the appellants.

A statute of Utah provides as follows:

"No action for the recovery of any estate sold by an executor or administrator in the course of any probate proceeding, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after such sale. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other lawful grounds upon which the action is based." Comp. Laws 1888, § 4193; Rev. St. 1898, § 2870.

To escape the bar of the statute, or rather to evade the application of the equitable doctrine of laches, the appellants averred in their bills of complaint that the executor acted fraudulently, and also that they had no notice or knowledge of the orders of the state court or of the fraudulent acts of the executor resulting in the sale and conveyance of the property until within a few months of the institution of their suits. They now contend that those averments made their bills of complaint secure from the attack of the demurrers.

There was, however, an entire absence of averment of substantive facts justifying the charge of fraud; and in such a case the mere use, by the pleader, of the terms "fraudulent" and "fraudulently" signifies nothing. St. Louis, etc., Ry. Co. v. Johnston, 133 U. S. 577, 10 Sup. Ct. 390, 33 L. Ed. 683; Moore v. Greene, 19 How. 69, 72, 15 L. Ed. 533; Moss v. Riddle, 5 Cranch, 351, 3 L. Ed. 123. Viewing the bills of complaint in the aspect most favorable to the appellants, it does not appear that the executor acted otherwise than in the utmost good faith. A misconception of power or authority, unaccompanied by corrupt or improper motive, is not fraud. When the executor applied for the orders of sale of the property he stated the condition of the estate and his previous conduct of its affairs truthfully and in most commendable detail. Everything that he did was reported to and met with the judicial sanction of the state court in which the estate was being administered; and upon the showing which he made—and it is not claimed that it was false in fact—the court ordered the property to be sold. The sales were made, reported to, and confirmed by the court, and the deeds were duly executed. If it were true that the sales were

ar or even void, it does not follow that the executor was of fraud.

appellants also contend that the statute of limitations had n, and that they are not subject to the charge of laches be- they did not until recently discover the existence of the pro- gs of the state court and the alleged defects therein upon they rely to defeat the orders of sale and the deeds. It ap- from the averments of the bills of complaint that they knew will of the testator, its provisions, and the granting of the testamentary in 1883. They therefore knew that adminis- upon the estate had begun and was in course. They were d with knowledge that their title to the property devised to night in certain contingencies be devested under the authority tute of Utah, which provided:

specific devise or legacy the title passes by the will, but possession y be obtained from the personal representative; and he may be au- by the court to sell the property devised and bequeathed in the cases provided." Rev. St. 1898, § 2810.

proceeding of administration was in the nature of a proceed- rem, and in a sense the appellants were parties thereto. hing they now complain of appeared upon the public rec- There was no fraud, no deception, no concealment, nor were tters of which complaint is made of such a character that would ordinarily remain secret. Under these circumstances misapplication of terms to say that the grounds of action were ered years after they arose and appeared upon the records of urt. Discovery as employed in a statute or equitable rule tations and knowledge are not convertible terms, nor does rmer mean the result of a resort at leisure to known sources ormation. The possession of the means of knowledge is lent to knowledge itself. A party who has the opportunity wing the facts of which he complains cannot avail himself of activity, and thus escape the imputation of laches. The ls of attack against the validity of the orders of sale and the or's deeds were matters of record. They had notice of the acy of the administration proceedings sufficient to excite their on and to put them on guard as to the course thereof. Under ircumstances they must be deemed to have had actual knowl- f what the records showed. The Lady Washington Col. Co. od, 113 Cal. 482, 45 Pac. 809; Shain v. Sresovich, 104 Cal. Pac. 51; Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Hecht ey, 72 Cal. 363, 14 Pac. 88; Norris v. Haggin, 136 U. S. 386, Sup. Ct. 942, 34 L. Ed. 424; Wood v. Carpenter, 101 U. S. 9, 25 L. Ed. 807; St. Paul, etc., Ry. Co. v. Sage, 49 Fed. 315, C. C. A. 256; Percy v. Cockrill, 53 Fed. 872, 4 C. C. A. etzel v. Transfer Co., 65 Fed. 23, 12 C. C. A. 490; Swift v. 79 Fed. 709, 25 C. C. A. 154; Rhino v. Emery (C. C.) 65 26.

ill be observed that the Utah statute authorizes the main- e of the action at any time within three years from the dis- of the fraud or other lawful grounds upon which the action

is based. The settled rule requiring diligence in endeavor to discover the facts affecting the rights of a party has generally been applied to cases of fraud, but there is equal, if not greater, reason for its application to other grounds or causes of action.

The appellants claim that they were ignorant of the matters complained of until November 1, 1901. This was nearly 18 years after the admission of the will to probate and the issue of the letters testamentary; nearly 6½ years after the entry of the orders for family allowance upon which, in part, the subsequent orders of sale were based; more than 4½ years after the order of sale in one case, and more than 5 years in the other. In each case the sale was made and the deed was executed shortly after the entry of the order. It does not appear that during these years the appellants took any steps or made any inquiry for the ascertainment of the patent facts or the protection of their interests. The sole excuse presented in the bills of complaint is that they were nonresidents of and absent from Utah, and such excuse is insufficient either in law or equity. Whether time runs against the assertion of their claims cannot be made to depend upon their proximity to or remoteness from the seat of the court whose orders are in question. There is no such quality in distance from the location of public records as would enable us to say that those living within the state are bound to diligence while those living in neighboring states may rest secure without care or inquiry.

In proposed amendments to the bills of complaint it was averred that one of the appellants was a minor until about 15 months before the suits were commenced. It is well settled that under the rule in Utah and in California, from whence the Utah law was taken, the statute of limitations in cases of this character runs during the minority of the party affected. Jenkins v. Jensen, 24 Utah, 108, 66 Pac. 773, 91 Am. St. Rep. 782; Dennis v. Bint, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17; Meeks v. Olpherts, 100 U. S. 564, 25 L. Ed. 735; Meeks v. Vassault, 3 Sawy. 206, Fed. Cas. No. 9,393.

The appellants did not institute their suits within the time specified in the statute. There are no exceptional conditions or unusual circumstances attending the cases as presented which make it inequitable to follow the statutory rule of limitation. The duty of the Circuit Court was therefore clear, and its action was right.

The decrees are affirmed.

NOTE.—The following is the opinion of the court below (MARSHALL, District Judge):

On October 23, 1883, Jonathan M. Williamson died testate, being then a resident of Salt Lake county, Utah. By his last will he appointed Joseph R. Walker and Boyd Park as his executors, and devised the real estate in controversy in this action, together with other real estate, to his widow for life, and the remainder to the plaintiffs herein and their immediate predecessors in interest. Besides leaving real estate of considerable value he left sufficient personalty to more than pay his debts, the reasonable costs of administration, and a family allowance limited to the time reasonably necessary to administer his estate. The will of decedent was admitted to probate, and letters testamentary thereon were on the 5th day of December, 1883, duly issued to Joseph R. Walker and Boyd Park. They continued to act as executors

his will until the 20th day of April, 1894, when Joseph R. Walker l his resignation. This resignation was not formally accepted, nor ers revoked, nor any order made discharging him as executor, but ch resignation Boyd Park acted alone as executor, claiming to be the ing executor under the will of the deceased. On the 17th day of 895, upon the petition of Boyd Park as executor, the probate court n order for a family allowance to the widow of the deceased and to er in the sum of $75 per month. Upon the 24th day of March, 1897, ark, claiming to be the sole executor, filed a petition asking for an f sale of the premises here in controversy to pay arrears due on this allowance and certain expenses of administration in a small amount due. On the same day the court made an order that those opposing ition should show cause on April 21, 1897, why the same should not ted, and that a copy of the order be published for four successive rior thereto in a designated weekly newspaper. This order to show as first published in the newspaper named on the 27th day of March, nd the last publication was on the 17th day of April, 1897. By an ated April 21, 1897, and filed in the clerk's office on April 26, 1897, rt directed the sale of the premises in controversy, and on the 17th May, 1897, said Boyd Park, as executor, sold the same to the defend- ich sale was on the 29th day of May, 1897, confirmed by the court, leed of the premises to the defendant was executed and delivered on day of June, 1897. On the 11th day of November, 1901, Williamson's died, and not until after this date did the plaintiffs discover the fact sale or the facts claimed to show its invalidity.

e bill of plaintiffs the foregoing facts are in substance stated, and a is sought setting aside this sale, which is claimed to be void on the ng grounds: (1) That the petition praying for the sale was made by cutor alone and was not with the assent of his co-executor; (2) that ssity for the sale was shown; (3) that four full weeks' publication of was not had prior to the day fixed by the court for the showing of gainst the petition; (4) that the order of May 17, 1895, granting the allowance, was void, and it was the only basis for an order of sale. not claimed in the bill that the defendant colluded or connived in any th the executor, or did not pay a fair price for the premises sold, or ual notice of any irregularity or informality in the proceedings lead- to the sale.

DE HAVEN v. HENNESSEY BROS. & EVANS CO.

(Circuit Court of Appeals, Sixth Circuit. April 29, 1905.)

No. 1,355.

TER AND SERVANT—MASTER'S LIABILITY FOR INJURY TO THIRD PERSON—SUMPTION OF RISK.

A person visiting a public building in course of construction, by invi- ion of the contractor or its superintendent in charge of the work, ere such invitations were frequently given to him, and to other citi- s, was not a trespasser because of a notice posted outside the build- warning the general public to keep out, and while he assumed the k of injury from apparent dangers resulting from existing conditions did not assume the additional risk due to negligence of the licensor its servants, and especially of a servant known to the contractor to be gerously careless.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Serv- , § 1226.]

E—ACTION FOR DAMAGES—QUESTIONS FOR JURY.

Defendant was a contractor engaged in the construction of a court- se, the work being in charge of a superintendent. On several occa- ns plaintiff, as well as other citizens, had visited the building by in- ation of the superintendent, and in his company, and sometimes also

In company of a subordinate, who, as the evidence tended to show, had charge of the work in his absence, had gone over the building, using at times an elevator or hoist used to carry both men and materials to the several floors and into the tower. On one occasion, the superintendent being absent, plaintiff, by invitation of the assistant, went with him into the tower, and was injured by the falling of the elevator, which the latter called to take them down. The accident was caused by the gross negligence of the man in charge of the hoisting engine in failing to put on the clutch which held the elevator in position, the result being that it dropped at once when the two men stepped upon it. He was known to be careless, and had once been discharged for that reason. *Held*, that whether the assistant was in fact such and acting as vice principal within the scope of his authority was a question for the jury, as was also the question of defendant's liability for the injury, under all the facts shown.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Darlington & Darlington (Howard & Howard, of counsel), for plaintiff in error

Worthington & Strong and Horace L. Smith, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action to recover damages for personal injuries caused by the accidental fall of an elevator or hoist in use in a courthouse in course of construction at Xenia, Ohio. The defendant company was the contractor; the plaintiff a physician who, upon the invitation of the superintendent of construction, was visiting the building to observe the progress of the work. The negligence charged was that of the engineer who was operating the elevator. At the conclusion of the plaintiff's testimony the court directed a verdict for the defendant.

The testimony tended to prove the following facts: The work of construction was in charge of one Frazier as superintendent. Under Frazier was one Schlee, who was timekeeper, paid the men off, and, in the absence of Frazier, had charge of the building and work. The courthouse was a three-story stone structure, with a tower extending several stories higher, in which was a dial window for a clock. An elevator or builder's hoist, operated by an engine on the outside of the tower, ran up through the building into the tower. It was operated by a young man named Griesbaum, whose father owned the hoisting machine. Griesbaum was so careless that prior to the accident Frazier turned him off, but had to take him back because he could not get the use of the machine without employing the boy, the father making that a condition. The hoisting machine had a double drum. One end of the cable was attached to the drum and the other to the cage. There was a cogwheel with a clutch, which, when placed between the cogs, would hold the cage firmly in position. The cage could also be held by "jamming down the lever," but not safely so, especially if a load were placed upon it. The testimony was undisputed that it was the duty of the

er to lock the cogwheel and drum by means of the clutch leaving the engine when the elevator was in use.

plaintiff, Dr. De Haven, was a physician. He was well ac- with Frazier; had treated his family professionally. frequently invited him to visit the building and see how were getting on. He had visited the building several times the accident, and had been with Frazier and Schlee on the or. On the day of the accident he went to the building with allaway, a druggist. Frazier was not there, and Schlee was rge. While on the third or attic floor, Schlee came down he tower and invited them to go up there for a view. Gallo- ined, but the plaintiff followed Schlee up a ladder to the containing the opening for the clock dial. After remaining three or four minutes and enjoying the view, Schlee signaled e elevator. As it was coming up the plaintiff asked Schlee, ou going down on the elevator?" He answered, "Yes," and aintiff said to him, in substance, "Well, the elevator looks as safe as the ladder." Schlee replied, "The elevator is all When the elevator reached the level of the door Schlee the plaintiff to get on, and the two stepped on. The elevator ll like a stone to the basement, injuring the plaintiff. The as due to the fact that Griesbaum, after sending the elevator on Schlee's signal, left the engine to get some coal, without g the clutch in the cogwheel. While putting the coal on, baum heard the elevator falling, and tried to stop it, but it o late.

court below directed a verdict for the defendant upon the d that the plaintiff in visiting the building was a bare licensee, assumed all risks except that resulting from the intentional, , or wanton acts of the defendant, and none such was shown; chlee was not a vice principal at the time of the accident, but e timekeeper, and in inviting the plaintiff to use the elevator ing outside the scope of his employment; and, finally, that cident was due to the negligence of Schlee in not signaling the ser that he desired to descend, in which negligence the plain- participated, and therefore contributed to his own injury.

are unable to follow the court in its view of either the facts law. Whether on that day Schlee was a vice principal, in e of the building and of the work, was a question which should been left to the jury. One of the county commissioners testi- hat Frazier told him that if they wanted anything during his e to go to Schlee, which they did, while Griesbaum stated e thought Schlee was "assistant superintendent," and when r was absent Schlee had charge and "bossed" the men.

same thing is true as to the cause of the accident. The court says it was due to the negligence of Schlee in not signaling gineer that he desired to descend. The record does not sup- this statement. Schlee signaled Griesbaum to send the ele- up. Griesbaum knew to what floor, for he sent it there. He Schlee was there, for he says so; and he knew, inferentially, he elevator was sent up to receive a load. Schlee could not

have properly given the signal to descend until the load (whether men or material) was put on. In the meantime, it was the plain duty of Griesbaum, when the elevator reached the floor, to put the clutch in the cog-wheel, so as to hold the cage firmly until the load was on. He grossly violated his duty in sending the elevator up for a load, and then leaving the engine without putting the clutch in.

There were posted on the outside of the building notices signed by the contractor reading "No Admittance Except on Business." The court excluded testimony offered for the purpose of showing that many citizens had been invited by the superintendent to visit the building prior to the accident, and in the face of this, and the plaintiff's testimony that he had frequently been in the building on Frazier's invitation, declared it was the policy of the defendant to exclude persons from the building, and that therefore Schlee was acting without authority in showing the plaintiff over the building. The broad inference drawn from the posted notices was negatived by the invitations. It might be to the interest of a contractor engaged in putting up a public building to invite certain citizens to visit the building and observe the progress of the work, notwithstanding the necessary exclusion of the general public. Every citizen has an interest in a public building, and if invited to visit it is not to be treated as a trespasser.

The invitation, repeatedly given the plaintiff, "to come over and see how we are getting on," was one to visit any part of the building, including the tower, especially when supplemented by Schlee's suggestion, and it did not matter whether he followed Schlee into the tower to inspect the work or enjoy the view. Towers are built to look out of as well as to look at.

The plaintiff found Schlee apparently in charge, and Schlee suggested the trip to the tower and led the way. After showing the tower, Schlee ordered the elevator up for the purpose of taking them down. The plaintiff did not suggest the sending up of the elevator. His question, "Are you going down in the elevator?" was the equivalent of "Are we going down in the elevator?" or "Do you expect me to go down in the elevator?" And, getting an affirmative answer, he accordingly discussed the safety of the elevator. It all amounted to an invitation from Schlee to the plaintiff to use the elevator.

The court below took the view that Schlee had no authority to show the plaintiff the tower and invite him to use the elevator. But if Frazier was acting in the line of his employment in inviting the plaintiff to visit the building, Schlee was in the line of his employment when, in Frazier's absence and acting in Frazier's behalf, he did only what Frazier might have done. The elevator was used not only to carry material, but men, from floor to floor, and the plaintiff on a former visit had ridden in it along with both Schlee and Frazier. Schlee, therefore, had reason to believe that he was within his authority in doing what he had seen Frazier do, and the plaintiff certainly had no reason to believe that he was exceeding it.

The risks the plaintiff took when he followed Schlee up the ladder, and later stepped into the elevator to come down, were only

resulting from things as they were. In mounting the ladder
k the risk of getting dizzy and falling, and when he stepped
e elevator he took that resulting from the fact it was not a
ger elevator. He was obliged to guard himself, and if he
een hurt in an ordinary descent he would have had no re-
. But in assuming these apparent risks he did not assume
en risk known only to the defendant—the risk of the negli-
of a grossly incompetent employé entrusted with the opera-
f the elevator. The assumed risk of the dangers resulting
existing conditions does not include an added risk due to the
ence of the licensor or his servants. Gallagher v. Humphrey,
h's Cases on Torts, 288, and 6 Law Times Reports, N. S., 684;
tt v. R. R. Co., 102 U. S. 577, 26 L. Ed. 235; Felton v. Aubrey,
l. 350, 359, 20 C. C. A. 436; Ellsworth v. Metheney, 104 Fed.
22, 44 C. C. A. 484, 51 L. R. A. 389; Corrigan v. Union Sugar
ry, 98 Mass. 577, 96 Am. Dec. 685; Pomponio, Adm'r, v. N.
H. & H. R. R. Co., 66 Conn. 528, 539, 34 Atl. 491, 32 L. R. A.
0 Am. St. Rep. 124.

cause of the accident in this case was not only the active neg-
e of the defendant's servant, but of a servant known to the
r to be dangerously careless. This negligence consisted in
g an elevator into the tower for a load, and negligently leav-
without locking the drum by putting the clutch in the cog-
. This was the setting of a trap for the plaintiff in the strict-
nse. It was impossible for him to anticipate what followed
epping on the elevator. The pitfall was beyond his prevision.
uld not fairly be said to assume a risk he could not possibly
e.

case should have been submitted to the jury. The judgment
ersed, and the cause remanded for further proceedings not
istent with this opinion.

UNITED STATES v. FLEITMANN et al.

(Circuit Court of Appeals, Second Circuit. February 22, 1905.)

No. 125.

TOMS DUTIES—PROTEST—SUFFICIENCY.

Certain importers, in protesting against the assessment of customs
ty, based their objections on an inapplicable paragraph of the tariff
, but named the correct rate of duty, it happening that the rate pro-
ed in said paragraph was the same as in the paragraph that should
re been referred to in the protest. There was nothing in the terms
the protest to direct the attention of the collector of customs to the
per paragraph or to suggest that the importers had inadvertently
ferred to the wrong paragraph and had intended to refer to the right
e. *Held*, that the protest was not sufficiently distinct and specific to
isfy the requirements of section 14, Customs Administrative Act June
1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

E—MISTAKES IN PROTESTS.

Under section 14, Customs Administrative Act June 10, 1890, c. 407,
Stat. 137 [U. S. Comp. St. 1901, p. 1933], no new rule obtains in re-

spect to the terms of protests against decisions of collectors of customs in the assessment of duty. If the protest fail to satisfy the requirements of said section, the collector's decision should be affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The decision below (131 Fed. 356) affirmed a decision of the Board of United States General Appraisers, which had reversed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Fleitmann & Co. Note United States v. Knowles, 126 Fed. 737, 62 C. C. A. 62, and In re Solvay Process Co. (C. C.) 134 Fed. 678.

The pertinent part of section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1633], referred to in the opinion, reads as follows: "The decision of the collector as to the rate and amount of duties chargeable upon imported merchandise * * * shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee or agent of such merchandise, or the person paying such fees, charges and exactions other than duties, shall * * * give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reason for his objections thereto."

Henry A. Wise, for appellant.

Benjamin Barker, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The question upon this appeal concerns only the sufficiency of the importers' protest.

The appellees imported certain silk ribbons, which were classified as "silk trimmings, 60 per cent.," and an ad valorem duty at that rate was assessed thereon under the provisions of paragraph 390 of the tariff act of July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 15 [U. S. Comp. St. 1901, p. 1670]. The importers by their protest claimed that the merchandise was dutiable "only at the rate of 50 per centum ad valorem under paragraph 389 of the tariff act of 1897." The protest was overruled, and upon review by the Board of General Appraisers it was conceded that the merchandise was dutiable, "as a manufacture of silk not otherwise provided for," at 50 per centum ad valorem, under paragraph 391 of the tariff act of 1897. The importers insisted that their protest was sufficient because they specified the proper rate of duty, notwithstanding they had based their objection upon the wrong paragraph of the act. The board sustained this contention, and overruled the collector.

We think the protest was insufficient because it was not sufficiently distinct and specific, within the rule applied in Herrman v. Robertson, 152 U. S. 522, 14 Sup. Ct. 686, 38 L. Ed. 538, and other adjudications which it is unnecessary to cite. Silk ribbons were not denominated eo nomine in either of the two paragraphs of the silk schedule imposing a duty of 50 per centum ad valorem, and the protest did not state that they were dutiable as "manufactures of silk not otherwise provided for"; consequently there was nothing in the terms of the protest to direct the attention of the collector to paragraph 391, or to suggest to him that the importers had referred inadvertently to paragraph 389, and must have intended to refer to paragraph 391. The Salambier Case, 170 U. S. 621, 18

Ct. 771, 42 L. Ed. 1167, is not controlling. The importations were sweetened chocolate, and were commercially known as and there was but one paragraph in the tariff act by which importations were subjected to a duty of two cents per pound, hat was paragraph 319 (Act Oct. 1, 1890, c. 1244, 26 Stat. 588); the court held that the protest was sufficient because it ed the importations were dutiable at two cents per pound, ithstanding it did not refer to any particular paragraph as the nder which they were claimed to be properly dutiable.

Sherman v. The United States, 55 Fed. 276, 5 C. C. A. 101, s held by this court that under the customs administrative o new rule in respect to the terms of the protest obtained, and e protest failed to satisfy the requirements of section 14 the d of General Appraisers were required to affirm the action of ollector. Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. 901, p. 1933]. That decision was followed by the Circuit Court ppeals for the Third Circuit in United States v. Bayersdorfer, Fed. 732, 62 C. C. A. 16, where it was cited and its reasons and usions were approved, and the distinction between it and the of Shaw v. United States, 122 Fed. 443, 58 C. C. A. 425, was ly defined.

e cannot agree with the reasoning of the opinion in United s v. Shea, 114 Fed. 38, 51 C. C. A. 664, to the effect that the pro-re under the customs administrative act contemplates that the d of General Appraisers may disregard omissions or mistakes otests which may have misled the collector, and allow them e corrected when the case comes before them upon review of ecision. The considerations which lead us to a contrary con-on are sufficiently presented in Sherman v. United States and nited States v. Bayersdorfer.

e decision is reversed, with instructions to reverse the decision e Board of General Appraisers.

UNITED STATES v. HOENINGHAUS & CURTISS.

(Circuit Court of Appeals, Second Circuit. February 24, 1905.)

No. 133.

oms Duties—Ascertainment of Component Material of Chief Val-e—Warping—Process of Weaving.

Under section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. omp. St. 1901, p. 1693], providing that the component material of chief alue in imported merchandise "shall be determined by the ascertained alue of such material in its condition as found in the article," *held* hat, as to woven fabrics, the ascertainment should be made with refer-nce to the time the process of weaving commences; that the operation f warping is not a part of such process; and that the cost of such op-ration should be included wholly in the value of the material constitut-ng the warp of the fabrics, and not distributed between the warp and he weft.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decisions below, see 131 Fed. 570, and G. A. 5335, T. D. 24,423, which related to merchandise imported at the port of New York by Hoeninghaus & Curtiss, and consisting of certain fabrics having a silk warp and a cotton weft. In determining, for the purposes of classification for duty, whether the goods were composed in chief value of silk or of cotton, the collector proceeded on the theory that the expense of warping the silk was part of the process of weaving, and should be equally apportioned between the two materials in finding their relative value. The importers contended that warping is a process preliminary to that of weaving, and not a part of that operation, and that, as the whole warping process is concerned with the silk threads alone, its expense should be included as a part of the cost of the silk component of the goods. This contention was overruled by the Board of General Appraisers, but sustained by the Circuit Court, in the decisions above cited.

Chas. D. Baker, for appellant.
Howard T. Walden, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The importations in controversy are woven fabrics of silk and cotton, and their classification for duty depends upon the question whether the silk or cotton was the component material thereof of chief value. The collector and the Board of General Appraisers classified them as articles in which cotton was the component material of chief value, and in arriving at that conclusion refused to estimate the expense of the "warping" of the silk, a process which is preliminary to the weaving process. It seems to have been assumed that, if the expense of warping should have been added, silk was the component material of chief value. To quote the finding of the Board of General Appraisers, "warping is the process of taking the silk from the spool and arranging longitudinally a sufficient number of yarns of sufficient length and quality to constitute the warp of the precise size and quality of the fabric intended to be produced." Although the process is essential in constituting the fabric, it is obvious that it must be completed before the weaving process commences. The learned judge of the court below, in reversing the decision of the Board of General Appraisers, took this view, and in his opinion discussed fully the considerations upon which he reached his conclusion. In the Opera-Glass Cases, where the articles were composed of shell and other materials, the Supreme Court held that the question of the value of the shell was to be determined by its value when in such condition that nothing remained to be done upon it except to put the several materials together to make the opera glass. In Seeberger v. Hardy, 150 U. S. 420, 14 Sup. Ct. 170, 37 L. Ed. 1129, it does not appear in the report of the decision what in detail had been done to bring the shell to its perfect condition before it was combined with the other materials; but in Seeberger v. Schlesinger, 152 U. S. 581, 14 Sup. Ct. 729, 38 L. Ed. 560, it does appear, not only that the shell had been brought to the proper polish, but also that it had been brought to the proper shape to

the covers of the opera glasses. Bringing the material to the
r shape for its use in a specific article is a step in the manufac-
of the article closely analogous to the warping in the manufac-
of the importations in controversy. The court below based
inion upon the decision in Seeberger v. Hardy. We fully
r in the opinion, and deem it unnecessary to add anything to
t may, however, serve to emphasize our conclusion by point-
ut that the statue, which prescribes the rule by which the
onent of chief value is to be ascertained, declares that "the
of the component material shall be determined by the ascer-
l value of such material in its condition as found in the ar-
" Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St.
p. 1693].
e decision is affirmed.

DEYE v. LODGE & SHIPLEY MACH. TOOL CO.

(Circuit Court of Appeals, Sixth Circuit. May 2, 1905.)

No. 1,377.

STER AND SERVANT—PLACE TO WORK—ASSUMED RISK FROM NEGLIGENCE
F FELLOW SERVANTS.

Where the place in which an employé was required to work, and where
e was injured, was only dangerous because of the negligence of his
ellow workmen in carrying on the work, the risk from such danger
as one which was assumed, and the master cannot be held liable for
ne injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Serv-
nt, §§ 567–573.

Assumption of risk incident to employment, see note to Chesapeake
O. R. Co. v. Hennessey, 38 C. C. A. 314.]

ME.

A company engaged in making heavy machine tools caused lathe beds,
fter they had been cast, to be taken to the finishing shop, where they
ere finished and cleaned, and piled up until wanted for use by the
nployés there, under directions of a foreman, who was generally com-
etent. *Held*, that the company owed no personal duty, as a master,
o supervise the manner in which the beds were piled, and could not
e held liable for an injury to a fellow servant of the foreman, caused
y the slipping of one of the castings from a pile near which he was
orking, and which was alleged to have been improperly built, on the
neory that he was not furnished with a reasonably safe place to work;
ne piling of the castings being a detail of the work itself, the risk from
hich was assumed by the workman.

Error to the Circuit Court of the United States for the South-
District of Ohio.

ion for personal injuries sustained by plaintiff in error while in the em-
ent of the defendant in error. Upon all of the evidence, there was a
ion for defendant in error. Deye's injury was sustained while engaged,
others, in moving a large iron casting, called a "lathe bed," by the falling
e or more similar castings from a pile adjacent to the casting being re-
l. The defendant company is a corporation engaged in making machine
Its business was divided into several departments. These lathe beds
heavy iron castings, of different sizes, and weighing from one to six

thousand pounds each, and ranged from 10 to 20 feet in length, and from 1 to 2 feet in width and thickness. They were of cast iron, hollow in the center, with brackets across the central space. On top were two V's or shears, an inch or more in width, and half inch in height, running along on each side of the bed, and projecting above the general level of the bed, upon which the parts of the completed machine tool slid. They were delivered by wagon at the "casting and cleaning department," where they were received by a receiving clerk, who, with the assistance of the wagoner, and by means of a crane, lifted them off of the wagon and piled them one on top of another, in piles of from three to six, sometimes bottom to bottom, top to top, just as they came off the wagon. These piles were in tiers on the north side of the building. One Lutz was foreman of this casting and cleaning department, and from time to time he would have the castings taken from the piles and cleaned, and then put back on the pile. This cleaning consisted in chipping off burrs and smoothing them with an emery wheel. As a cleaned bed was needed in the machine shop, Lutz would have one of them taken from its pile and removed by means of a crane into the machine shop. Deye was a workman in this casting and cleaning department, under Lutz, as foreman. He had been there at work for about five weeks, and had frequently seen these castings received and piled and removed for cleaning or to be built up in the machine shop, though he had never himself been called upon to handle them or pile them until the occasion of his hurt. While subject to the orders of Lutz, and liable to be put to any kind of work in his department, he had theretofore been engaged only in cleaning small castings with acid, and in washing the rags used for that purpose. On the morning of his injury he was called upon by Lutz to assist him in removing a cleaned lathe bed, needed in the machine shop, from a pile containing two or three others. The pile was one of a tier, the one next containing five or six such castings. A chain was fastened around the one to be moved, and the chain fastened to the crane. While Deye was pulling to lift the casting, and after it had been raised slightly above those below, one or more of the castings upon the adjacent higher pile slid off and against the one being raised, causing it to swing and crush Deye against the wall near which he was working.

Harlan Cleveland, for plaintiff in error.

E. W. Strong, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The general fitness and competency of Lutz, the foreman, who is said to have negligently piled the castings which fell and injured Deye, was not questioned. That Lutz and Deye were fellow servants, and that each assumed, as part of the risk of the business, the risk of the negligence of the other and of the other workmen engaged in and about the castings and cleaning branch of the defendant's business, is equally indisputable. The case must turn, therefore, upon the question as to whether the place of work was dangerous through neglect of any personal duty imposed by law upon the employer. The contention is that the place where Deye was called upon to work when hurt was a dangerous place, by reason of its proximity to a pile of castings which were liable to slip and fall because not properly piled, with strips of wood between them. The place was safe enough, except in so far as it was made unsafe by the system or manner in which these castings were piled. There was evidence tending to show that these beds would not have been so liable to slip and fall if sticks of wood had been placed between

the castings when being piled up, and that it was the practice in some shops and foundries to interpose pieces of wood to guard against slipping or falling. There was also evidence tending to show that no wood had ever been used or supplied for that purpose, nor any direction given by the defendant in error concerning the method of piling such castings. No other instance of the falling of such castings in this or any other shop was shown, nor did the foreman make any request for strips of wood to use when stacking them up, although he testified that he knew the danger and practice of using such strips in other shops in which he had worked.

Was the defendant company under any duty to supervise the method of piling such castings, or was that a detail of the business, which might be left to the judgment of the men whose business it was to receive, pile, and handle them? The system or manner in which they were piled when received from the foundry, and kept until needed for use in the machine shop, was one adopted by Lutz and those who were his fellow servants in this branch of the business. The case must therefore turn upon the question as to whether the defendant company, as the employer, owed any nondelegable personal duty in respect to supervising the methods adopted by Lutz and his fellow workmen, of whom Deye was one, for stacking, storing, or piling these rough castings.

That an employer engaged in a complicated and dangerous business is under obligation to prescribe rules for its orderly and safe conduct is a well-settled principle of the law of master and servant. B. & O. R. R. v. Doty (C. C. A.) 133 Fed. 866; Woods, Law of Master & Servant, § 403; Shearman & Redfield on Negligence, § 202; Slater v. Jewett, 85 N. Y. 61, 39 Am. Rep. 627. But this rule presupposes a complicated business, involving danger to those conducting it unless it be managed upon some prescribed system. A railway business is an example. The general business conducted by the defendant corporation may, in some of its aspects, be one of such complexity and danger as to require its conduct according to system or rule, having regard to the safety of its servants. But the matter we have to deal with is the simple question of receiving and piling rough, heavy castings in a room devoted to their storage until cleaned and needed in the machine shop. These castings had been made in the foundry. The next step was their transportation from the foundry to the place where they were to be kept and cleaned, and piled to wait their removal to the machine shop, to be there converted into a great tool by skilled men. The work which Lutz and the men under him, including Deye, were engaged to do, was the work of receiving, piling, and cleaning these and other castings; and, if they were negligently piled, it was because a part of the very work which they were employed to do was done in a negligent manner. It is true that Deye had not helped receive or pile these lathe beds; true, he had not before been required to assist in lifting one for removal to the machine shop. Nevertheless his employment involved every phase of the work superintended by Lutz. We say, therefore, that the mere detail of how these castings should be piled was a part performance of the work itself, the risk

of which he had assumed. Lutz was an experienced foreman. He was, in law, the fellow servant of the plaintiff; and his neglect, if his failure to properly pile these castings be regarded as negligence, was the negligence of a fellow servant, unless the method or manner of piling them constituted so complex or dangerous a matter as to require the active and personal direction or supervision of the master. But we are not able to bring ourselves to the conclusion that the circuit judge erred in holding that there was anything in the nature of this part of the work intrusted to Lutz and his fellow servants as to make it the personal duty of the defendant company to lay down a rule or system for piling them, or to personally supervise the manner in which the men engaged in the work should do that part of it. If such a matter is not a detail of the general business which may be intrusted to the judgment and common sense of the men whose business it was to receive, pile, and handle such castings, there is no detail which indirectly involves the safety of the place where work is being carried on which must not be personally supervised. Unless the business be of such a complex and dangerous character as to require that it shall be conducted upon a system or scheme, in order to secure the orderly conduct of the business and the safety of those engaged in it, the master's obligation to supply a safe place for his work to be done, and to keep it safe, does not impose the duty of always keeping it in a safe condition so far as its safety depends upon the proper performance of the very work which his servants have there undertaken to do. If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation. If it was the duty of the defendant company to see that Lutz used sticks in piling these castings while waiting the next step in the work upon them, it would be hard to say why it would not be equally the duty of an employer to supervise the temporary piling or storing of brick or lumber or stone or barrels or boxes containing the material to be used by the men upon the premises. Matters of this kind are not so complex or dangerous as to demand the direct supervision of the master, but are details which, from a reasonable consideration of the rule of master and servant, may be and must be left to the common sense of the men doing the work, as one of the risks of the business. Cullen v. Norton, 126 N. Y. 1, 6, 26 N. E. 905; Morgan v. Hudson River Ore Co., 133 N. Y. 666, 31 N. E. 234; Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021. Although it is the duty of a railway company to give correct orders for the running of its trains, and the train dispatcher stands for and represents the master in this matter, yet, if he gives an order, which brings on a collision, by reason of the negligence of a local telegraph operator in falsely reporting the passing of a train, the company is not liable to trainmen injured in the collision, such local telegraph operator being, in respect to the matter, the fellow servant of the men injured. Ill. Cent. Ry. Co. v. Bentz, 40 C. C. A. 56, 99 Fed. 657; N. P. R. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006.

he conclusion we reach is that the place where the plaintiff was red was only dangerous because of the negligence of his fellow kmen in the manner of carrying on the work, the risks of which ad assumed. Armour v. Hahn, 111 U. S. 313, 318, 4 Sup. Ct. 28 L. Ed. 440; Finalyson v. Utica Mining Co., 67 Fed. 507, 14 C. A. 492; Galow v. C., M. & St. P. Ry. Co., 131 Fed. 242, 65 C. A. 507; Cleveland, etc., Ry. Co. v. Brown, 73 Fed. 970, 974, 20 C. A. 147; Liermann v. Milwaukee Dock Co., 110 Wis. 599, 86 V. 182. Norman v. Wabash R. Co., 62 Fed. 727, 10 C. C. A. 617, a case of a floor defective and dangerous, not by reason of the ligent manner of fellow workmen in piling articles upon it, because the floor had been negligently suffered to get out of ir. The bale of cotton fell upon the plaintiff not because ad been carelessly piled or stored, but because there was a de- ive floor, which was depressed by the weight of the workmen, jostled the bale over. The place was an unsafe one, and the defense was the supposed obviousness of the danger. For the poses of this case, we have assumed that the danger that this of castings would fall upon slight provocation was not so ob- us as to charge the plaintiff with notice. We rest the case where district judge placed it—upon the point that, if the castings were ligently piled, the negligence was that of a fellow servant.

udgment affirmed.

LAKE SHORE TRANSIT CO. v. CORRIGAN et al.

(Circuit Court of Appeals, Sixth Circuit. May 11, 1905.)

No. 1,370.

LISION—OVERTAKING STEAMSHIPS—ATTEMPTING TO PASS.

Two steamers which overtook and attempted to pass another with a tow while coming down Lake St. Clair both *held* in fault, under the evidence, for a collision with the tow; one for crowding in when the other was attempting to pass between her and the tow, and the other for persisting in the attempt to pass after the danger should have been apparent.

[Ed. Note.—Collision, overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

ppeal from the District Court of the United States for the thern District of Ohio.

lbert J. Gilchrist (Hermon A. Kelley, of counsel), for appellant.

oulder, Holding & Masten, for appellees.

efore LURTON, SEVERENS, and RICHARDS, Circuit ges.

EVERENS, Circuit Judge. This is a composite litigation re- ing from two successive collisions of vessels near the lower end Lake St. Clair on July 31, 1899. The steamer George Spencer, ch will be called the "Spencer," having in tow the barge B. L. nington, which will be called the "Pennington," was proceed-

ing down from the cut at the upper end of the lake toward the cut at the lower end at a speed of from 7 to 7½ miles an hour. The Spencer was about 230 feet in length, and the Pennington about 240. Following this tow, and advancing at a somewhat greater speed, was the Aurania, a steamer having a length of 352 feet. Behind the Aurania was coming the Cumberland, a steamer 250 feet in length, at a still greater speed—between 8 and 9 miles an hour. All four of the vessels were loaded. The Spencer and the Pennington had each a draught of 14½ feet, the Aurania 17¼ feet, and the Cumberland 16½ feet. The course of the Spencer and tow was on the right hand, coming down; that of the Aurania was on the left; and that of the Cumberland lay between these. The weather was clear and calm, and it was 10 or half past 10 in the forenoon. When within about a quarter of a mile of the Pennington, the Cumberland gave to the Spencer a passing signal of two blasts, signifying her purpose to go down on the port side of the Spencer, to which the Spencer responded, giving her assent. This exchange of signals took place about 4 miles above the Grosse Point Lightship, which is at the upper end of the lower cut. All the vessels advanced in the order above stated, the Aurania gaining on the tow, and the Cumberland gaining on the Aurania, until they reached a locality from 2 to 2½ miles above the lightship, where the Aurania had lapped the Pennington perhaps two-thirds the length of the latter, and the Cumberland was coming in between. Perceiving, as her master says, that the space between the Aurania and the Pennington was too close for the Cumberland to pass through, the engine of the latter vessel was checked, reversed, and then backed strong. The course of the Cumberland was nearer to the Pennington than to the Aurania. When the signals to the engine were commenced, the Cumberland had slightly lapped the Pennington. The consequence of the reversing and backing of the Cumberland was that her stern was thrown to port and her stem to starboard, and this continued until her starboard bow, and perhaps her stem, struck the Pennington on her port quarter; scraping her side as the Pennington went forward, and carrying off her yawl, which was suspended on davits over her stern. At about the time of the impact of the Cumberland upon the Pennington (those on the Cumberland say a little before) the latter sheered off to port rapidly, broke her tow line, and struck the Aurania, stem on, at a point on her starboard side about one-third of the Aurania's length from her stem, doing some damage, and suffering slightly herself. The vessels were all able to proceed.

The owner of the Aurania libeled the Cumberland, charging the latter with negligence in colliding with the Pennington and causing her to sheer into the Aurania, and with the damages to the latter resulting therefrom. And at the same time the owner of the Pennington filed its libel against the Cumberland for the damages sustained by the Pennington, charging the same faults. The owner of the Cumberland filed answers to each of these libels, and also filed petitions under rule 59—in the first case to bring in the Pennington to charge her with the damages to the Aurania; and, in the second,

ring in the Aurania to charge her with the damages to the Pen-gton. In the pleadings of the Cumberland, she charged that the ania was at fault, in that, at the critical time of her attempt to s between that vessel and the Pennington, the Aurania crowded r so much into her course that she was compelled to stop, and t the Cumberland was not at fault in her maneuvers to retrieve situation; and, as to the Pennington, she answered that in what did, causing injury, she was impelled by the Aurania, and was iout fault, and charged the Pennington with negligence in ering off, insisting that the sheer was not caused by the Cumber-d. The cases were consolidated, evidence was taken, and the rt gave judgment against the Cumberland for the damages of the ania and of the Pennington, respectively, holding the former sel to have been the sole cause of the injuries suffered by each he other vessels.

These are the outlines of the case. We come now to the con-eration of the special circumstances which form the ground of the troversy. The testimony was all taken by depositions, and it ows that we have the case without that favor toward the decree ich is usually accorded to a judgment from the circumstance t the judge saw the witnesses and heard them testify. But there he general presumption of correctness in favor of the decree.

The witnesses, of whom there were some from each of the four sels, give discordant testimony, and we cannot pin our faith to particular one of them. In most instances it seems more or less ored by self-interest, bias, or favor. Thus Smith, the captain of Cumberland, whose account seems to us to agree in general with probabilities arising from undoubted facts, puts the course of the ania at the time when the passing signals were given at 1,000 t distant from that of the Pennington. But we think his estimate ravagant, and that the distance was not more than 700 feet. So gives the impression that, at the time when the Cumberland came nearly abreast of the stern of the Pennington, the Aurania came rapidly and decisively athwart his course. We do not think the duct of the Aurania is subject to so severe a criticism. We do nk, however, as hereafter explained, the Aurania had for some e been on a converging course, and, just prior to the coming in the Cumberland, had been coming up to the course on which she ended to go through the cut below. Embarrassed as we should by the conflict in the testimony without the aid of probabilities, , being aided by them, we have not much difficulty in reaching clusions which satisfy us.

Without canvassing the testimony in detail, we are convinced t at the time the passing signals were given, and the manner in ich the Cumberland would pass was settled and understood by parties, the courses of the vessels were far enough apart to per-t the navigation proposed to be safely done. No one seems to ve had any apprehension of danger until the peril became immi-nt. If at the time the passing signals were blown, the Cumber-d was a quarter of a mile astern of the Pennington, the latter st have run from 1¾ to 2 miles before the Cumberland reached

her, and the vessels were all in plain sight of each other. The safety of the course of the Cumberland depended largely upon the conduct of the Aurania and the Spencer and her tow. If they should crowd in at the moment of the Cumberland's passing, and especially at the time when the three vessels should be abreast of each other, a well-known situation of peril would arise. They both knew this, and were bound to abstain from such conduct. The Spencer, with her tow, held on their course, as was their duty, and no criticism is made by any one. If the Aurania had done likewise, there would have been no trouble. She was bound to hold on her course as long as she could without danger to herself. But it is manifest that she did not. Otherwise no such cramped situation as happened could have occurred. For, while there is much dispute as to the distances of the courses of the vessels apart when the passing signals were given, no one expresses any doubt that they were sufficient to make the passing safe. The only witness from the Aurania who testified to the management of her wheel is the captain, who stated that his memory of the events of that occasion was dim. The wheelsman is not produced or accounted for. But it is said that she was entitled to come up on her course before going down into the channel below, and that this was keeping her course, within the meaning of the rule prescribing the conduct of an overtaken vessel. Granting this to be so, she was bound to exercise this privilege at a time and under circumstances in which she would not needlessly involve the other ships in peril. The collisions occurred more than two miles above the upper end of the cut, and we cannot but think that the Aurania could and should have delayed her straightening up until after the Cumberland had passed. Instead of this, she came up in the nick of time to work the mischief which happened. Nor did the courses of the vessels come near enough together to excite any one's attention until the moment of their getting huddled together. There is some conflict in the testimony as to whether there was any exchange of passing signals between the Aurania and the Cumberland. The captain of the Aurania states that the water in Lake St. Clair is shoal, and gives this as a reason for coming up to his course through the cut. But it nowhere appears that the water these vessels were navigating was shallower between the place of the collisions and the cut than elsewhere in the lake. The captain of the Cumberland says there is no dredged channel above the lightship at the upper end of the cut, and other indications in the record confirm this statement. We note also that the captain of the Aurania states that, when he was coming astern of the Pennington, his course was about 300 feet distant from the Pennington, and had been parallel with her course all along. Being asked if it might not have been further than that, he answered:

"I don't think it was, for the reason that the channel there is 800 feet wide. She would be inside of the channel banks. I would keep inside of the channel bank, or keep away from the channel banks as much as possible. That would throw us both inside of the channel bank 150 feet, or so. I would figure that we were probably 300 feet away."

But the 800-feet channel did not extend up to that point by at least two miles. In view of the inaccuracy and uncertainty of this witness, it is to be regretted that the wheelsman of the Aurania was not called.

The captain of the Aurania testifies that he had already exchanged signals with the Cumberland when the Spencer exchanged hers, and that the agreement was that the Cumberland was to go down on his starboard hand; and this was what the Cumberland did. The testimony is convincing that there was no exchange of signals with the Aurania, but it matters little. Her captain heard the signals with the Spencer, and was in no doubt as to the proposed course of the Cumberland, and gave no sign of objection. In respect to the action of the Cumberland in stopping, there is no criticism, or at least none that seems more than half-hearted. And no fault on that score is alleged in the pleadings. The complaint is that she attempted to pass between the Aurania and the Pennington. The testimony of the master and the wheelsman of the Cumberland is that as they came in they had ported closer to the Pennington in order to escape the Aurania, which was coming up on the port side; and all the witnesses agree that the Cumberland came in quite near the Pennington. That being so, the question which presses is, what was the reason for her porting toward the Pennington and finally stopping? There can be but one answer. There was nothing in the way except the Aurania. The probability is very persuasive.

But we think also that the Cumberland persisted too long in her purpose to go between the Aurania and the Pennington. Upon her own showing, which we believe to be substantially correct in this respect, she had ported twice before she reached the Pennington, and this was because she saw the Aurania coming up across her bows. Her captain says he saw this, but expected she would straighten out. Considering the peril where several vessels are proceeding in the same direction and passing at full speed in such close quarters, we are constrained to think that reasonable prudence should have warned him, as the embarrassment began to appear, of the danger of making the attempt.

We have no doubt that the sheer of the Pennington was caused by the Cumberland. The concurrence of time of its commencement with that of the coming against her by the Cumberland, and the sufficiency of the impact upon her port quarter to drive the Pennington to port, are very persuasive to the conclusion we have reached. No other cause for her sudden departure from her course is shown with any such distinctness as to remove the strong impression which the facts referred to make upon our minds.

So far as the decree exonerates the Pennington, it will be affirmed, with costs. The decree against the Cumberland will be reversed, with costs, as against the Aurania; and the court below will be directed to enter a decree condemning the Aurania and the Cumberland, and assessing each of them with one-half the damages sustained by the Pennington and her costs, and the Cumberland with one-half the damages of the Aurania, without costs of that

court, and for satisfaction of the decree by the respective owners and stipulators for the last-named vessels in conformity with such decree.

KINZEL v. ATLANTA, K. & N. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. May 11, 1905.)

No. 1,384.

MASTER AND SERVANT—KILLING OF RAILROAD ENGINEER BY LANDSLIDE—ASSUMED RISK.

Plaintiff's intestate, who was a railroad engineer, was killed by a landslide while on his regular run with his train in the mountains of East Tennessee in the nighttime. It had been raining, several slides had occurred, and a number of trains had been abandoned. At a station a few miles north of the mountains, deceased had asked for permission to lay over, on account of the danger of running at night, and because it was thought impossible to get through; but he was directed to proceed slowly and carefully, looking out for slides, and to take with him certain cars, with an extra track gang, to clear the road. The track was also specially patrolled. A trackman was ahead of the train with a lantern at the time of the accident, and the track was clear, but a slide occurred as the engine passed, carrying it and the track into the river below. *Held*, that the death was due purely to an accident, for which the company could not be held liable, and which was a risk assumed by deceased.

[Ed. Note.—Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

V. A. Huffaker and Pickle & Turner, for plaintiff in error.

Smith, Hammond & Smith and Cornick, Wright & Frantz, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

RICHARDS, Circuit Judge. This was a suit for the wrongful death of the plaintiff's intestate, Joseph Kinzel, who was a locomotive engineer in the employ of the defendant company, and lost his life in the wreck of his engine, caused by a landslide in the mountains of Tennessee. The court below twice directed a verdict for the defendant on the ground that Kinzel's death was the result of a pure accident, for which the railway company was not to blame, and the risk of which he had assumed. This action is here for review.

The material facts are conceded. Kinzel had been a locomotive engineer for seven years, and for three years had run a freight train south from Knoxville through the mountains into Georgia. Two or three miles south of the station of Wetmore the mountainous region began, and continued for about 22 miles. For the most of this distance the railroad ran along the side of the mountains, at the foot of which flows the Hiawassee river. The steepest part of the line began at Appalachia, about 20 miles south of Wetmore, and extended several miles south to Farner, which is near the sum-

mit. Beyond Farner is Blue Ridge, Ga. Naturally the portion of the line most liable to landslides was that between Appalachia and Farner. The portion between Wetmore and Appalachia was regarded as comparatively safe. The accident occurred about six or seven miles south of Wetmore, about 11 o'clock on the night of February 27, 1902. That day Kinzel was engaged, as usual, in running freight train No. 13 from Knoxville to Blue Ridge. He left Knoxville at 12:30 p. m., and arrived at Wetmore at 5:30 p. m., about two hours late. He was drawing a train of 12 cars, loaded with coal and coke. It had been raining for two or three days, and slides and washouts were anticipated in the mountains. Because of this, trains Nos. 11, 12, and 14, of that date, between Blue Ridge and Knoxville, were annulled. This left but one train going north (No. 2, a passenger train) and one train (No. 13, Kinzel's freight) running south. The passenger train, No. 2, was delayed by small slides in the mountains, and did not reach Wetmore until after 9 o'clock. In the meantime Kinzel, acting under a special order, went back to Grady with his engine, and brought four camp cars, with track tools and men, to Wetmore, for the purpose of taking them along with his train up into the mountains to repair the track next day. Passenger train No. 2, when it arrived at Wetmore, reported that it had struck several small slides, that a large one fell in behind it, and that it did not think No. 13 could get through that night. Before the arrival of No. 2 at Wetmore, Kinzel asked the operator to tell the train dispatcher that he did not want to go through that night, because it was not safe, and that he could not go through anyhow. The reply came back that he would have to proceed with his train, and cautioned him to run slowly and carefully, and look out for slides. About 9:30 he pulled out south, having cut off two of his loaded cars, and attached the four camp cars which were needed for the next day's work in the mountains. The primary object of sending Kinzel's train from Wetmore south that night was to get the extra track gang from Grady to the mountain line, in order to open the road for the next day's business. The secondary purpose was to advance the freight as far as Appalachia. There was no idea of any serious trouble between Wetmore and Appalachia. The trouble was usually between Appalachia and Farner. Kinzel proceeded south, observing the caution to run slowly. The track was being patrolled by an extra gang of track walkers. About six or seven miles south of Wetmore, where the road ran along the foot of the mountain about 20 feet above the river, and when Kinzel was in sight of the light of the section foreman, who had a few minutes before passed along where he was then running, suddenly and without warning a slide occurred under or directly in front of the engine, which carried the track and engine down into the river. The section foreman was within three or four hundred yards of the engine, watching it, when the slide carried it down. Kinzel, though terribly hurt, was still alive when taken out of the wreck. He told the foreman that he saw his light, and thought everything was all right, but the slide came in on him, giving him no chance to avoid it.

There was no testimony tending to show that the defendant was to blame for the slide which caused the accident. There was in Union Pac. Railway Company v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766. For aught that appeared, the roadbed was properly constructed, and the track that night was exceptionally well patrolled. It was not in Fisher v. Oregon Short Line (Or.) 30 Pac. 425, 16 L. R. A. 519. The section foreman passed along on his round of inspection but a few minutes before the slide took place, and there was nothing to indicate trouble ahead. The track and its surroundings appeared to be all right.

The plaintiff's case therefore rests solely on the claim that the defendant was at fault in sending Kinzel into the mountains that night. It is insisted he was ordered into a place of unusual danger, despite his protest and against his will, and was thus exposed to perils known to the company, but of which he was ignorant, with the result described. In other words, it is insisted he was the victim of a negligent order which subjected him to risks outside his regular employment. If this claim found support in the testimony, there might have been a case for the jury. But there was no order given him, in the sense claimed. Kinzel was not engaged in extraordinary work under a special order. He was on his regular run. It is true, he was being exposed to an additional risk by reason of the weather. A railroad in a mountainous region is liable to slides and washouts in rainy weather. This is a matter of common knowledge. Kinzel knew this when he took the job. And of course he assumed the risk. It was one of the risks of his employment. Union Pac. Railway Co. v. O'Brien, 161 U. S. 451, 456, 16 Sup. Ct. 618, 40 L. Ed. 766; Id., 49 Fed. 538, 1 C. C. A. 354. Rains will come in mountains as well as elsewhere, but trains must be run, and roads kept open for traffic, notwithstanding the increased risk to operatives.

Moreover, the record contains plenty of proof that Kinzel was advised on the day of the accident of the increased risk of the situation. He reached Wetmore two hours late. He was ordered to wait there for the passenger train coming north, which did not arrive until 9 o'clock. In the meantime he was sent to Grady for the extra track gang. This advised him there was trouble in the mountains. Because he anticipated trouble ahead—feared there might be slides on the track—he asked to be allowed to stay at Wetmore overnight. The exigencies of the situation would not permit the granting of the request. It was necessary to get the extra gang through to Appalachia that night, so as to put the track between there and Farner in condition for the next day's business. So he was told to proceed, but to run slowly and carefully and look out for slides. This again was notice and warning that there was danger of slides ahead. It is to be observed, however, that the order was not a special one. It did not require exceptional work—work outside his line of duty. It only required him to do the work he had undertaken to do when he accepted the job. When he pulled out of Wetmore that night, although he did so reluctantly, he nevertheless assumed the risk. He did only what every engineer must do under

like circumstances. 1 Labatt, Master & Servant, § 438, and cases cited; Linch v. Sagamore Mfg. Co., 143 Mass. 206, 210, 9 N. E. 728; Toomey v. Eureka Iron & Steel Wks., 89 Mich. 249, 50 N. W. 850; C. & O. R. Co. v. Hennessey, 96 Fed. 713, 38 C. C. A. 307, and note, p. 314.

Kinzel's reluctance to go on that night was due to the fact that he feared that in the darkness he might run into obstructions. The declaration averred there were obstructions known to the company, of which he was not advised, that caused the accident. If the proof had in any degree supported this averment—if it had tended to show that there were dangerous obstructions on the track which were known to the company, and that in spite of his protest the company had ordered him on without advising him of their presence, and without taking proper steps to protect him against them—another case would be presented. But the accident was not due to an obstruction into which Kinzel ran because of the darkness. Every reasonable precaution was taken by the company to protect him against obstructions. He was warned to run slowly and look out for slides, and the track was carefully patrolled. Everything was done that could be done. The slide which caused the accident was not known to the company when it directed Kinzel to proceed south. It had not then occurred, and could not have been anticipated. The track was clear when Kinzel reached the place of the accident, and the light of the trackman who had preceded him but a few minutes was in sight. The slide came on so suddenly that Kinzel could not avoid it. He did not run into the slide because of the darkness, but the slide virtually ran into him. In an instant the track was swept from under him. The result would have been the same if, under similar circumstances, the slide had occurred during the daytime. We agree with the court below that it was a case of pure accident, for which the company cannot be held liable.

The judgment is affirmed.

BULTE v. IGLEHEART BROS. et al.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,078.

1. APPEAL—PARTIES—ASSIGNMENT.

Where, during the pendency of an action by a firm to restrain an alleged infringement of a trade-mark, one of its members filed an amended complaint alleging an assignment to him of the other member's interest in the subject-matter of the suit, but the master found that the alleged assigning member was still interested, that he had agreed to assume one-half the cost and expense of the suit, and that the damages recovered by or against the firm were to be assumed by the two members in equal proportions, both were necessary parties to an appeal from a decree dismissing the bill.

2. TRADE-MARKS—ASSIGNMENT—VALIDITY.

An assignment of a flour trade-mark, disassociated from the business in which it was used and in which it had acquired its value by association with the manufacture of flour by the originator and his successors, was void.

3. SAME—PLEADING.

Complainants in an original bill to restrain infringement of a flour trade-mark alleged that L., under whom they claimed, originated it in 1865, and described it as a circular label having thereon a circle within which was a smaller circle, and within this a pictorial representation of a body of water on which was a white swan; that above the picture was the name of the manufacturers, and beneath the words "White Swan," the name of the manufacturers, the location of the manufacturers' plant, and at the top the figures "196." Thereafter complainants filed an amendment asserting that in the year 1880 they originated the brand subsequently mentioned, to wit, the picture of a white swan together with the words "White Swan," in a manner entirely independent of any of their said predecessors, and had continuously used it in their business up to and including the date of filing the bill. *Held*, that the allegations were inconsistent, and that the amendment constituted an admission that complainants pirated the mark previously belonging to L. and his successors.

4. SAME—PRIOR USE.

Where at least 15 years prior to complainants' appropriation of a flour trade-mark containing the words "White Swan" and the picture of a swan floating on water such words had been quite generally used, and the picture of the swan, etc., had been adopted and used by at least two other firms, complainants were not entitled to claim that they were the originators of the brand, though they changed the arrangement of the marks and picture in immaterial respects.

5. SAME—UNFAIR COMPETITION.

Where complainants had no exclusive right to the use of the picture of a white swan floating on water, or to the name "Swan," as applied to a flour trade-mark, and there was no proof of a single instance in which the public had been deceived by the points of similarity of defendant's trade-mark, containing such name and symbols, defendant was not guilty of unlawful competition.

[Ed. Note.—Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

6. SAME—BILL—AMENDMENT—DISCRETION.

Where, in a suit to restrain infringement of a trade-mark, the appeal record did not show either the ground on which an application for an amendment to the bill was made nor the amendment which was proposed, the exercise of the court's discretion in refusing such amendment could not be reviewed.

Appeal from the Circuit Court of the United States for the District of Indiana.

In April, 1900, the appellant and one Herman J. Meyer, copartners as Meyer & Bulte, filed their bill in the court below to restrain alleged infringement of a trade-mark for flour, and also to restrain unfair competition in trade. By a supplemental bill filed by Bulte as sole complainant March 4, 1901, it is stated that on July 1, 1900, Meyer transferred his interest in the business, his trade-mark and good will, to Bulte, who holds the right thereto, and to all rights of action for past infringement. The original bill charges that the complainants have from 1880 to May 1, 1897, carried on business as manufacturers of flour at St. Louis, and then moved to Clinton, and later to Kansas City, Mo., where the business is now carried on; that Philip Land originated the brand in question and established the business of manufacturing flour in the year 1865 at Brownsville, now Sweet Springs, Mo. He was succeeded by Land & Co. in 1875; the latter were succeeded by Land & Swaggard in the year 1882, who in turn were succeeded by George Swaggard & Son, in March, 1885; and they were succeeded by the Sweet Springs Milling Company in the year 1887; and that company in turn was succeeded in November, 1892, by the complainants "in the good will and trade-mark rights hereinafter specified." The bill proceeds: "And your orators now conduct and

carry on the said business of said predecessors, and are vested with all the rights of their said predecessors, all and singular, including the good will, trade-mark, brands, trade-names, etc., of said predecessors, as hereinafter specified, and your orators are in all things vested with all of said rights and interests of their predecessors in business, all and singular, and are the sole owners thereof. And from the year 1880 to the 1st day of May, 1897, were located and did business in the city of St. Louis, and later moved their offices to Clinton, and later to Kansas City, in said state of Missouri, as a copartnership under the firm name of Meyer & Bulte." The bill charges that: "Since the year 1865 their predecessors or themselves have been continuously manufacturing and selling in the markets of the United States and elsewhere a certain brand of flour of superior quality for certain uses, which has been known, identified, referred to, and called for as the 'White Swan' brand, and which has long been and now is in very great demand, and known, referred to, and distinguished by the said designation 'White Swan'; and that said flour has been manufactured during more than thirty-four years past in uniform high quality, and put up in packages, sacks, and barrels to which has been applied a circular label having thereon a circle within which is a smaller circle, and within the smaller circle is a pictorial representation of a lake or body of water, upon whose bosom is a white swan, and within the outer circle are the words 'Roller Patent Process,' and above the picture of the swan is the name of the manufacturers, and the following words and marks, to wit, 'Meyer & Bulte's,' and beneath the picture of the swan are the words 'White Swan' and the name of the location of the manufacturers' milling plant, and at the top of the label are the figures '196.'" The bill charges that Land & Swaggard registered on the 29th of April, 1884, upon application filed March 31, 1884, their trade-mark, "the essential feature of which is therein specified as the pictorial representation of a white swan upon water"; that the complainants on the 21st of November, 1899, "again caused the said trade-mark to be registered according to the statutes of the United States, * * * the essential feature of which is therein given as the pictorial representation of a white swan, or the words 'White Swan'"; that the trade-mark, as applied to flour, and referred to in said certificates of registration, has been used by the complainants and by their predecessors in connection with a single package, sack, or barrel of flour for many years in commercial intercourse with Indian tribes and in commerce with the United States, Canada, Mexico, and Great Britain. The bill contains the usual allegations with respect to infringement by the defendants, and prays for an injunction, etc.

On December 28, 1900, the complainants, with leave of the court, amended their bill by inserting after the allegations touching the use of the brand by their predecessors in business the following: "Your orators further say that early in the year 1880 they originated the brand hereinafter mentioned, to wit, picture of a white swan, together with the words 'White Swan,' in a manner entirely independent of any of their said predecessors, and have continuously used the same in business up to and including the date of filing the bill of complaint herein, and have always sedulously guarded their rights and interests in the same;" and also amended the bill by alleging that prior to the registration of the trade-mark by their predecessors the complainants "had already secured registration in the United States Patent Office of their label illustrating said brand, the picture of white swan and the words 'White Swan,' said registered label being numbered 3,624 and dated 23d day of October, 1883," and under date of January 22, 1884, duly registered the trade-mark under the statutes of the state of Missouri.

The answer denies that the complainants are the successors in business of Philip Land or his successors named. Alleges that the Sweet Springs Milling Company is the sole successor of Philip Land, carrying on the business at Sweet Springs, Mo.; that the complainants never had any interest in the milling plant owned and operated by the several persons and firms who were successors of Philip Land, but used the white swan label upon a brand of flour of their own, different in quality, made at different places, of different weight, and by different machinery; that all that they acquired from the Sweet Springs Milling Company or its predecessors was by an instrument executed November 7, 1892, by B. F. Swaggard, of the late firm of George Swaggard

& Son, Sarah Swaggard, the wife of George Swaggard, deceased, Thomas O. Berry, guardian and curator of the minor heirs of George Swaggard, deceased, Philip Land, and the Sweet Springs Milling Company, which recited that P. Land was the original appropriator of a trade-mark for flour embodying the pictorial representation of a white swan upon water, as specifically set forth and described in trade-mark No. 11,147, registered April 29, 1884, and used continuously in business by them since 1875, and grants all their right, title, and interest to the said brand and trade-mark; that Land established the milling business about the year 1871, which business was carried on by Land & Co., Land & Swaggard, and Swaggard & Co., until June 1, 1888, when the milling plant, business, and good will thereof were purchased by the Sweet Springs Milling Company, which has since owned and conducted the business, and now operates and conducts the same. The answer denies that Philip Land or the complainants at any time originated the brand of flour known as the "White Swan" brand, and denies that the pictorial representation of the white swan, or the words "White Swan," were used by Land or his successors in business, or by the complainants, prior to the year 1875; that complainants used the brand subsequently to the use thereof by Land & Co., and priority of use by them is denied; and it is alleged that other millers and manufacturers of wheat flour used the brand continuously for many years, so that it has come into general and extensive use throughout the country, independent of complainants or their use of it. The answer denies that the defendants have imitated the brand as charged; alleges that in the brand used by the defendant it employs form, detail, and ornamentation different from that used by the complainants. In the defendants' brand the picture of the white swan is fronting to the right; in that used by the complainants it is fronting to the left, and is of different form. Defendants use the words "Swans Down," with the name of their corporation and the address of their milling plant, and their flour is known to the trade as "Igleheart's Swans Down Flour"; the complainants using the words "White Swan" with their name, "Meyer & Bulte," and the name and address of their milling plant, upon the label and brand, and their flour is known as "Meyer & Bulte's White Swan Flour"; that the defendants' brand "Swans Down," with the pictorial representation of a white swan in connection therewith as a label of white flour, was originated by one McCann, of the city of Nashville, in the year 1868 or 1869, in the manufacture and sale of wheat flour, and has been continuously used by him and his successors until it came to the ownership of the Cumberland Mills in the year 1899, in which year the defendants acquired the right thereto by assignment from the Cumberland Mills. The answer also challenges the validity of the use of the white swan as a trade-mark; asserts it to be descriptive of quality and grade; asserts 30 years' general use of the label; that the failure of complainants to exhibit upon the label that they are the successors of Land & Swaggard vitiates any claim on their part to the use of the label; alleges 20 years' use by the defendants of the trade-name "Swans Down" as giving a perfect title; asserts laches upon the part of the complainants and their predecessors and asserts other claimed defenses of which this opinion does not treat.

On March 5, 1901, the cause was referred to a master, who, in July, 1903, reported his findings of fact and conclusions of law, together with the evidence. So far as deemed material to the discussion of this case, the facts found by him are these: That the firm of Meyer & Bulte was formed in the year 1881 in the city of St. Louis to do a flour commission business. For four or five years prior thereto they had been engaged in a like business in that city with one Imbs, under the firm name of Imbs, Meyer & Co., which firm was dissolved May 31, 1881. That firm had succeeded Imbs, Meyer & Fusz, which firm had been engaged in a like business as early as 1871. Subsequently to this suit Herman Meyer sold his interest in the firm of Meyer & Bulte to August J. Bulte, but by agreement he retained an interest in the subject-matter of this suit. The firm of Imbs, Meyer & Fusz used a flour brand containing the words "White Swan," but not containing the picture of a swan bird in any form. The brand became the property of Meyer & Bulte, who, in July, 1881, began to use on their best grade of flour a brand containing

words "White Swan" and the picture of a swan bird floating or swimming water, which brand was used continuously by them to the present time.
gleheart Bros. was a firm doing a flour milling business at Evansville, .., for several years prior to 1860, and continued therein until 1887, when ain changes were made in the firm, and in 1892 the partnership property, iness, and good will were transferred to Igleheart Bros., a corporation of iana, by whom the business has been conducted continuously to the present e. The firm of Igleheart Bros. in September, 1879, began the use of a r brand containing the words "Swans Down," but not containing the pic- e of a swan bird in any form; which brand was used by them until a date ween the years 1881 and 1884, the precise date being indeterminable upon evidence, when they added the picture label of a swan upon water, which since been continuously used by the defendants without material change. rior to 1876, persons engaged in the flour milling business or flour com- sion business in the states of New York, Illinois, Missouri, Iowa, Texas, Canada used upon barrels, bags, or sacks containing flour, as a brand or criptive badge or mark, the single word "Swan," or the word "Swan" ed with other words, making the combination "White Swan," "Swan e," or "Swans Down." Early in the year 1874, Eckhart & Swan, a flour mission firm of Chicago, placed upon its flour barrels by a stencil the pic- e of a swan floating or swimming on water. It used this brand, which was its leading brand, from 1874 to 1901, both in its wholesale flour commis- n business, which it conducted up to 1884, and its flour milling business, ch it engaged in in 1884, and continued until the business was sold to the khart & Swan Milling Company, which corporation used that brand up to year 1901. Prior to 1878 they used the swan brand upon the flour in ad- ce of sales, and after the year 1878 only when requested so to do by their rons.

n 1878, Land & Co., at Brownsville (now Sweet Springs), Mo., began the of a brand or descriptive badge or mark for flour containing the word hite" over the picture of a swan floating or swimming upon water. This nd was continuously used by that firm and its successors in business down 1888, when their mill and milling business was transferred to the Sweet ings Milling Company, which company operated the mill and continued the iness and the use of the brand up to the year 1901, except that for a time or to 1891 one McAfee, the then manager of the company, designed new r brands and labels, and the White Swan brand was only used when such nd was called for by patrons of the company; but it was used after 1891. en Philip Land, the originator of the brand, acquired an interest in the pany, and became its president and manager, and was used upon a lower de of flour than the grade upon which that company used its leading flour nd and label. On April 29, 1884, Land & Swaggard procured to be regis- ed in the Patent Office as a trade-mark to be used in the sale of flour the ture of a white swan swimming upon water and facing to the right. On ober 23, 1883, Meyer & Bulte procured to be registered in the Patent ce a flour label. The instrument deposited for the purpose of procuring istration had attached to it as a part thereof a barrel label "similar to endants' Exhibit No. 2, except only that the words 'Registered in Patent ce in Washington July 1881,' which appear on a strip of white imme- tely above the black background in the center of the label in said exhibit, re marked out with black ink." (As neither defendants' Exhibit No. 2 nor registration are preserved in the record, no fuller description can be given.) October 9, 1899, Meyer & Bulte caused to be deposited in the Patent Office registration a trade-mark of which "the essential feature is a pictorial resentation of a white swan, or the words 'White Swan,' as set forth in the lication statement of said Meyer & Bulte, and record of the registration of l trade-mark was made on November 21st, 1899." (This application and istration does not seem to be preserved in the record, and no further illus- tion of it can be given.) On January 17, 1898, the defendant corporation l in the Patent Office its application for registration of a trade-mark, of ich "the essential feature is the representation of a swan floating on a body water in which are water lilies." The record of certain interference pro- dings in the Patent Office between Igleheart Bros. and Meyer & Bulte

was introduced, in which Meyer & Bulte claimed to be the assignees of the Land & Swaggard White Swan trade-mark.

The master further finds that the evidence does not show any genuine case of deception of a purchaser, where such purchaser was induced to buy and receive the defendants' Swans Down flour instead of the complainants' White Swan flour by reason of any similarity of defendants' Swans Down flour label or brand; that the evidence did not show that an ordinary retail purchaser of flour would be likely or liable to be so misled by any similarity of the brands; that the dissimilarity is such that an ordinary retail purchaser of flour would not be misled in taking the one brand of flour for the other; that there is nothing in the evidence showing that the defendants were guilty of any act, fraud, or unfair dealing as against the complainants or the complainants' predecessors in title, or the general public.

As conclusion of law the master found that the equities were with the defendants, and that the bill of complaint should be dismissed. Exceptions to the master's report were overruled, and on January 10, 1904, a decree passed dismissing the bill for want of equity. The decree also contained the statement that the court overrules an application of the complainants for leave to file an amended bill of complaint; but the record shows no other reference to the matter, and no copy of the proposed amendment. The complainant, Bulte, alone appealed, there being no petition for severance.

Dasey A. Jamison and Henry Lore Hopkins, for appellant.

John E. Iglehart, Edwin Taylor, and Eugene H. Iglehart, for appellees.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judge.

JENKINS, Circuit Judge (after stating the facts as above). We might properly dismiss this appeal for the nonjoinder therein of Herman J. Meyer, co-complainant with August J. Bulte. The supplemental bill asserts the transfer by Meyer of all his interest in the business of Meyer & Bulte, and that Bulte is the sole party interested in the subject-matter. The master finds that Meyer still retains an interest in this suit, and the record of the transfer contains this provision:

"In view of the litigation now pending on the White Swan brand, it is specially agreed that Herman J. Meyer will assume half the cost and expense of carrying on this suit, or others that may follow, to their final end; and damages granted by the court in our favor or against us to be assumed in equal proportions by Herman J. Meyer and August J. Bulte."

This is far from showing a transfer of Meyer's interest in this litigation. He was a necessary co-complainant with Bulte. No order of the court was at any time passed dismissing Meyer as a co-complainant. He was party on the record to the proceedings, and, there being no petition for an order of severance in the taking of an appeal, we would be justified in dismissing it. Loveless v. Ransom, 46 C. C. A. 515, 107 Fed. 626. The question, however, was not raised at the bar, and we pass it with the suggestion of danger flowing from inattention to correctness in practice.

The original bill charges that Philip Land originated the brand in question. The date of such origin is stated to be the year 1865. The complainants' right to the trade-mark is derived from Philip Land and his successors in the business. It is the only claim of right stated in the original bill. The title asserted is to "the good

will and trade-mark rights hereinafter specified"; but this is coupled with an allegation that they now conduct and carry on the business of their predecessors, and are vested with all their rights, including the good will, trade-mark, brands, trade-names, etc. Prior to 1897 the complainants were located in the city of St. Louis, and thereafter moved their offices to Clinton and to Kansas City. The Sweet Springs Milling Company, the ultimate successors of Philip Land in his business at Brownsville (now Sweet Springs), are still located at that place, operating the mill property and the business formerly conducted by Land. The transfer of title of November 7, 1892, recites that Land "was the original appropriator of a trade-mark for flour, breadstuff, etc., embodying the pictorial representation of a White Swan upon water, as specifically set forth and described in the trade-mark No. 11,147, and registered in the firm name of Land & Swaggard as proprietors, on the 29th day of April, 1884, and used continually in business by them since 1875"; then, pursuing the various transfers of the business down to the Sweet Springs Milling Company, recites that Meyer & Bulte are desirous of acquiring the exclusive ownership, right, title, and use of said brand or trade-mark for said class of merchandise"; then, in the granting clause, the vendors sell, assign, and transfer to the firm of Meyer & Bulte "all their right, title, and interest to the said brand and trade-mark." The milling business of the grantors is not transferred, nor is any interest therein passed to Meyer & Bulte. It is simply the transfer of the trade-mark, independently of the business in which, as it is claimed, the trade-mark originated and was used. The question, then, arises: Is there such right of property in a trade-mark, when dissociated from the business in which it is employed, that such right can be transferred to another, and he be clothed with the exclusive right to its use at another place, in another business having no connection with the business in which the mark was originally employed, but in connection with the same class of manufacture? The function of a trade-mark is to distinguish the products of a manufacturer or the objects of commerce; to point out distinctively the origin or ownership of the article to which it is affixed; that is to say, it must of itself or by association indicate the origin or ownership of the article. A trade-mark or trade-name is of no virtue in and of itself. It becomes of value only through use, and because by use it is an assurance to purchasers of the excellence of the article to which it is affixed as manufactured by the one whose name appears as the producer. The fanciful or arbitrary trade-mark, by association with the name of the producer, becomes, therefore, valuable, because it is a sign and symbol to the purchaser, an assurance to him of the genuineness of the article and of its manufacture by the proprietor of the trade-mark or trade-name. Dissociated from such manufacture, it is not an assurance of genuineness. When used by another, its use works a fraud upon the purchaser. A trade-mark is analogous to the good will of a business. Whoever heard of a good will being sold to one while the original owner

continues the business as before? The good will is inseparable from the business itself. So, likewise, is a trade-mark or trade-name that gives assurance to a purchaser that the article upon which is stamped the trade-mark or trade-name is the genuine production of the manufacturer to whom the trade-name or trade-mark points by association as the maker of the article. Therefore it is that it is a necessary qualification to the assignability of a trade-mark that there goes with it the transfer of the business and good will of the owner of the symbol. Cotton v. Gillard, 44 L. J. Ch. 90; Croft v. Day, 7 Beav. 84; Robertson v. Quiddington, 28 Beav. 529; Singer Manufacturing Company v. Long, 8 App. Cases, 17; Gegg v. Bassett, 3 Ont. L. Rep. 263; Kidd v. Johnson, 100 U. S. 620, 25 L. Ed. 769; Brown Chemical Company v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; Congress, etc., Spring Company v. High Rock Congress Spring Company, 45 N. Y. 302, 6 Am. Rep. 82. There is here no pretense of the transfer to Meyer & Bulte of the business of the originators of this trade-mark, or of their successors in business. They have continued up to this time the manufacture of flour as before. It was a bald attempt to sell the trade-mark disassociated from the business in which it had been used, and in which it had acquired its value by association with the manufacture of flour by the originator and his successors. It was subsequently used by the complainants at another place, and upon their own manufactures. To uphold such a transfer would be to ignore the fundamental office of a trade-mark, would be to disregard its purpose and object, would be to sanction a fraud upon the public purchasing the article. We are of opinion, therefore, that the complainants acquired no title to this trade-mark under the transfer from Land and his successors in business.

It is equally clear that, if the title could be upheld, the complainants would not be entitled to equitable relief, because of their omission to state the fact of transfer in connection with its use. Leather Cloth Company, Limited, v. The American Leather Cloth Company, Limited, 4 De G. J. & S. 137, 11 House of Lords' Cases, 523; Manhattan Medicine Company v. Wood, 108 U. S. 218, 223, 2 Sup. Ct. 436, 27 L. Ed. 706; Pillsbury v. Pillsbury-Washburn Flour Mills Company, 12 C. C. A. 432, 64 Fed. 841. In the case in the Supreme Court it is said, page 223 of 108 U. S., page 439 of 2 Sup. Ct. (27 L. Ed. 706):

"The object of the trade-mark being to indicate, by its meaning or association, the origin or ownership of the article, it would seem that when a right to its use is transferred to others, either by act of the original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use; otherwise a deception would be practiced upon the public, and the very fraud accomplished to prevent which courts of equity interfere to protect the exclusive right of the original manufacturer. If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers."

For the reasons assigned the complainants can rightfully claim nothing under the assignment to them of this trade-mark.

By an amendment to the bill they assert that "early in the year 1880 they originated the brand hereinafter mentioned, to wit, picture of a white swan, together with the words 'White Swan' in a manner entirely independent of any of their said predecessors, and have continuously used the same in business up to and including the date of filing the bill of complaint herein." Under this amendment they claim the right to priority and exclusiveness of use. The amendment certainly puts the complainants in a peculiar position. In their original bill they assert that Land originated the trade-mark or brand in the year 1865, and the brand is described as a circular label having thereon a circle within which is a smaller circle, and within the smaller circle is a pictorial representation of a lake or body of water upon whose bosom is a white swan, and above this picture of the swan is the name of the manufacturers, beneath the picture of the swan are the words "White Swan," the name of the manufacturers, and the name of the location of the manufacturers' milling plant, and at the top of the label are the figures "196." It will be observed that in the amendment the only description of the trade-mark claimed to be originated by them is that it is the picture of a white swan arranged in a manner entirely independent of any of their predecessors. The design, within the terms of the allegation, would seem to go only to the matter of arrangement of parts, not to original appropriation of symbols. The trade-name "White Swan" is appropriated, and the picture of the bird upon the water is also appropriated. These are the two salient objects which catch the eye of the purchaser. The matter of arrangement of them is subordinate, and probably immaterial, not justifying appropriation of symbols belonging to another. So that the allegation of the amendment is nothing more than a confession that in the year 1880 they pirated the mark and brand which by prior use belonged to Land or his successors, and without justification invaded their rights and infringed their trade-mark.

But leaving out of view the assertions of the original bill, and construing the language of the amendment as broadly as possible in the interest of the complainants, in what plight are they left with reference to this trade-mark? We have given careful scrutiny to the great volume of evidence contained in this record, and we think the master's conclusions of fact well supported. Leaving out of consideration all doubtful evidence, it appears that the name "White Swan," but without the picture of a swan, was used in Western New York and in the country around St. Catharines, in Canada, as early as the year 1867, and continuously up to 1872 or 1873, when the witness testifying to the fact moved west from that country. It also satisfactorily appears that the firm of Eckhart & Swan, in the year 1874, sold flour with the brand "White Swan" and the picture of a swan floating or swimming on water. The history of this use is fully set forth in the third paragraph of the

master's finding, and is here quoted in full as expressive of our own views upon the testimony.

"Prior to 1876 persons engaged in the flour milling business or flour commission business in New York, Illinois, Missouri, Iowa, Texas, and Canada used upon barrels, bags, or sacks containing flour, as a brand or descriptive badge or mark, the single word 'Swan' or the word 'Swan' joined with other words, making the combination 'White Swan,' 'Swan Lake,' or 'Swans Down.' Early in the year 1874 a flour commission firm in the city of Chicago, Illinois, placed upon its flour barrels by a stencil the picture of a swan (bird) floating or swimming on water. The name of the Chicago firm was Eckhart & Swan. This 'Swan' brand of flour was never its leading brand, but it used that brand from 1874 down to 1901, both in its wholesale flour commission business, which it conducted up to 1884, and in its flour milling business, which it engaged in in the year 1884, and which it continued until the partnership sold its property and business to a corporation of the name of Eckhart & Swan Milling Company, and that corporation used that brand down to 1901. Down to 1878 said Eckhart & Swan used said Swan brand containing the bird picture upon flour sold by them. Subsequently, and down to a time after the filing of the bill of complaint herein, the partnership and its above-named successor corporation used the same brand upon flour purchased from the firm or corporation; that is to say, before 1878 they used the Swan brand upon flour in advance of the sales by that brand, and after the first of the year 1878 they used the Swan brand upon flour when they were asked to do so by their patrons."

It would serve no useful purpose to discuss at length the testimony in this case. It clearly and certainly appears that prior to the appropriation of the trade-mark containing the words "White Swan" and the picture of a swan floating upon water by the complainants in 1880, and for at least 15 years prior thereto, the words "White Swan" had been quite generally used, and the picture of a swan floating upon water had been adopted and used by at least two firms, Eckhart & Swan and Land and his successors. So that there can be no justification for the pretension that the complainants originated this brand. They undoubtedly changed the arrangements of the marks and the picture, but that gave them no right to the exclusive use of the picture or the marks or the name as a trade-mark.

This conclusion brings us to the consideration of the question of unfair trade—whether the defendants have disguised their goods, so imitating the marks of the complainants, that they are liable to be palmed off upon the public as and for the goods of the complainants. We cannot doubt that the words "White Swan" had for many years been quite generally used as a brand of flour. We need not consider the question whether that term has come to indicate the quality of flour rather than point to its origin. But that name and the names "Swan Lake" and "Swans Down" and other like terms had for many years been quite generally employed as a brand for flour. The defendants' brand is "Swans Down." Both brands are circular in form—a form quite common in respect to brands of flour. The outer circle of each is in blue, but of different design; that of the defendants being a representation of heads of wheat, that of the complainants a fancy border. The principal background of the outer circle of the complainants' brand is dark red, with the words "Patent Process" in the center and on either

side of the inner circle in white letters upon blue; the complainants' name being printed in white upon the red background above the inner circle, and the words "White Swan" in white below the inner circle. Above the entire circle is printed, "48 lbs. Flour" in blue letters upon white background. In the inner circle is the picture of a swan facing the left, floating upon water, the background being purple, and above the swan the word "Roller" in white letters. Below the entire picture are the words "White Swan" "Best Patent." The defendants' outer circle has a background of pink or rose color, the space above and below the inner circle being occupied by the names in white, "Igleheart Brothers. Roller Patent. Evansville, Indiana," and picture of two small swans facing in opposite directions. There are two inner circles, the outer one of which is of blue background with the words "Swans Down" in white letters, a name employed by them as a trade-mark as early as 1879. The inner one has a greenish background representing foliage, a fence in white, and a swan floating upon water, facing to the right. Below the entire circle is printed in blue, "48 lbs. Iglehart's Swans Down."

Starting with the predicate that the defendants had no exclusive right either to the name "White Swan" or to the picture of a swan, we perceive, upon a comparison of these brands, nothing to indicate a design to confuse, and nothing that would be apt to deceive a purchaser using the ordinary care of purchasers into mistaking the one for the other. As before remarked, the term "White Swan" and the picture of a white swan floating upon water are the salient features of the trade-mark asserted. These are things which catch the eye and abide in the memory. A certain similarity in form and contour may be observable, but that is common to innumerable brands of flour. In some respects an acute observer using extraordinary inspection might discern features common to both. So he could in any two brands of flour. But flour is purchased, by the retailer at least, by the name of the brand, or of the symbol which indicates by association the origin or manufacture As, therefore, the complainants had no exclusive right to the symbol or to the name, and as not a single instance of imposition or mistake is shown, we are satisfied that the conclusion of the master is correct that the dissimilarity between the brands is such that an ordinary retail purchaser of flour would not be misled.

At the hearing upon the master's report, as indicated by the testimony, an application was made for permission to file an amended bill, which permission was refused. This is asserted for error. The contention cannot be sustained. The matter of amendment rests largely, if not wholly, in the discretion of the trial court. Any abuse of that discretion must be made plain to authorize an appellate court to inquire into the matter (United States v. Atherton, 102 U. S. 372, 375, 26 L. Ed. 213), and especially so where the cause has advanced to a hearing (Neale v. Neale, 9 Wall. 1, 9, 19 L. Ed. 590). The presumption is that the ruling of the court below was correct. An abuse of the discretion must be clear. The rec-

ord here exhibits neither the ground upon which the application was made nor the amendment which is proposed, so that we are wholly at a loss to judge concerning the exercise of discretion.

The decree is affirmed.

O'CONNOR v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,121.

1. MASTER AND SERVANT—DEATH OF SERVANT—RAILROADS—ACTIONS—DECLARATION.

Where, in an action for death of a railroad section hand while unloading a dump car, the declaration, though alleging that the service in which deceased was killed was without the service he had contracted to render, did not allege that defendant or its road master knew, or should have known, that deceased was inexperienced, of immature judgment, or ignorant of the dangers attending the service, it was demurrable.

2. SAME—FELLOW SERVANTS.

Where a railroad section hand was killed while working on a railroad dump car by the forcible striking of the car by the engine attached thereto caused by the negligence of those operating the engine, deceased and such operatives were fellow servants.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 500, 501.

Who are fellow servants, see note to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The suit is brought to recover damages for the death of Joseph O'Connor, occasioned, as is claimed, by the fault of the defendant in error. The declaration contains four counts. The facts asserted, which are common to all the counts, are substantially these: The deceased was in the service of the defendant in error as a workman on a section of its railway under the direction of a section foreman, and engaged in repairing the track and roadbed a short distance east of Galesburg, Ill. On September 4, 1902, the railway company brought to the place of the accident a gravel car of the character known as "The Roger Ballast Dump Car," from which gravel was discharged upon the track through an opening or chute in the floor of the car. This car, loaded with gravel and certain foreign substances in large lumps, was hauled to the place by a locomotive engine, and stood there, according to the allegation in some of the counts, coupled to the engine. In attempting to dump the gravel the lumps of foreign substance obstructed the opening, preventing the discharge of the gravel. The roadmaster thereupon directed the deceased to mount the car and to remove the obstructions in the opening or chute. He obeyed, and was engaged in that work when, according to the first count, he caused the obstruction which prevented the discharge of the gravel to be removed, whereby the gravel flowed from under him and out of the car, causing him to fall into the opening, and thereby caused his death. According to the other counts, while he was so engaged in removing the obstruction to the flow of the gravel, the locomotive engine was caused to move along the track and with great force to strike the gravel car, whereby the obstructions to the flow of the gravel were removed from the opening, and the gravel, passing from the car with great speed, caused the deceased to slide into the opening, and the gravel and the other substance to fall upon him, thereby causing his death. Each count contains the allegation that it was not the duty of the deceased to unload the gravel; that he had no experience in discharging such duty, and

was wholly unfamiliar with the danger attendant upon such service; that the roadmaster knew the employment to be dangerous, but failed to advise the deceased of the attendant danger.

A general demurrer was interposed to the declaration and was sustained; whereupon, the plaintiff below electing to stand by the declaration, there was judgment dismissing the suit. The present writ of error is sued out to review that ruling.

John F. Golden, for plaintiff in error.
Robert Dunlap, for defendant in error.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. The declaration in each count, while averring that the service in which the deceased came to his death was without the service he had contracted to render, and while asserting that he was ignorant of the attendant danger of the service he was ordered to perform, and that the roadmaster knew of the danger but failed to advise the deceased thereof, nowhere asserts that the defendant in error or its roadmaster knew, or had reason to believe, or by the exercise of reasonable care and observation could have known, that the deceased was inexperienced or of immature judgment, or of tender years, or ignorant of the attendant danger of the service to which he was ordered. In dealing with the facts pleaded, we are compelled to assume that the deceased was a man of mature judgment, of ordinary intelligence, and acquainted with the workings of the laws of nature which are of common observation. Assuming, then, that the roadmaster was a vice principal; that the deceased was temporarily withdrawn from the service he had engaged to perform; that he was directed to enter upon another and more dangerous service, with the perils of which he was unacquainted (if we are permitted to assume that he was ignorant of the law of gravity)—the question arises whether the declaration is sufficient without an allegation that the railway company or its roadmaster knew or had reasonable cause to believe that the deceased was ignorant of the dangers attendant upon the service to which he was ordered. This question is not a new one in this court. In Reed v. Stockmeyer, 74 Fed. 186, 20 C. C. A. 381, we held that the liability of a master in case of injury to his servant received in an employment outside of that for which he had engaged arises, not from the direction of the master to the servant to depart from the one service and engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger. This principle is sustained by abundant authority. In addition to the cases considered in our decision, we need only refer to the cases of Klochinski v. Shores Lumber Company, 93 Wis. 417, 67 N. W. 934; Murphy v. Rockwell Engineering Company (N. J. Sup.) 57 Atl. 444; Felton v. Girardy, 104 Fed. 127, 43 C. C. A. 439; Deisenrieter v. Kraus-Merkel Malting Company, 97 Wis. 279, 289, 72 N. W. 735; Sladky v. Marinette Lumber Company, 107 Wis. 250, 260, 83 N. W. 514;

Wagner v. The Plano Manufacturing Company, 110 Wis. 48, 85 N. W. 643.

So far as recovery is sought by reason of the forcible striking of the car by the engine, caused by the carelessness of those operating the engine, it is clear that the deceased was a fellow servant with the operator. Northern Pacific Railroad Company v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; Martin v. Atchison, Topeka & Santa Fé Railroad Company, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; Northern Pacific Railway Company v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1161.

We need not consider the contention that the master, failing in duty to his servant, cannot avoid liability because the negligence of a fellow servant contributed in some degree to the injury, because we hold there is no apt allegation in this declaration showing failure of duty on the part of the master.

The judgment is affirmed.

FIRST NAT. BANK OF COUNCIL BLUFFS, IOWA, v. MOORE.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1905.)

No. 1,148.

1. BILLS AND NOTES—ACTION BY ASSIGNEE—VALIDITY OF ASSIGNMENT.
   Where, in an action by an assignee of certain notes, the complaint alleged that the notes had been assigned and delivered to plaintiff, and evidence that they were transferred and delivered to plaintiff by the payee, long before a written assignment thereon was made, was admitted without objection, such evidence established a prima facie case, regardless of the validity of the assignment.

2. SAME—NEGOTIABLE NOTES—PAROL ASSIGNMENT.
   In the absence of a statute to the contrary, a written assignment of a negotiable note, payable to order, is not necessary to transfer an equitable title to the note to the transferee.

3. SAME—ACTION—FOREIGN LAW.
   Where certain negotiable notes sued on were transferred by parol in Iowa, the transferee was entitled to maintain a suit thereon in his own name under the law of that state.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

The First National Bank of Council Bluffs, Iowa, the plaintiff in error herein, brought an action against the defendant in error to recover upon three promissory notes of date January 2, 1897, made by him to the Citizens' State Bank of Council Bluffs, Iowa, two of said notes being for $2,500 each and one for $800, and all made due and payable six months after date. The complaint alleged that on January 2, 1902, the payee of the notes, by an instrument in writing, assigned and transferred the same to the plaintiff in error, and that the said payee delivered said notes to the plaintiff in error. The defendant in error answered, denying upon information and belief the assignment and delivery of the notes, and setting up as an affirmative defense fraud in obtaining the original note for the renewal of which the notes in suit were made, and failure of consideration for such original note. Upon the trial of the cause the plaintiff in error introduced in evidence the deposition of T. G. Turner, formerly a clerk in the Citizens' State Bank, who testified in sub-

stance that the notes had been in the possession of the plaintiff in error long prior to January 2, 1902; that the stock of the plaintiff in error was bought up by the Citizens' State Bank, and the two banks became consolidated, thereafter doing business under the name of the plaintiff in error; that the latter took over all the assets and assumed all the liabilities of the Citizens' State Bank, and that the written assignment of the notes had been made for the purpose of enabling the plaintiff in error to bring an action thereupon. The written assignment of the notes was offered in evidence. It purported to have been signed by the Citizens' State Bank, by Charles R. Hannan, cashier; but when it appeared from the testimony that the name of Charles R. Hannan, cashier, was written, not by himself, but by T. G. Turner, objection was made to the instrument on the ground that the execution and delivery of the assignment had not been proven, and that it had not been shown that Turner had authority to sign Hannan's name thereto. As to the authority of Turner to sign the name of Hannan, Turner testified that on January 2, 1902, Hannan was the cashier of the Citizens' State Bank, and that he (Turner) was the vice president of the plaintiff in error, and that he had verbal authority from Hannan to sign his name to any instrument necessary to close up the business of the Citizens' State Bank. He admitted that he did not consult Hannan about signing his name to the instrument, but testified that Hannan knew that he had signed it and made no objection thereto. The objection to the admission in evidence of the written assignment was sustained by the court. The plaintiff in error then moved for leave to amend its complaint so as to allege as follows: "That long prior to January 2, 1902, and after the maturity of said note, the Citizens' State Bank of Council Bluffs, for value received, sold and delivered to the plaintiff the note hereinbefore set out, and that ever since said time plaintiff has been the owner and holder of said note and in sole possession thereof," and moved the court to continue the cause in order to give opportunity to procure the attendance of some of the officers or directors of the Citizens' State Bank for the purpose of proving the same. The court denied permission to make the amendment, on the ground that to allow it would be practically to set aside a stipulation that had been entered into before the trial, whereby a similar allegation had, by the consent of the parties, been struck from the complaint, and overruled the motion for a continuance. The plaintiff in error thereupon renewed its offer of the assignment and of the notes sued upon, to which offer the defendant in error interposed the same objections as before. The objections were sustained, and, the plaintiff in error having rested, the defendant in error moved the court to direct a verdict in his favor on the ground that the evidence introduced did not sustain the cause of action set forth in the complaint, nor any cause of action, on the part of the plaintiff in error against the defendant in error. The court allowed the motion, and the jury, under the instructions of the court, were directed to return a verdict for the defendant in error. The rulings of the court in these matters were excepted to by the plaintiff in error, and those exceptions form the basis of its assignments of error.

James Kiefer and James McNeny, for plaintiff in error.
Geo. McKay and L. C. Gilman, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the case as above). In the view which we take of the law of this case, it becomes unnecessary to consider the question whether the written assignment of the notes was properly executed or was admissible in evidence. The complaint contained the allegation that the notes had been assigned and delivered to the plaintiff in error. The testimony showed that the notes in question were transferred and delivered by the Citizens' State Bank to the plaintiff in error long before the written assignment was made. No objection was interposed to the admission of this testimony on any ground, and it was, we

think, prima facie sufficient under the pleadings to sustain the right of the plaintiff in error to recover on the notes. The objections that were made were to the admission in evidence of the written assignment, and to the testimony tending to show that Turner was authorized by the cashier of the Citizens' State Bank to sign his name thereto. In the absence of a statute to the contrary, a written assignment of a negotiable promissory note payable to order is unnecessary. An assignment by parol is sufficient. 7 Cyc. 814. And while the title so transferred is equitable, and is subject to the defenses which the maker might have made prior to notice of the transfer, and under the old system of pleading and practice, an action to recover on the note could be prosecuted only by the holder in the name of the payee (Jones v. Witter, 13 Mass. 304; Minor v. Bewick, 55 Mich. 491, 22 N. W. 12; Coombs v. Warren, 34 Me. 89; Freeman v. Perry, 22 Conn. 617; Martin v. Martin, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290; Davis v. Lane, 8 N. H. 224; Waters v. Millar, 1 Dall. 369, 1 L. Ed. 180), under the code system, by the very decided weight of authority, a negotiable unindorsed promissory note, payable to order, may, for a valuable consideration, be assigned by mere delivery, so as to give the transferee the right to recover thereon in his own name. Williams v. Norton et al., 3 Kan. 295; Pease v. Rush, 2 Minn. 107 (Gil. 89); Billings v. Jane, 11 Barb. 620; Savage v. Brevier, 12 How. Prac. 166; Boeka v. Nuella, 28 Mo. 180; Quigley v. Mexico Southern Bank, 80 Mo. 289, 50 Am. Rep. 503; Fultz v. Walters, 2 Mont. 165; White v. Phelps, 14 Minn. 27 (Gil. 21), 100 Am. Dec. 190; Cassidy v. First National Bank, 30 Minn. 86, 14 N. W. 363; Fox v. Harrison National Bank (Kan. App.) 50 Pac. 458; Beard v. Bedolph et al., 29 Wis. 136; Moore v. Miller, 6 Or. 254, 25 Am. Rep. 518; Harrisburg Trust Co. v. Shufeldt, 87 Fed. 669, 31 C. C. A. 190.

The notes in controversy were made and transferred in the state of Iowa. We find no statute of that state which requires that such an assignment be in writing, nor have the courts of that state so held. On the contrary, it seems to have been there settled by the adjudications that not only may such an assignment be made by parol, accompanied by delivery, but that the assignee of such a note, so transferred, may maintain an action in his own name to recover thereon. In Conyngham v. Smith, 16 Iowa, 471, it was held that the assignee of a bond by parol contract of assignment may maintain an action thereon in his own name. In Younker v. Martin, 18 Iowa, 143, in an opinion rendered by Judge Dillon, it was held that the transferee by delivery, without indorsement of a promissory note payable to order, may maintain an action thereon in his own name, but without prejudice to the maker's right of set-off of equities existing before notice to him of the transfer. The court said: "Notes are choses in action—that is, things which must be recovered by action at law—and, like all other things in action, they may be assigned and the title will pass without indorsement." The doctrine of that decision was reaffirmed in Pear-

son v. Cummings, 38 Iowa, 344, and Switzer v. Smith & McGowen, 36 Iowa, 340.

It is our judgment, therefore, that the judgment be reversed, and the cause remanded to the court below for a new trial.

NORTHERN PAC. RY. CO. v. CUMMISKEY.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1905.)

No. 2,067.

1. RAILROADS—ACCIDENTS TO TRAINS—COLLISION—INJURIES TO SWITCHMAN—RULES—VIOLATION—CUSTOM.

A custom in railroad yards, permitting the use of a main track by engines and inferior trains without waiting the lapse of five minutes after the due time of a first-class train, which was reported late, provided there was sufficient time for the completion of the work in hand before the arrival of the belated train at the time reported, as required by a rule of the company, did not justify action on information as to the delay of such first-class train, received nearly an hour before.

2. SAME—APPLICATION.

Where a portion of the main track of defendant's railroad between certain stations, for a maximum distance of 15 miles, was used for the transfer of trains from different parts of the yards of another railroad, and defendant had prepared a separate time-table, covering such track, on which it had printed a rule providing that when a train stops, or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with danger signals a sufficient distance to insure full protection, such rule applied to the operation of a transfer train of another company, in charge of a switchman, operated over such portion of the track on the time of a passenger train, on it appearing that the transfer train was being delayed, and was not going to be able to clear the main track in time to prevent a collision with the approaching passenger.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Rules of a railroad company required that an inferior train, failing to clear the main track in time to keep out of the way of a superior train, must be protected as provided in another rule, requiring that a flagman be sent back immediately with danger signals a sufficient distance to insure full protection. Plaintiff, a switch foreman, in charge of a transfer train of another company, started to use a portion of defendant's track on the time of defendant's first-class passenger train, and though he saw such train approaching more than a mile away, and might easily have alighted and signaled the passenger train, as required by the rule, he did nothing except attempt to signal the passenger train with a lantern in a dim twilight, even after he observed that his signal had not been seen or was not being observed, whereupon a collision occurred and plaintiff was injured. *Held*, that plaintiff was guilty of contributory negligence precluding recovery.

In Error to the Circuit Court of the United States for the District of Minnesota.

L. T. Chamberlain and Alfred H. Bright (C. W. Bunn, on the brief), for plaintiff in error.

F. D. Larrabee (Mathias Baldwin, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. Cummiskey recovered a judgment against the Northern Pacific Railway Company for injuries sustained in a rear-end collision which occurred upon one of the tracks of that company at Minneapolis, Minn. He was the foreman of a switching crew in the service of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, commonly called the "Soo" Company, and at the time of the accident was engaged in conducting the transfer of a train through the yards of the Northern Pacific. The railroad tracks of the Northern Pacific which have immediate relation to the case extend from Northtown Junction across the Mississippi river to Fifteenth avenue, a distance of between two and three miles. Between those two points is located what is known as the Northeast Minneapolis yard of the Northern Pacific, and through it run two main line tracks—one for north or west bound trains, and the other for south or east bound trains. Commencing at a point a short distance below Northtown Junction, the main line tracks, flanked on both sides by switches and sidings, run southward in a straight line for a distance of more than a mile, and then turn sharply to the west, and cross the Mississippi river at right angles to their former course. Within the bend of this curve and for a part of the distance along the straight line are a large number of switch tracks, covering a lateral space of between 150 and 200 feet. The "Soo" Company owned railroad yards at Shorham, eastward of the Northern Pacific tracks, and also yards on the west side of the river, and by arrangement with the Northern Pacific it secured the right to transfer its trains from one to the other over the tracks and through the yards of the latter company. On the morning of December 10, 1902, Cummiskey, as switch foreman, was in charge of one of these transfer trains of the "Soo" Company, consisting of an engine and 25 cars, and it was his purpose to take the same from Shorham across the river to the yards of his company there located. His course was over a track running from Shorham a half or three-quarters of a mile to a connection with the Northern Pacific tracks at a point called Atlantic Junction, which was eight-tenths of a mile below Northtown Junction, thence across two or more tracks of the Northern Pacific until he was upon the south-bound main line of that company, and thence southward and westward along that line and across the Mississippi river until he came to a switch about Fifteenth avenue, which would let him off into the yards of his own company.

On the morning of the accident he arrived at Shorham, where his duties commenced at 6 o'clock. He immediately sought to communicate with the train dispatcher of the Northern Pacific to learn the whereabouts of passenger trains No. 8 and No. 4, both of which were due to use the main line on which he expected to travel between half past 6 and 7 o'clock. He called up the public telephone exchange in Minneapolis, and asked for the number of the train dispatcher. The young woman who occupied the positon of night operator at the exchange asked him what he wished to know. He replied that he desired to ascertain how Northern

Pacific No. 8 and No. 4 were, and she told him that the former was on time, and that the latter was 10 or 15 minutes late. It appeared that some time before this the train dispatcher of the Northern Pacific, not desiring to be bothered by public inquiries as to these trains, was accustomed at some time between 5 and 7 o'clock in the morning to advise the telephone operator as to the time of the trains and then she would impart the information to inquirers; and Cummiskey said, and it was not denied, that previously the dispatcher had in substance told him to inquire of her. Passenger train No. 8 was due at Northtown Junction at 6:35 and at Atlantic Junction at 6:38; but with this train we have no further concern, because it passed shortly before Cummiskey arrived with his transfer train at Atlantic Junction, and had no connection with the accident. Train No. 4 was a first-class passenger train from Portland, Or., and was scheduled to arrive at Northtown Junction at 6:50 and at Atlantic Junction at 6:52 in the morning.

After receiving the information about 6 o'clock that No. 4 was 10 or 15 minutes late, Cummiskey then obtained his bills and list of cars, from which he ascertained the cars he was to take over, assisted in making up his train, and started for Atlantic Junction. He arrived there at 6:44 a. m. His front brakeman opened the switches, and let the train in on the south-bound main line. Cummiskey closed the switches as the train passed over. His train straightened out on the main line and was fairly under way about 6:50, the time at which No. 4 was due at Northtown Junction, eight-tenths of a mile northward, and two minutes before the time it was due at Atlantic Junction. There was convincing evidence that No. 4 was on time that morning, and had been on time at every station within 93 miles of Northtown Junction. The train dispatcher's sheet made up from telegraphic advices from stations along the line so showed. The conductor and the engineer of the train so testified. The engineer of Cummiskey's transfer train said that upon pulling away from the crossover switch at Atlantic Junction he saw the headlight of No. 4 behind him at Northtown Junction. A pedestrian, Schonebaum, who exchanged greetings with Cummiskey immediately after he had closed the last switch, had walked but from 50 to 75 feet when he saw the headlight at Northtown Junction. The evidence against this fact consists largely of calculations predicated upon the distance covered by Cummiskey's train, the approximate speed of its passage, the time when Cummiskey says he saw the approaching passenger train, and the time of the collision, and it should not prevail against the very clear and positive evidence to the contrary. The transfer train proceeded on its way southward with Cummiskey upon the rear car. He testified that when he had gone about 1,800 feet from Atlantic Junction he for the first time discovered the headlight of No. 4 at Northtown Junction, more than a mile away. Shortly afterwards, while standing upon the rear car of his train, he gave to the approaching train the slow signal with his white lantern, and thereafter the signal to stop. But the signals were not seen by the engineer, and near the middle of the curve, about two-thirds of

a mile from Atlantic Junction, a collision with the rear end of the transfer train occurred, throwing Cummiskey to the ground, and inflicting upon him the injuries complained of. It was then at least 40 minutes before sunrise. There was testimony on behalf of Cummiskey that it was break of day, and that there was sufficient natural light to enable one to see objects as large as a car within a distance of half a mile; also testimony to the contrary. The headlight of No. 4 was burning, also the headlight of the transfer engine, and the signal lights of the various switches and on the semaphores.

The engineer of the passenger train testified that on account of the dim and uncertain light and the curve he was unable to discover the transfer train until too late to prevent the collision. There was, however, a fair conflict in the evidence upon this subject, and also as to the rate of speed of his train, and, in view of the verdict of the jury, we must assume that the passenger train was running too rapidly through the yards, and that the engineer negligently failed to keep a proper lookout for obstructions.

We therefore turn to a consideration of the defense that Cummiskey was guilty of negligence directly contributing to his injury. It is contended by the railway company that by taking his train upon the main track at the time he did he violated one of the special rules governing the movement of trains over that part of the railroad; also that when he saw passenger train No. 4 rapidly following him he violated other rules of the company, one of which, numbered 299, imperatively required that he immediately leave his own train and go back as far as he could to flag the other; and that his failure to observe those rules resulted in the collision. The verdict of the jury and a fair conflict in the evidence make it unnecessary that we consider the alleged violation by him of other rules than those just referred to. The following excerpts from the rules, which were received in evidence, are sufficient for a consideration of those contentions of the company which challenge our attention:

Special Rule.

Yard engines in yard limits will work on time of first-class trains after they are five minutes past due, and will work on time of all other trains until they arrive, but will relinquish track immediately upon arrival of such trains. Delayed first-class and all other trains will be under proper control in yard limits expecting to find yard engines using main tracks.

General Rules.

60. The greatest care and watchfulness must be exercised to prevent injury or damage to persons or property; in case of doubt take the safe course and run no risk.

207. Those giving signals must locate themselves so as to be plainly seen, and make them so as to be plainly understood. * * * Employés whose duty may require them to give signals, must provide themselves with the proper appliances, keep them in good order and ready for use.

285. An inferior train must keep out of the way of a superior train.

290. A train failing to clear the main track by the time required by rule must be protected as provided in rule 299.

299 (a). When a train stops or is delayed under circumstances in which it may be overtaken by another train the flagman must go back immediately with danger signals a sufficient distance to insure full protection.

(f) Should the speed of a train be reduced or its rear endangered, making it necessary to check a following train before a flagman can get back, lighted red fusees shall be thrown on the track at intervals.

(g) Responsibility for protection of a train rests with conductor and engineer, and they must know that their brakemen, flagmen and the firemen are conversant with and fully understand the application of all rules relating to the protection of trains, and comply therewith.

The special rule above quoted prohibited Cummiskey from venturing upon the main line with his train until after No. 4 was five minutes past due; that is, until after 6:57. Evidence was introduced, however, tending to show that there was a custom in those yards permitting the use, by engines and inferior trains, of the main line without awaiting the lapse of five minutes after the due time of a first-class train which was reported late, provided there was sufficient time for the completion of the work before the arrival of the belated train at the time reported. But even such a custom would not justify action upon information received so long before as to be in the very nature of things unreliable. Cummiskey was familiar with the rules. As foreman of the switching crew he was in charge of the transfer train with the authority of a conductor, and its movements were subject to his order. It was fully three-quarters of an hour before he went upon the main line that he received information from the telephone operator as to the time of No. 4, and it was then reported only 10 or 15 minutes late. He took no other precaution and made no other inquiry, although he said that sometimes theretofore he got his information as to the train from his own yardmaster, sometimes from the Northern Pacific train dispatcher, sometimes from the telephone operator, and sometimes he would wait at Atlantic Junction until it was more than five minutes overdue before taking the track. The duty was incumbent upon him to exercise "the greatest care and watchfulness to prevent injury or damage to persons or property," and in case of doubt "to take the safe course and run no risk." It was shown that even had No. 4 been 10 or 15 minutes late at 6 o'clock, when he received the report, it could easily have made up the time before it reached the yards, and he said that he knew of trains reported late that came in on time, and others that, though still belated, had come in earlier than reported. So it was that when his train entered on the main line he had no information upon which he was entitled to rely that No. 4 would not be immediately behind him, and he must have known that his course might result in most serious consequences, especially in the event of concurring negligence of the engineer of that train. He knew that if No. 4 was on time, or less than five minutes late, it had the right to the track, and its engineer had a right to assume that his way was not obstructed by other trains. He knew that if that train was on time or less than five minutes late he had no right to go upon the track, and when he went there he did not know whether it was late or not. His clear duty, in the absence of other information than that which he possessed, was to wait at Atlantic Junction until five minutes after the due time of No. 4 at that place, and, failing to

observe that duty, he was not in the exercise of ordinary care. Had he waited, that train would have passed and the collision would not have occurred.

The Circuit Court instructed the jury that rule No. 299, which required the sending back of a flagman, did not apply "to such a train as plaintiff was engaged on, and in that place"; but that had his train been any other than a transfer or switching train operated in the yards he would have been held to a compliance with the rule, and his failure in that respect "would have been negligence of itself." And although it was held that the rule was not applicable, the court further instructed the jury that if a man of ordinary care and prudence would, under the existing circumstances, have sent a flagman back, then Cummiskey should have done so, and if his neglect of that duty helped to cause the accident he could not recover. To the jury, therefore, was committed the determination of the question whether ordinary care required the doing of that which the company contends it required by a specific rule applicable to the case. If the rule applied, and it imposed upon Cummiskey the duty to send a flagman or to go back himself and flag the approaching passenger train, it was error to make the existence of that duty dependent upon the conception of either court or jury of the requirements of ordinary care. There was no contention that the rule was unreasonable or that Cummiskey was not fully cognizant of it.

Whether the instruction of the Circuit Court was right involves a consideration of the character of the track upon which Cummiskey was moving, whether his engine and 25 cars constituted a train within the meaning of the rule, and the conditions appearing to him under which he was called upon to act. The only part of rule 299 that need be fully recited in this connection is the provision:

"When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with danger signals a sufficient distance to insure full protection."

After the transfer train had crossed over the tracks at Atlantic Junction, and pulled out upon the south-bound track, the last switch being lined up behind it, it was then upon the main line of the Northern Pacific. Although the track was in frequent use for switching and the transfer of trains, its primary character was that of a main line, and it was as much so as any other section of the road of equal length between St. Paul and the coast. It was used by through trains, both passenger and freight, and its use for other purposes was in subordination thereto, and so declared in unmistakable terms in the rules promulgated by the company. In no proper sense could the track upon which the transfer train was moving be called a switch or side track. A separate time-table, complete in itself, covering the railroad tracks from Northtown Junction to the union stations at Minneapolis and St. Paul, the maximum distance being about 15 miles, had been previously issued and was in force at the time of the accident; and upon

is time-card the officials of the Northern Pacific had caused the
le in question, with others, to be printed for the government of
ose using the tracks in the movement of trains. The track upon
ich Cummiskey was moving with his transfer train was covered
this time-table, and no other part of the lines between North-
wn Junction and the union stations of Minneapolis and St. Paul
s more truly a part of the main line. Whatever may be said
to a switch track, seldom if ever traversed by a through train,
must be admitted that if the rule was in force at all in the
rritory covered by the time-table it was in force upon the main
e track upon which Cummiskey was moving. If effect is to be
ven to the intention of the railway officials whose province and
ty it was to make such rules and to prescribe their sphere of
eration, there can be no doubt as to the construction to be
opted. The printing of the rule upon a time-table relating to
e locality and embracing the track in question clearly evidences
eir intention, and that the rule applied to the track was the
disputed testimony of the men who were respectively the division
perintendent and assistant division superintendent at the time of
e accident.

Nor is there more room for doubt or conjecture as to the appli-
bility of rule 299 when we come to the consideration of the
aracter of the train which Cummiskey had charge of. If under
e rule it was the duty of the conductor of a regular freight train,
layed upon this main line, to send a flagman back to protect
s rear from an approaching passenger train, what satisfactory
ason can be suggested for holding that under similar conditions
was not likewise the duty of the conductor of a transfer train?
mmiskey's train consisted of an engine and 25 freight cars,
d, being either stopped or delayed upon the main line, it was as
ch a menace or source of danger as if it had been a train of any
her kind or character. He himself testified that if his trans-
train had broken down or been derailed he would have sent
lagman or gone back himself far enough to give the approaching
in a reasonable distance in which to stop. A practical inter-
etation of the meaning of the word "train" in the rule was
de by the railway company by the discharge, a few months
ior to the accident to Cummiskey, of an employé who failed
go back with a flag to protect some cars in charge of a switch-
g crew on the north-bound main track near Atlantic Junction. The
glect was in the omission to comply with the very rule now be-
g considered, and it resulted in a collision with a passenger train.
he difference between the two cases seems to be that in one the
in or cars were in charge of a switching crew upon the north-
und main track, and in the other the train was a transfer train
on the south-bound main track. Other portions of the general and
ecial rules appearing upon the time-table confirm the conclusion
at an interpretation that would exclude the engine and 25 cars
charge of Cummiskey from the meaning of the word "train"
ould not be in accord with either the letter or the spirit of the
le in which that term is employed. The course of the engine

and cars was for a mile and a half upon the main line of railroad, and, while it might be said that they composed an "irregular train," nevertheless they made a train the presence of which upon the track when stopped or delayed would give rise to a danger which it was the purpose of the rule to guard against. The reason of the rule applies to such a train, and the letter is broad enough to comprehend it. Johnson v. Southern Pacific Company, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. —.

The facts in the case, either conceded or fully proved, also show that that part of rule 299 which required the sending back of a flagman was applicable to the conditions confronting Cummiskey and of which he was fully cognizant. After his train had crossed the tracks at Atlantic Junction, and had straightened out upon the south-bound main line, he said to Schonebaum, a witness: "Yes, we are a little late; if we do not get a move on these cars, No. 4 will catch us if she is no later than reported;" or, as that witness testified, "I will have to hurry and catch my train and watch out for No. 4." Aside from the overwhelming testimony that the passenger train, No. 4, was on time, and that its headlight was either then in view or appeared at Northtown Junction almost immediately thereafter, Cummiskey himself admitted that he discovered the approaching headlight when it was more than a mile away. The progress of the transfer train was retarded by frosted and slippery rails, by the lightness and inefficiency of the engine considering the load it had to pull, and by the inability of the engineer to get sand under the wheels. It was not making the speed it was expected to make, it was delayed while occupying the main line upon the regular time of the passenger train, and Cummiskey knew that the information, obtained by him nearly an hour before, that that train was late was either incorrect or that the time had been made up, for the train was in sight and was rapidly approaching him. While standing upon the last car of his train he gave the slow signal with his white lantern, and he thought that it was answered by the shutting off of the steam, but immediately afterwards he discovered, as he said, that the train was coming on more rapidly than before. It was apparent to him that his signal had not been seen, or at least that it was not being observed. His own train was moving along slowly, about eight miles an hour, or, as one witness testified, about twice as fast as an ordinary man could walk. He said that at that rate of speed he could easily have descended to the track; but instead of doing so he stood near the rear end of the last car, and waved to an fro, in such light as existed about 40 minutes before sunrise, the lantern which he had in his hand. After he discovered that the passenger train had not obeyed his signal, but was rapidly approaching him, sufficient time remained for him to have descended to the track and gone back, as was required by the rule. His failure to do so resulted in his injury. We can perceive no escape from the conclusion that the rule which the court excluded, or rather the portion of it to which attention has been directed, applied to the place, the train, and the occasion.

ow others construed the rule is shown by the action of the conctor of the passenger train, who immediately after the collision t a flagman back, and went forward himself to flag trains from south.

But even if it should not be declared that Cummiskey's train s "delayed" within the meaning of rule 299, there is another nsideration which leads to the same result. Rules 285 and 290 d together required, "An inferior train failing to clear the main ck in time to keep out of the way of a superior train must be otected as provided in rule 299," and Cummiskey neglected to so otect it. Rule 299 contains various requirements for the protecn of trains, but it does not follow that, because some of them not applicable to a particular emergency, none of them are.

It was contended that the rule requiring the sending back of a gman had been abrogated by a custom prevailing in the yards signal from the rear end of the train, but, as the jury were tructed that the rule was not applicable to the case, the evidence ching the alleged custom was not passed upon.

The judgment is reversed, and the cause remanded for a new al.

UNITED STATES v. BIRDSEYE.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1905.)

No. 946.

BLIC LANDS—GRANT TO RAILROAD—SURVEY—CUTTING TIMBER.

The partial survey by the United States of a section of public land by running lines on two sides of it is insufficient to identify it as an odd-numbered section, within the grant to the Northern Pacific Railroad Company, so as to relieve one cutting timber thereon from liability to the United States.

In Error to the District Court of the United States for the Dist of Montana.

Carl Rasch, U. S. Atty.

W. F. Sanders, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, strict Judge.

PER CURIAM. The United States, as plaintiff, commenced action against Mattie Birdseye, as executrix of the last will and tament of Charles G. Birdseye, deceased, to recover the sum of 655, the alleged value of 14,620 railroad ties manufactured from mber alleged to have been cut by the decedent from certain lands the United States in the state of Montana. The complaint alged that on December 1, 1900, and long prior thereto, the plaintiff error was the owner and entitled to the possession of 14,620 railad ties manufactured out of timber and logs cut from unsurveyed vernment lands, which lands, when they shall have been surved, will be within township 11 north, of range 9 west, Montana

meridian, and that said Charles G. Birdseye wrongfully and unlawfully took possession of the said ties and disposed of and converted the same to his own use and benefit, to the damage of the plaintiff in error in the sum of $3,655. The defendant in error, in her answer to the complaint, pleaded payment to and settlement with the United States for 700 of the ties cut and converted, and denied the ownership of the United States in the remainder thereof. The answer then proceeded to allege by way of affirmative defense that the defendant in error was not liable on account of said ties, for the reason that the same were cut from section 27 in said township, and that that section had been partially surveyed by the United States by lines run on two sides thereof; that said land is agricultural land, and within the place limits of the congressional land grant to the Northern Pacific Railway Company, and was and is the property of said corporation or its grantees; that the said railway company had taken possession of said land, and had sold the timber thereon, and at the time of the cutting thereof by said Charles G. Birdseye the said lands had come by mesne conveyances into the possession of the Big Blackfoot Milling Company, which company licensed the said Birdseye to enter upon said land and cut ties thereon; and that at the time of cutting said ties said land did not belong to the plaintiff in error. The plaintiff in error demurred to that portion of the answer which sets up said affirmative defense on the ground that the same does not state facts sufficient to constitute a defense to the complaint, or to any portion thereof. The court overruled the demurrer. The plaintiff in error declined to file a replication to the answer, and elected to stand upon the demurrer. The court thereupon dismissed the complaint. It is assigned as error that the court erred in overruling the demurrer and in dismissing said action.

On the authority of the decision of the Supreme Court of the United States in the case of the United States of America v. The Montana Lumber and Manufacturing Company et al. (decided in that court on February 20, 1905) 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. ——, the judgment of the District Court is reversed, and the cause is remanded, with instructions to sustain said demurrer, and for further proceedings in said cause.

In re INGALLS BROS.

(Circuit Court of Appeals, Second Circuit. March 1, 1905.)

No. 121.

BANKRUPTCY—TIME FOR FILING PROOF OF CLAIMS—POWER OF COURT TO EXTEND.

Within the meaning of Bankr. Act 1898, c. 541, § 57n, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], which provides that claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication, a claim is not proved until it has been filed, and neither the court nor a referee has any discretionary power to permit the filing of proofs of claim after the expiration of such year, either nunc pro tunc or other-

wise, nor is their power in that respect enlarged by the fact that the proofs were delivered to the trustee within said year.

Appeal from the District Court of the United States for the Northern District of New York.

The following is the opinion of King, Referee:

Three alleged creditors herein have filed petitions asking leave to file proofs of claims not filed within a year after adjudication. Within that year J. B. Orcutt Company verified a proof for $893.68; C. H. Dauchy Company, a proof for $3,535.67; Charles Duncan, a proof for $3,844. The Orcutt and Dauchy proofs were duly received by said Duncan, who is the trustee herein, for the purpose of being filed with the referee, and, together with his personal proof, were handed to his official attorney, with instructions to file all three proofs. The attorney instructed his clerk to file them, but the clerk neglected to do so. Certain creditors have objected to their being now filed.

The question for determination is whether, as matter either of right or of discretion, these proofs can now be filed. The earnestness and ability of counsel have left little to be said, and no attempt will be made to follow out all the various lines of argument suggested; but it seems desirable to indicate something of the considerations involved in the decision reached.

The petitioners assert two things, viz.: (1) That neither section 57n (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]), nor any other provision of the bankrupt act, limits the filing of a proof of claim to a year or any particular time after adjudication; and (2) that if this be not true, then the last sentence of general order 21 (1) 89 Fed. ix, 32 C. C. A. xxii) operates to confer jurisdiction, under the circumstances of this case, to permit filing after the expiration of a year nunc pro tunc as of a date within the year.

Briefly stated, the argument for the first proposition is that section 57a (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) defines a proof of claim as "a statement under oath, in writing, signed by a creditor, setting forth the claim," etc.; that subdivision "e" provides that "claims after being proved may, for the purpose of allowance, be filed by the claimants before the referee"; that subdivision "d" provides that "claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court (referee)," etc.; that subdivision "n" provides that "claims shall not be proved against a bankrupt estate subsequent to one year after adjudication"; that a "proof" is a claim "proved"; that the word "proved" must be assumed to have been employed in but a single sense and with a single meaning in the same section, and was not designated and cannot be construed to have in subdivision "n" any larger meaning than in "a," "c," or "d"; in short, that no logical or necessary construction of subdivision "n" imposes any limitation upon the time of filing, but the contrary; and, finally, applying the section to the facts of this case, that the three claims in issue, having been "proved" within the year, may be filed at any time.

As a matter of first impression, the construction urged seems almost conclusively reasonable. Pursued further, however, the proposition is perhaps reduced to the absurd, when it is seen that the prohibition against "proving" in its literal effect would not prohibit—would simply forbid an act which per se would be not only utterly harmless but utterly foolish, unless logically related to some further act designed to render it effective. If "proved" in subdivision "n" is the mere equivalent of "proof" in subdivision "a," and "proved" in subdivisions "c" and "d," there seems to be nothing better than some purely speculative reason for subdivision "n," since practically the time of verification can make no possible difference to parties in interest except as involved in the time of filing. "Proof" under subdivision "a" involves nobody save the creditor himself; filing—"proved"—under subdivision "n" involves notice to all parties in interest. That the presumably logical and consistent use of language is opposed by the practically illogical and inconsistent consequences involved seems to have been the decision or assumption of every court before which the interpretation of subdivision "n" has arisen, although most of the decisions are somewhat general, rather than specific, and none of them specifically appears to have been predicated upon the precise state

of facts disclosed here, i. e., upon proofs verified within the year, but offered for filing thereafter, which squarely raises the question of construction. However, their purpose cannot be doubted, and, being unbroken in point of their conclusion, they must be accepted as conclusive against the petitioners. Stated in the order in which they are reported, they are: In re Stein (D. C.) 1 Am. Bankr. Rep. 662, 94 Fed. 124; Bray v. Cobb (D. C.) 3 Am. Bankr. Rep. 788, 100 Fed. 270; In re Shaffer (D. C.) 4 Am. Bankr. Rep. 728, 104 Fed. 982; In re Rhodes (D. C.) 5 Am. Bankr. Rep. 197, 105 Fed. 231; In re Leibowitz (D. C.) 6 Am. Bankr. Rep. 268, 108 Fed. 617; Hutchinson v. Otis, 8 Am. Bankr. Rep. 382, 115 Fed. 937, 53 C. C. A. 419; s. c. on appeal, 10 Am. Bankr. Rep. 135, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179; In re Towne (D. C.) 10 Am. Bankr. Rep. 284, 122 Fed. 313; In re Moebius (D. C.) 8 Am. Bankr. Rep. 590, 116 Fed. 47; In re Bimberg (D. C.) 9 Am. Bankr. Rep. 601, 121 Fed. 942; In re Prindle Pump Co. (D. C.) 10 Am. Bankr. Rep. 405; In re Thompson's Sons (D. C.) 10 Am. Bankr. Rep. 581, 123 Fed. 174; In re Brown (D. C.) 10 Am. Bankr. Rep. 588, 123 Fed. 336; In re Lane (D. C.) 11 Am. Bankr. Rep. 136, 125 Fed. 772. See, also, In re Stoever (D. C.) 11 Am. Bankr. Rep. 345, 127 Fed. 394. The conclusion that subdivision "n" relates to filing is categorically stated in Collier (4th Ed.) 394.

I hold that no statutory right to file a proof of claim subsequent to the expiration of a year after adjudication exists.

This leads to the second proposition at issue, which is most strenuously urged. Irrespective of statutory powers, courts always possess the inherent power to be just in their direct dealings with persons subject to their jurisdiction and orders and in case of fraud. In re Wolff (D. C.) 4 Am. Bankr. Rep. 74, 100 Fed. 430; In re Towne, supra. It is unnecessary to pursue the refinements of this subject. It is necessary to admit that the arguments advanced in support of the issue appeal very strongly to the sense of justice. The issue itself presents a radical problem, turning upon the effect attributable to the final sentence of general order 21 (1).

The bankruptcy act, section 30, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434] provides: "All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." Pursuant thereto that court prescribed general order 21 (1), which, by its final sentence, provides: "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred." The act, section 47, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438], prescribes, and general order 17 (89 Fed. viii, 32 C. C. A. xix) relates to, duties of trustees, but no such duty is among them. The subject of proofs of claim is covered by section 57.

The act of 1867, § 10, 14 Stat. 521, c. 176, provided "that the justices of the Supreme Court, subject to the provisions of this act, shall frame general orders for the following purposes: For regulating the duties of the several officers of said courts." Section 22, 14 Stat. 527, provided: "If the proof is satisfactory to the register (referee), it shall be delivered or sent by mail to the assignee (trustee), who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of the creditors who have proved their claims, which books shall be open to the inspection of all the creditors." To regulate this duty general order 34 provided: "Proofs of debt received by any assignee shall be delivered to the register to whom the case is referred." Thus it appears that this general order was strictly within section 10 operating upon section 22.

Under the act of 1898, general order 34, just mentioned, became the basis of general order 21; but so carelessly were the changes made that although "trustee" replaced "assignee," and "referee" replaced "register," "claim" did not replace "debt," and apparently no comparison of the two acts and study of the old general orders sufficient to produce harmonious results was made. The same criticism applies equally to various other general orders.

The point sought to be emphasized is the necessary connection between the act of 1867 and its provisions just considered contained in general order 34 as contrasted with the entire lack of connection between the act of 1898 and its similar provisions in general order 21 (1), which has no reason to be.

oes section 30 of the present act, already quoted, contemplate any enlarge-
t of the rights or duties of any person prescribed by the act? Unde-
ly the general orders are treated in practice as essential upon the sub-
s to which they relate. This very general order 21 (1) is inevitably
tive in its requirements preceding the sentence in question, as has been
whenever it was considered. It is claimed upon behalf of the trustee
in that the general orders possess the force of law. That proposition, if
eded, would permit them to be inconsistent with the statute of which
are the creatures and to modify or enlarge it. Even though controlling,
ar as not inconsistent with the act, certainly they must yield to the act,
cannot operate to prevent or alter its operation.
erhaps unwilling recognition of this conclusion induces the further con-
ion of the trustee that a decision of the question whether section 57n
ts the time within which proofs can be filed is unnecessary to the deter-
ation of the question whether, in view of the special sentence in general
r 21 (1), the court possesses power to permit the filing nunc pro tunc of
proofs in issue. This contention seems wholly untenable.
he authorities hereinbefore cited do or do not correctly declare the mean-
of section 57n. If they do correctly declare it, the Supreme Court is
erless to vary it. The sentence of general order 21 (1) in issue either
s or does not impose a duty. If it does impose a duty, clearly the trustee
t fault, and the remedy of the petitioners is upon his bond, which was
n expressly to secure the faithful discharge of his duties, rather than in
favorable discretion of the court. If it does not impose a duty, equally
rly creditors cannot rely upon it, since they were not justified in depend-
upon mere volunteer action. It is urged that its existence is a perpetual
re and menace to creditors, and so puts the court in the position of doing
ustice which good conscience requires it to rectify and which it has in-
ent power to rectify. Its existence is certainly unfortunate, and particu-
y to the petitioners, if their present plight be attributable to it. That,
ever, seems not to be at all the case, the proximate cause being mere care-
ness, altogether not imputable to them. But to hold it a perpetual snare,
the sense and with the effect claimed, would be to hold it per se a per-
nal abrogation of section 57n, entitling any tardy creditor at any time, and
tardy creditors at all times, to avoid the limitation, even to the point of
id and injustice. Thus section 57n is inevitably involved in any decision
he right to exercise discretion.
Discretion depends upon particular facts, not upon fixed general conditions.
mpulsory discretion would be no discretion. To recognize the mere exist-
e of this obnoxious sentence as a sufficient basis for the exercise of dis-
tion in the case at bar would be to compel the same action in every case,
so to nullify section 57n. In the case at bar no particular facts appear
specialize it, and so call for or justify the exercise of any discretion—
h as a direct act of the court, which the court could readily see had pro-
ed damage. It was not misapprehension, but was carelessness, which pro-
ed the trouble. If section 57n creates no limitation upon filing, no dis-
tion need be invoked; if it creates the limitation declared by the author-
s cited, no discretion can be exercised, even though invoked, merely in
sequence of the existence of the obnoxious provision of general order 21
or upon the facts of this case. Wait v. Van Allen, 22 N. Y. 319; People
Security Co., 79 N. Y. 267; McQuigan v. R. R. Co., 129 N. Y. 50, 55, 29 N.
235, 14 L. R. A. 466, 26 Am. St. Rep. 507.
n reaching this conclusion, it has become logically necessary to disregard
re Seff, the only decision urged as direct authority for the position of the
itioners. The papers therein have been treated as properly authenticated.
nsiderable might be said about them, but if the conclusions reached herein
correct the Seff order is erroneous from whatever standpoint viewed,
ether based upon the mere existence of the provisions of general order 21
or upon the exercise of discretion.
Careful consideration has been given to all the arguments submitted, but
the reasons stated I believe I am powerless to allow the proofs of claim
issue to be filed, and I so decide.
An order may be entered accordingly.

This cause comes here upon appeal from an order of the District Court, Northern District of New York, providing that the claims of three creditors of the bankrupt, one of whom is also the trustee, be received and filed by the referee, although they had not been presented to him within one year after adjudication.

William W. Morrill, for J. B. Orcutt Co. and Charles Duncan.
Thomas O'Connor, for C. H. Dauchy Co.
H. W. Smith, for trustee.
H. D. Bailey and Frank H. Deal, for objecting creditors.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The referee rejected the claims, but the District Judge reversed his ruling, evidently in order to conform the practice in the Northern District to that followed in the Southern District. In re Seff (unreported). The opinion of the referee sets forth the facts, and contains a very full discussion of the questions of law involved, and we concur in his interpretation of the statute and in his conclusions. His opinion is not reported, but it may be printed as a supplement to this memorandum.

The order of the District Court is reversed.

In re LITTLE.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,145.

BANKRUPTCY—SUCCESSIVE PETITIONS—TIME.

Bankr. Act July 1, 1898, c. 541, § 59, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445], provides that any qualified person may file a petition to be adjudged a voluntary bankrupt; and section 4a (30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]) declares that any person who owes debts, except a corporation, shall be entitled to the benefit of the act as a voluntary bankrupt. Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], makes it a ground for refusal of a discharge that the bankrupt has been previously discharged within six years. *Held*, that such limitation referred to the time between the first and second discharge, and not between the first discharge and the filing of the second petition, and hence it was immaterial to the right of a person to be adjudged an involuntary bankrupt that he had previously been discharged in bankruptcy within six years.

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Illinois, in Bankruptcy.

On September 22, 1898, Newton D. Little filed a petition in voluntary bankruptcy in the court below, and in that proceeding was on April 12, 1899, duly discharged of his debts. On June 10, 1904, he filed in the court below his second voluntary petition, upon which adjudication of bankruptcy passed June 17, 1904. On December 6, 1904, upon petition of a creditor of the bankrupt, the court below dismissed the bankruptcy proceeding upon the ground that the bankrupt had been granted a discharge within six years prior to the filing of his second petition in bankruptcy. The correctness of this ruling is challenged by the bankrupt by this petition to review the order of December 6, 1904, dismissing the second petition.

Thomas J. Peden, for petitioner.
Roland D. Whitman, for respondent.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

JENKINS, Circuit Judge. It is conceded that the bankrupt cannot obtain a second discharge before April 12, 1905, after a lapse of six years from his first discharge; but it is insisted that the bankruptcy law places no restriction upon one's right to file a second petition before the expiration of the six years. By the bankruptcy law of July 1, 1898, c. 541, § 59, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445], "any qualified person may file a petition to be adjudged a voluntary bankrupt." Section 4a of the act (30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]) provides that "any person who owes debts, except a corporation, shall be entitled to the benefit of this act as a voluntary bankrupt." A "qualified person" of the statute is therefore one other than a corporation who owes debts. Section 14a of the act (30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]) provides that the application for a discharge from debt can only be filed after the expiration of one month and within the next twelve months subsequent to the adjudication of bankruptcy, unless, for cause, the judge may extend the time not exceeding six months. By the original act the grounds of objection to a discharge did not include the objection that the applicant in voluntary proceedings had been granted a discharge within six years. That ground of objection was added by the amendment of February 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411]. The expression "within six years," as we think, measures the time between the first and second discharge, and not between the first discharge and the filing of the second petition in bankruptcy. The amendment establishes a ground for the denial of the petition for a discharge available to a creditor if he desires to prefer it. But in view of the unqualified right to become a voluntary bankrupt, and in the absence of any restriction placed upon that right, we see no reason to give to the amendment qualifying the right to a second discharge a greater restriction than its terms express. It is to be observed that a petition in bankruptcy contains no prayer for a discharge. It merely asks the court sitting in bankruptcy to take the property of the bankrupt and to distribute it ratably among creditors. The discharge from debt may follow within the time authorized by the statute, if the bankrupt has conformed to the law. That is an incident to the proceeding—a privilege granted to the bankrupt which may or may not be accorded to him, but, whether accorded or denied, in no way affects the rightful jurisdiction of the court to receive and distribute the estate of the bankrupt. It may well be that one in embarrassed circumstances, not entitled to a discharge, may desire that his estate be distributed ratably among all his creditors. Why should he be deprived of the right to invoke the court to carry out the fundamental principle of the bankruptcy act that "equality is equity," because for some reason he is not entitled to avail himself of the

privilege of a discharge which under certain circumstances the law grants him?

In the earliest days of bankruptcy law, the object was to relieve the debtor from arrest upon the delivery to the court of his estate, but the debt was not discharged. This dated from the time of Julius Cæsar. 2 Blackstone, Comm. 473. The English system of bankruptcy originated in 1542, under Henry VIII, but it was not until the time of Anne (4 Anne, c. 17; 10 Anne, c. 15) that the bankrupt could obtain a discharge, and then only with the consent of a specified majority of his creditors. Loveland on Bankruptcy (2d Ed.) c. 1; Bush on Bankruptcy, introductory chapter. In this country the first bankruptcy act of April 4, 1800, c. 19 (2 Stat. 19), was confined to involuntary proceedings; and it was not until the act of August 19, 1841, c. 9 (5 Stat. 440), that voluntary proceedings could be instituted. The discharge of a debtor from his debts was grafted upon bankruptcy proceedings as an incident wrought by an advanced civilization. The fundamental principle of the bankruptcy law is to take into legal custody the property of the bankrupt, and to distribute it ratably among creditors, protecting the latter from frauds and unjust preferences, and to relieve the honest bankrupt from his load of obligation. The latter may or may not result, but that in no way interferes with the right of the court, either by voluntary or involuntary proceedings, to take over and distribute among creditors the estate of the bankrupt. The fact that one has been discharged from his debts within six years cannot possibly be an objection to the institution of involuntary proceedings by creditors. That would leave them at the mercy of the debtor, and tend to the perpetration of the very frauds denounced by the bankruptcy act. Why, then, should the debtor be debarred from doing that voluntarily which the creditors might compel, namely, the turning over of his estate for equitable distribution among his creditors? It is urged that the case is no different from that of a suit brought upon negotiable paper before its maturity. But the cases are not analogous. The one is a demand for money not due. The other is an appropriation of the debtor's estate to all the creditors, to be followed possibly by an application for discharge, which may or may not be granted. A discharge is not an absolute right existing at the time of filing the petition in bankruptcy. The right or privilege arises subsequently, and is granted upon the conditions of the statute, and is dependent in part upon the conduct of the bankrupt after the filing of his petition in bankruptcy. Those conditions cannot be applied until application has been made for a discharge. But whether the discharge is or is not applied for, or can or cannot be granted, the rightful jurisdiction of the bankruptcy court to accept the appropriation of the debtor's estate for distribution among his creditors is in no way affected. A case somewhat analogous is that of In re Houghton, Fed. Cas. No. 6,727, arising under the act of 1841. There it was urged that a fraudulent transfer by the debtor would prevent an adjudication in voluntary bankruptcy. The court ruled otherwise, although the fraudulent transfer would

have prevented a discharge from indebtedness, Betts, District Judge, saying, "But it [the act] does not say that the party shall be prevented from being a bankrupt, but that he shall be deprived of the benefit of the act."

The order is reversed, and the clerk will certify this ruling to the court below.

EASTON v. GEORGE WOSTENHOLM & SON, Limited.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1905.)

No. 1,153.

1. PARTNERSHIP—DISSOLUTION—RETIRING PARTNER'S LIABILITY—WHAT LAW GOVERNS.

Where a partnership was organized in California, the liability of a retiring partner to a creditor of the firm was governed by the law of California, though it also carried on business in Costa Rica.

2. SAME—GOODS PURCHASED ABROAD.

Where a firm doing business in California and Costa Rica purchased goods in England through complainant, as a purchasing agent, under an agreement that complainant in England should advance the money for the purchase, and to prepay freight, insurance, and other charges, for a commission of 5 per cent., complainant's contract was to be performed in England, and was therefore governed by English law; and this though some of the goods were ordered through complainant's agent in Costa Rica, authorized "to take orders and make needful business arrangements."

3. SAME—SHIPMENT OF GOODS—TITLE—DELIVERY TO CARRIER—RETIRING PARTNER.

Where a firm employed complainant to purchase goods for it in England—complainant agreeing to advance money for the purchase, and to prepay freight, insurance, and other charges, for a commission of 5 per cent.—title to goods so purchased passed to defendant firm on delivery of the goods to a common carrier for transportation to such firm, as against a retiring partner, regardless of the time when the bill of lading therefor was mailed.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 535.]

4. SAME—HARMLESS ERROR.

Where, in an action by an English purchasing agent against the retiring partner of a firm to recover advances made to purchase goods ordered by the firm, the court properly charged that, as against such retiring partner, the title to the goods passed to the firm on delivery to a carrier prior to the agent's acquiring notice of the partner's retirement, other instructions in conflict therewith were favorable to defendant, of which he could not complain on appeal.

5. SAME—ESTOPPEL.

Where a firm for which complainant had been acting as purchasing agent in a foreign country dissolved, and defendant, the retiring partner, relied on his continuing partner to give notice of his retirement, but he gave no notice thereof to complainant, defendant was estopped to deny his liability for a debt subsequently contracted by the continuing partner to complainant for goods purchased in the ordinary course of business.

6. SAME—STOPPAGE IN TRANSITU.

Where a purchasing agent of a firm from whom goods were ordered in the ordinary course of business by the continuing partner had no knowledge of the dissolution of the firm and of defendant's retirement until

after the goods had been delivered to a carrier for transportation, as ordered, such purchasing agent was not bound to stop the goods in transitu in order to protect defendant from liability and loss.

In Error to the Circuit Court of the United States for the Northern District of California.

This is an action brought by the defendant in error, as plaintiff, for an alleged indebtedness of £3,747 3s. 7d., English money, or its equivalent, $18,173.82 in gold coin, with interest thereon at the rate of 5 per cent. per annum from December 21, 1898, against the firm of Schwartz, Lowe & Co., a copartnership organized in 1894 at San Francisco, Cal., composed of the plaintiff in error, L. Leon Lowe, William Schwartz, Samuel Schwartz, and David Speyer. In 1895 Speyer's interest in the copartnership was purchased by the other members of the firm, and the business was thereafter continued in the firm name, and places of business maintained at San Francisco, Cal., and at San Jose de Costa Rica, Central America. It appears "that on or about the 10th day of August, 1899, at said San Jose de Costa Rica, plaintiff [defendant in error] executed with other creditors an agreement in writing for the compensation and liquidation of the debts of said Luis Leon Lowe, as a bankrupt, who was then and after the said 21st day of December, 1898, engaged in business alone at the place last named, under said firm name and style of Schwartz, Lowe & Co., which said agreement also provided for the distribution among his creditors of his estate, if any, in a certain manner, plaintiff thereby releasing and discharging said Lowe from all claims and demands then held or asserted by it against him; but said agreement was so executed by plaintiff with the following express provision, to wit: 'Without waiving or in any manner affecting our [plaintiff's] claims against the other [said] members of the recent firm of Schwartz, Lowe & Company, which it is not intended this agreement shall operate to discharge.'" The action was tried before a jury, which rendered a verdict against Ansel M. Easton for $20,401.36, and against each of the Schwartzes for $22,003.49, and judgment was entered accordingly, from which Easton alone brings error, to have the case as against him reviewed by this court.

Without entering into all the details of the evidence, it may be said that there are two orders for goods specially involved in this case—one dated March 30, 1898, and the other October 1, 1898. It appears from the testimony in the record that the business between the parties commenced in January, 1897, under an arrangement made by William Schwartz, representing the firm of Schwartz, Lowe & Co.; that the defendant in error was to purchase goods for the firm of Schwartz, Lowe & Co. at a profit, and was to pay all charges for freight and insurance on goods to Port Limon and Punta Arenas, Costa Rica, and through freight to San Jose de Costa Rica, as requested by said firm, and a commission to be charged on payments made for freight and insurance; that in October, 1897, the agreement was changed, and an arrangement made that on certain goods, instead of charging a profit, the defendant in error should charge 5 per cent. commission on all proprietary articles it bought for the firm. In March, 1898, in San Jose de Costa Rica, the defendant in error, by its representative, Thomas Wing, met Luis Leon Lowe, and took orders and made arrangements to ship further goods to the firm of Schwartz, Lowe & Co. at a profit, and on commission; all freight and insurance to be paid in England, and charged to Schwartz, Lowe & Co., plus a commission. On June 20, 1898, the firm of Schwartz, Lowe & Co. was dissolved by an agreement of the members of the firm, but no public notice thereof was given until December 8, 1898, when it was published in a newspaper in San Francisco, Cal. In the meantime defendant in error was expending money in the purchase of goods for Schwartz, Lowe & Co., with instructions from the firm, as usual from Lowe, upon the firm letter paper, over the firm name, in accordance with the usual course of dealing between the parties. The second order was thus given on October 1, 1898. On November 18th the defendant in error received an unusually large order, which would amount to an outlay of about $75,000; and on the 28th of November, 1898, defendant in error cabled to the Crocker-Woolworth National Bank of San Francisco (which William Schwartz had given as a reference) to know

whether Schwartz, Lowe & Co. were good for an advance of £15,000. To this the bank replied on December 2, 1898, "Are without particulars; do not know," and later, on the same day, at the request of Mr. Easton (plaintiff in error), telegraphed that Easton was no longer a member of the firm. On the same day Mr. Easton, through his counsel, George C. Sargent, sent a notice of the dissolution of the firm, which was received by the defendant in error December 17, 1898.

The testimony shows that in filling the orders given by Schwartz, Lowe & Co. the defendant in error did so on the distinct understanding that Mr. Easton, a wealthy man, was a member of the firm, and liable for its engagements; that it would neither have given the credit nor entered into business transactions with the firm if this had not been the case. It is stipulated between the parties that all shipments of merchandise made by the defendant in error which were shipped prior to November 1, 1898, were delivered to Lowe before December 2, 1898. That other shipments were made by the defendant in error as follows (the first date is that upon which the goods left the defendant's works): November 1, 1898, £519, arrived at customhouse at Port Limon, Costa Rica, November 25, 1898; delivered out of customhouse to Lowe December 15, 1898. November 9, 1898, £243, arrived at customhouse at Port Limon December 7, 1898; delivered to Lowe out of customhouse February 9, 1899. November 18, 1898, £310, arrived at customhouse, Port Limon, December 17, 1898; delivered out of customhouse to Lowe May 29, 1899. December 2, 1898, £263, arrived at customhouse, Port Limon, December 31, 1898; delivered Lowe out of customhouse part January 13, 1899; part May 29, 1899. December 7, 1898, £147, arrived at customhouse, Port Limon, January 4, 1899; delivered to Lowe out of customhouse part February 14, 1899; part May 27, 1899; part June 15, 1899; balance July 13, 1899. December 16, 1898, £270, arrived at customhouse, Port Limon, January 16, 1899; delivered out of customhouse to Lowe or his assignee subsequent to July 13, 1899.

In the deposition of J. C. Wing, he testified as follows: "Q. Has plaintiff any orders for goods, signed, 'Schwartz, Lowe & Co.,' which were on file on December 21, 1898, and which plaintiff did not fill? A. Yes; immediately I learned that the partnership was dissolved, all orders in hand were suspended, except such as were in such a position that dispatch could not well be avoided, and plaintiff paid a considerable sum to cancel contracts entered into on defendant's account. I understood that all goods dispatched after that date could not be charged to the firm as originally constituted, and no claim for them is made in the present action." In reply to a question asked witness as to what authority plaintiff had to incur and charge defendants with freight, insurance, and other matters, he said: "It is almost universally the case that shippers pay freight, insurance, and other expenses. October 1, 1898, Schwartz, Lowe & Co., Costa Rica, say: 'Freight paid through to San Jose.' These terms, I understand, were made between William Schwartz and Thomas Wing, when the account was opened." In replying to questions as to what information he received as to the dissolution of the firm of Schwartz, Lowe & Co., and as to why he sent the telegram of inquiry, the witness answered: "As the defendants' Costa Rica branch proposed to make shipments of coffee and other produce, which would involve considerable sums, plaintiff considered it prudent to obtain further information as to the standing of the San Francisco branch. When William Schwartz was in Sheffield, I understand he informed Thomas Wing that, if plaintiff wished at any time to apply for reference, he should do so to the Crocker-Woolworth National Bank, San Francisco." Then after reciting the telegrams hereinbefore stated, and the replies, said: "This was the first intimation of any change in the firm. Mr. Sargent's letter of December 1st was the official information. I know of no oral or written intimation from any person whatsoever previous to these dates." The first telegram to the bank was the first intimation that Easton had that the firm name had been used since the dissolution.

George C. Sargent and Morrison & Cope, for plaintiff in error.

Charles Page, E. J. McCutchen, Samuel Knight, and C. Irving Wright, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The questions presented for our consideration are of a legal character, and arise upon exceptions taken to the charge of the court. The points raised by the assignments of error and discussed by the respective counsel are numerous, but some of them are dependent upon the views that may be taken by the court as to the others. The specific assignments of error may therefore be materially reduced.

There is no real controversy as to the facts, but there is a wide diversity of opinion between the respective counsel as to the principles of law applicable thereto. The case is somewhat complicated, and can only be made clear by a thorough comprehension of the several business transactions, and a careful consideration of the situation of the respective parties, as well as their real intent in their business dealings with each other.

1. Did the court err in charging the jury—

"That the liability of the partners of a firm established and duly domiciled, and having a place of business in California, although transacting business in foreign places as well, is governed by the law of California, in the absence of any express provision to the contrary known to the creditor of such firm. In the case at bar the contracts for the merchandise in question, with the payments of money in connection therewith, were all to be performed in England, and are governed by the law of England as to their interpretation, and liability of the persons entering into such contracts, respectively; but the liability of the partners of the persons so respectively entering such contract is governed, as I have just stated, by the laws of this state. You should therefore entirely ignore all testimony regarding the laws of Costa Rica offered in evidence in this case. There has been some testimony concerning the law in Costa Rica with respect to the formation of partnerships and the liability of partners. All those questions that were involved in that matter have been withdrawn from your consideration."

Mr. Easton's liability originally arose out of the agreement of copartnership signed and entered into by him and his copartners in San Francisco, Cal. It is shown that the copartnership had a place of business, and carried on a trade at said place. The mere fact that said copartnership also engaged in and carried on a business at San Jose de Costa Rica does not change the status of Mr. Easton's liability as a copartner of the firm. It does not appear that any steps were taken by the firm to comply with the Costa Rican Code as regards other species of partnership, so as to make it an "account in participation," which is limited to cases where the credit of the dormant partner is not at all utilized in the dealings of the firm with third parties. King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128; Lawrence v. Batcheller, 131 Mass. 504, 509; Cutler v. Thomas, 25 Vt. 73, 76.

By what laws was the order of March 30, 1898, to be governed —those of England or of Costa Rica? The contention of the plaintiff in error is that the contract for the goods contained in this order was made in Costa Rica, and that the laws of that country

govern. The principal case relied upon to sustain his position is that of Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 435, 9 Sup. Ct. 469, 32 L. Ed. 788. It was there declared that the law of the place where a contract is made governs its nature, obligation, and interpretation, unless it appears that the parties, when entering into the contract, intended to be bound by the law of some other country. Mr. Justice Gray, who prepared the opinion of the court, deemed it appropriate to refer to the various decisions rendered in England as to what law should prevail in a case of a conflict of laws concerning a private contract, and declared that the rule was concisely and exactly stated by Sir William Blackstone as follows:

"The general rule, established ex comitate et jure gentium, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, when the parties (at the time of making the contract) had a view to a different kingdom. Robinson v. Bland, 1 W. Bl. 234, 256, 258; s. c., 2 Bur. 1077, 1078."

And then refers to the various decisions in England and America in support of this rule. After a reference to all these authorities, it is said:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

The rule announced in this case, as well as in the other authorities cited and relied upon by the plaintiff in error, is not applicable to the case in hand, because the facts of those cases are essentially different. All the authorities agree that an exception to the rule exists where the contract is made in one state or sovereignty, to be performed in another. In such cases the general rule is that the contract is governed by the law of the place of performance.

In Minor on Conflict of Laws, § 155, the author says:

"The essential elements or circumstances around which all the incidents of contracts revolve are (1) the making of the contract; (2) the consideration supporting the contract; and (3) the performance of the contract. * * * Everything relating to the making of the contract is to be governed by the law of the place where it is made; everything relating to the performance of the contract is to be controlled by the law of the place of performance; and, wherever the legality or the sufficiency of the consideration is the subject of the inquiry, the law of the situs of the consideration is to govern."

The order of March 30th was taken in Costa Rica by Thomas Wing, who had authority from defendant in error "to take orders, receive payments, and make any needful business arrangements." The testimony in relation to this order does not show that any contract for the purchase of the goods was ever made, other than the contract, understanding, agreements, and course of dealing entered into previously between the parties. And unless the mere

fact that the agent of the defendant in error took the order when he was in Costa Rica, it should be governed by the same rules as other orders previously given. The order itself says, "terms as before."

In the determination of this question, we shall not stop to consider whether the defendant in error is to be treated as an agent for the firm, or whether their relations were to be governed by the rules relating to vendors and vendees. It affirmatively appears that the goods were purchased by the defendant in error in England; that the money for their purchase was to be by it advanced in England, as was also the money for the "prepayment of freight, insurance, and other charges." We are of opinion that the question under consideration, as applied to the facts of this case, must be governed and controlled by the principles and rules of law announced in London Assurance v. Companhia De Moagens, 167 U. S. 149, 160, 17 Sup. Ct. 785, 42 L. Ed. 113, which was a contract of insurance. The court said:

"Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract, by its terms, was to be performed in England. The parties to it understood and agreed that, in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London, and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the usages of Lloyds, but subject to the conditions of the policy and contract of insurance. Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story, in his work on Conflict of Laws, § 280, says: 'But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance.'"

Story, at section 282 (8th Ed.), states that, although the general rules in relation to this subject are well established, yet the application of them is attended with many difficulties, because in cases of a mixed nature it is frequently a serious question which rule should prevail. And in subsequent sections makes several illustrations of the different applications of the rule. Among others applicable to this case, at section 283, he says:

"One of the most simple cases is where two merchants doing business with each other reside in different countries, and have mutual accounts of debt and credit with each other for advances and sales. * * * If the business transactions are all on one side, as in case of sales and advances made by a commission merchant in his own country for his principal abroad, there the contracts may well be referred to the country of the commission merchant, and the balance be deemed due to him according to its laws."

Again, at section 285, in speaking of the relation of principal and agent:

"A merchant in America orders goods to be purchased for him in England. In which country is the contract to be deemed complete, and by the laws of which is it to be governed? Casaregis has affirmed that in such a case the law of England ought to govern, for there the final assent is given by the person who receives and executes the order of his correspondent."

See, also, Andrews v. Pond, 13 Pet. 65, 78, 10 L. Ed. 61; Howenstein v. Barnes, 5 Dill. 482, Fed. Cas. No. 6,786; Weil v. Golden, 141 Mass. 364, 368, 6 N. E. 229; Miller v. Tiffany, 1 Wall. 298, 310, 17 L. Ed. 540; Bedford v. Eastern B. & L. Ass'n, 181 U. S. 227, 242, 21 Sup. Ct. 597, 45 L. Ed. 834; Wharton on Conflict of Laws (2d Ed.) § 401.

Under all the facts and circumstances of this case, we are of opinion that the order in question, as well as the others previously given, is to be governed by the law of England, and that the charge of the court was correct.

There was no proof as to what the law of England was, and, in the absence of proof upon that point, it will be presumed to be the same as that of California. See Brown v. S. F. Co., 58 Cal. 426, 428; Marsters v. Lash, 61 Cal. 622, 624; Shumway v. Leakey, 67 Cal. 458, 460, 8 Pac. 12; Mortimer v. Marder, 93 Cal. 172, 28 Pac. 814; Pierce v. So. Pac., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350; Conn. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 254, 5 Sup. Ct. 119, 28 L. Ed. 708.

2. Did the court err in charging the jury that:

"As to defendant Easton, if you believe that plaintiff, acting as a purchasing agent of the firm of Schwartz, Lowe & Co., bought the goods of which these consignments consisted, before receiving information concerning Mr. Easton's retirement from the firm, then, subject to a lien which plaintiff might have for their price, these goods became the property of said firm of Schwartz, Lowe & Co., and defendant Easton is liable therefor, although the shipment of the goods to Costa Rica was made subsequent to the receipt of the information that Mr. Easton was no longer connected with the firm of Schwartz, Lowe & Co. Under the circumstances of this case, I instruct you further that the title to the goods, wares, and merchandise sold by the plaintiff, and consigned to the firm of Schwartz, Lowe & Co., passed to the latter as soon as such merchandise was delivered to the common carrier in England for transportation, regardless of the time when the bill of lading therefor was mailed to Costa Rica."

It will be observed that this instruction is very broad, and covers many questions which have been elaborately argued by counsel. The latter part of it is the most important, and, if the principle announced therein is correct, it will obviate the necessity of specifically noticing several other assignments of error relied upon by the plaintiff in error.

As was said by the court in Havens v. Grand Island L. & T. Co., 41 Neb. 153, 155, 59 N. W. 681:

"The general rule doubtless is that the delivery of goods to a carrier consigned to the purchaser is a delivery to the purchaser, and that the title of the goods so delivered to the carrier at once vests in the purchaser; but this rule is by no means universal, and, whether applicable in any case, depends upon the facts, circumstances, and the contract between the seller and the purchaser in the case."

As we have heretofore stated, the facts in this care are not in dispute. Under arrangements made between the parties, the defendant in error purchased the goods for Schwartz, Lowe & Co. It took out policies of insurance in favor of Schwartz, Lowe & Co. It prepaid the freight, shipped the goods, and advanced for Schwartz, Lowe & Co. all the various sums that were required in

the performance of such services, and charged those sums to Schwartz, Lowe & Co. These moneys were advanced by defendant in error to said copartnership, as their agent, for a commission of 5 per cent. Did not these transactions constitute a debt for which the firm was liable?

In Bibb v. Allen, 149 U. S. 481, 498, 499, 13 Sup. Ct. 950, 37 L. Ed. 819, the court said:

"It is a well-established principle, which pervades the whole law of principal and agent, that the principal is bound to indemnify the agent against the consequences of all acts done by him in the execution of his agency, or in pursuance of the authority conferred upon him, when the actions or transactions are not illegal. Speaking generally, the agent has the right to be reimbursed for all his advances, expenses, and disbursements incurred in the course of the agency, made on account of or for the benefit of his principal, when such advances, expenses and disbursements are reasonable, and have been properly incurred, and paid without misconduct on the part of the agent. * * * It is another general proposition, in respect to the relation between principal and agent, that a request to undertake an agency or employment, the proper execution of which does or may involve the loss or expenditure of money on the part of the agent, operates as an implied request on the part of the principal not only to incur such expenditure, but also as a promise to repay it."

There is no pretense that the acts of the defendant in error in this case were illegal.

In Field v. Banker, 9 Bosw. 467, 476, the facts are different from the case at bar, but the principles for which the defendant in error here contends are clearly announced. There the plaintiffs were engaged in the business of purchasing hardware abroad, upon a commission, and received an order from the defendant as follows, "I annex memorandum of chains, which please forward by an early packet, giving the preference to the 'Black Ball Line,' at lowest rate of freight," and annexed thereto a description of the goods. The Supreme Court, in the course of its opinion, said:

"If the contract was one of mere sale and delivery, it was the business of the defendant to select the carrier, or, if he left the choice to the plaintiffs, to be ready to insure his interest at the instant of shipment. The carrier was the agent of either the defendant or the plaintiffs in such case; if of the latter, the delivery was not complete until the goods arrived in New York; if of the former, it was so the moment they were put on board. But there was no such contract as that between vendor and vendee. The plaintiffs were authorized to buy and ship as the defendant's agents. They might have used his name as purchaser, and left him alone responsible. It is true, they personally assumed the responsibility to the sellers of the chains, but this did not alter the relation of principal and agent. From the domestic who is sent to a tradesman to purchase articles for daily use, to the agents employed to buy millions, the rule is the same. The moment the purchase is made for the principal, he owns the property bought, from the time of its delivery to his agent, and is bound to reimburse the latter for moneys expended by him in the purchase. The property is at his risk, and not his agent's, whatever responsibility the agent may be under for the care and safe transmission of the goods afterwards. They are his property, subject to the lien for the purchase money, and not his agent's."

In Mee v. McNider, 109 N. Y. 500, 503, 17 N. E. 424, in the course of the opinion, the court said:

"On the other hand, the vendor is to be reimbursed for his advances at the same time and in the same manner that he receives payment for the

goods. Only one condition is to be performed—that of shipment by steamer. * * * On the part of the vendor the shipment by steamer was an effectual appropriation of the cocoa to the buyer, and at that moment the agreement on the vendor's part was executed. The plain obligation of the purchaser, as defined by the written contract, then attached, and he was bound to accept and pay for the cargo at the price named and in the manner specified."

See, also, Halliday v. Hamilton, 11 Wall. 561, 564, 20 L. Ed. 214; McNeal v. Braun, 53 N. J. Law, 618, 23 Atl. 687, 26 Am. St. Rep. 441.

In Neimeyer v. Railroad Co., 54 Neb. 321, 332, 74 N. W. 670, 40 L. R. A. 534, et seq., the court discussed the question in all its various phases under different state of facts, and cited numerous authorities with reference thereto. In the course of the opinion the court quotes the rule announced in Benjamin on Sales, as follows:

"Where goods are shipped, and by bill of lading the goods are delivered to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal."

And adds:

"But Neimeyer & Co. at the time they shipped these goods did not cause them to be consigned to themselves, to their agent, or to their order. On the contrary, they caused these goods to be consigned to Deitz, the vendee of their vendees, and this fact authorizes the inference that it was then and there the intention of Neimeyer & Co. that the title to the goods should pass upon their delivery to the carrier for transit to their vendees' vendee. Upon this subject the cases are all one way."

When the defendant in error purchased the goods and delivered them to the common carrier, and paid the freight thereon, to be forwarded to Schwartz, Lowe & Co., at Costa Rica, it performed all that it was required to do, by virtue of its agreement with that firm, to entitle it to recover the amount due from said firm for advances by it made for the purchase of the goods, the payment of freight, insurance, etc., with 5 per cent. commission.

The instruction of the court under review, is correct.

3. Plaintiff in error claims that the court erred in its charge to the jury in relation to what constitutes notice, actual or constructive, of the dissolution of a copartnership, and that the instructions as to the partnership liability were contradictory, and that he is entitled upon these grounds to have the case reversed. It is undoubtedly true, as a general proposition, that a party is entitled to have instructions to the jury clear and consistent with themselves. But the real question in the present case is whether the instructions were in fact so misleading or contradictory as to show that the jury could possibly have been misled thereby to the prejudice of the plaintiff in error. Having held that the court did not err in giving the last instruction discussed, as to the time when the title of the goods passed to Schwartz, Lowe & Co., it necessarily follows that, if the court erred in giving other instructions in conflict therewith, it was an error in favor of the plaintiff in error, of which he cannot complain.

The telegram from the bank, received on December 3, 1898, was the first intimation that defendant in error received that there had been any change in the firm. The testimony in the record shows

that prior to that time the goods embraced in the order of October 1, 1898, as well as all goods for which any claim is made in this action, had been purchased by the defendant for Schwartz, Lowe & Co. As a matter of fact, the goods were delivered to the common carrier for transportation prior to that time. The goods charged in the invoice of December 16th were delivered to the steamship Georgic, and a bill of lading taken, to the order of Schwartz, Lowe & Co. on December 2, 1898. This was the last shipment for which any recovery is sought.

It is fair to presume that the instructions given by the court, which are claimed to be adverse or in conflict with the one which we have sustained, accounts for the amount of the judgment against Easton being less than against the Schwartzes. But whether that be true or not, the fact remains that the instructions of the court, which left it to the jury to determine whether the telegram from the bank was sufficient to put the defendant in error upon inquiry as to the dissolution of the copartnership, whether it used reasonable diligence in detaining the goods, pending such inquiry, or made efforts to minimize the loss, were more favorable to the plaintiff in error than the law would warrant under the particular facts of this case.

In the light of all the facts, the plaintiff in error is estopped from denying his liability for the debt.

The rule is well settled that where a partnership is dissolved, or one or more of its members retires from the firm, without giving notice to the party with whom the partnership is dealing, the power of each member to bind the firm remains in full force, although, as between themselves, a dissolution or retirement is a revocation of the authority of each to act for the others. Lind. on Part. § 407; Parsons on Part. (4th Ed.) § 324; Story on Part. (7th Ed.) § 162; Collyer on Part. § 530; McLemore v. Ranken M. Co. (Miss.) 8 South. 845; Rose v. Coffield, 53 Md. 18, 23, 36 Am. Rep. 389; Ruiz v. Norton, 4 Cal. 355, 358, 60 Am. Dec. 618; Williams v. Bowers, 15 Cal. 321, 76 Am. Dec. 489; Block v. Price (C. C.) 32 Fed. 562, 564.

If any fraud was committed by Lowe, the plaintiff in error, instead of the defendant in error, must suffer. Easton relied upon Lowe to give the notice of the dissolution and to pay the outstanding debts against the partnership. Lowe did neither. The fraud of Lowe was against the firm. The firm allowed Lowe to hold himself out as a partner in dealing with third persons, without notice, after the dissolution, and cannot complain if they be held for the debts incurred prior to any notice of the true condition of the partnership affairs. The rule is universal that, where one of two innocent parties must suffer, it must be he whose misplaced confidence enabled the wrong to be committed. The defendant in error owed no duty to lessen the debt or to minimize the loss to the members of the firm who had, as between themselves, withdrawn from the firm without giving any notice of such dissolution. It was not bound to stop any of the goods in transitu, which it had bought and delivered to the firm in the usual course of dealing. It was not in any way responsible to the firm for the wrongdoing of Lowe toward them. It certainly was not bound to

stop the goods in transitu, even if it had the power to do so, and thereby suffer a loss in order to protect Easton, and relieve him from any part of his liability. Mr. Easton was not a party to any wrongdoing, but his failure to notify the defendant in error has estopped him, as before stated, from denying the debt. He cannot hold the defendant in error responsible for the wrongful acts of Lowe towards himself and his copartners.

It is only necessary to add that we find no error in the refusal of the court to give the instructions requested by the plaintiff in error, or in any of the other assignments of error, not governed by the principles we have already announced, that would justify a reversal of the judgment.

The judgment of the Circuit Court is affirmed, with costs.

BANK OF BRITISH NORTH AMERICA v. FREIGHTS, ETC., OF THE HUTTON.

SAME v. FREIGHTS, ETC., OF THE ANSGAR.

(Circuit Court of Appeals, Second Circuit. April 12, 1905.)

Nos. 653, 654.

1. SHIPPING—FREIGHTS—PLEDGE—MARITIME LIEN.
   Where a charterer procured advances from a bank on the credit of the freights of particular vessels, assigning the charters and insurance policies covering the freights, etc., the bank had a maritime lien on such freights, which it was entitled to follow into whosesoever hands they might go.

2. SAME—TERMINATION OF LIEN.
   Where a charterer had been in the habit of procuring advances from a bank on the credit of the freight of particular vessels, and had collected such freights as agent for the bank, deposited them to his individual bank account, and thereafter applied only the balance in excess of the advances to his own use, the bank's maritime lien on such freight did not terminate on the charterer's depositing and mingling the same with his own funds.

3. SAME—ENFORCEMENT—REMEDIES.
   Where a bank had a maritime lien on the freights of certain vessels for advances, it was entitled to enforce the same by an action in admiralty in rem, regardless of the fact that it also had a lien enforceable in equity.

4. SAME—TRUST FUND—APPROPRIATION BY AGENT—DEPOSITS—APPLICATION—PAYMENT OF CHECK.
   Where a charterer collected freight as the agent of a bank which held a maritime lien thereon, and deposited such freight to his individual bank account, but, before accounting for such advances, depleted the account by a check drawn against it for other purposes—not, however, shown to have been delivered until after he deposited $2,500 of his own money to the credit of the account—such deposit should be applied to the payment of the check pro tanto in exoneration of the trust deposit.

Appeals from the District Court of the United States for the Southern District of New York.

For opinion below, see 127 Fed. 859.

Charles S. Haight, for appellants.
Mark W. Patten, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. These are actions in rem by which the libelant seeks to assert an alleged lien arising out of the following facts: For two or three years prior to 1901 the libelant, a foreign bank having representatives in New York City, had been accustomed to make advances to one Perry, who was engaged there in operating chartered vessels. He usually had a number of vessels under charter, carrying cargoes upon long voyages, and his profits depended upon the excess of the freights earned by them, and payable upon delivery of the cargo at the port of destination, beyond disbursements for hire and other expenses; and, at times when he required moneys to pay hire and other disbursements of a vessel, he was accustomed to apply to the libelant, and the libelant would advance them to him. These advances were made without taking any evidence of indebtedness from him, and with the understanding that they were made against, and should be repaid from, the freights of the particular vessel for which they were made; and, as security, Perry customarily assigned to the libelant the charters and insurance policies covering the freights for the particular voyages. Upon the arrival of the vessels, Perry would collect the freight, deposit the amount to his own credit in bank, mingling the amount with his own funds, and would pay the libelant by checks drawn upon that bank. Among the vessels chartered by Perry were the steamers Ansgar and Hutton. December 26, 1900, he applied to the libelant for advances against the freights of these vessels. His letter, after stating that the former was about to load at Calcutta on her voyage home, with her hire paid to December 27, 1900, and that the Hutton was about to load at Nagasaki on her voyage home, with her hire paid to January 3, 1901, reads: "We desire advances against freights above steamers, $10,000 each. Kindly hand us your check for $20,000 and oblige. Documents will be handed you later." The libelant thereupon advanced him $20,000, which he deposited in his bank account; making a note on the stub of his checkbook that $10,000 was advanced "against freights" of the Ansgar, and $10,000 "against freights" of the Hutton. January 23, 1901, he sent the libelant the documents relating to the Ansgar, and February 2, 1901, the documents relating to the Hutton; these consisting of the charter parties, memoranda of accruing freights, and insurance policies covering the freights for the particular voyages; the charter parties and insurance having his assignment indorsed thereon. The memoranda showed expected freights of about $65,000. January 30, 1901, he applied for an additional $10,000 against the freights of the Ansgar, and on February 15, 1901, he applied for $20,000 more—$10,000 against the freights of each vessel. These sums were advanced by the libelant—in all $30,000 against the freights of the Ansgar,

and $20,000 against the freights of the Hutton. The Ansgar arrived at New York April 10, 1901, and the Hutton April 26, 1901. Perry collected the freights, and of the amount he deposited about $39,000 to the credit of his account in the Bank of New York. Perry died May 8, 1901, at which time there was a balance to his credit in that bank derived to the extent of $18,000 from the freights of the Hutton, and $803.78 from the freights of the Ansgar. His estate proved to be insolvent.

The libelant asserts that there was an hypothecation of the freight moneys, and that it is entitled to follow them into Perry's bank account. The claimant, the administrator of Perry's estate, asserts that the libelant stands in no better position than do the other creditors of Perry in respect to the moneys in bank.

Quite irrespective of the fact, which may be put aside for present purposes, that Perry used nearly $20,000 of the advances of the two vessels in aid of the voyages upon which the freights were earned, the libelant acquired a maritime lien upon the freights by the agreement of hypothecation, and thereby became the equitable owner. A pledge for loans made for the purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned, as a part of the contract, is as purely maritime as a bottomry bond. The Advance, 72 Fed. 797, 19 C. C. A. 194. Indeed, it has been held by the Supreme Court of New York (Brown v. Gray, 70 Hun, 261, 24 N. Y. Supp. 61) that an action to restrain the diversion of freight moneys which had been pledged for advances, and which it was asserted the charterers were collecting and misapplying, could not be maintained in the state court, because it involved an adjudication as to the existence of a maritime lien, and was therefore within the exclusive jurisdiction of the federal courts in maritime causes. The lien created by a maritime pledge of freights follows the freights through all their transmutations, and wherever they can be found. It is familiar doctrine of the admiralty courts that a maritime lien attaches not only to the original subject of the lien, but also to whatever is substituted for it, and that the lienholder may follow the proceeds wherever he can distinctly trace them. "Wherever there is a maritime lien upon property, it adheres to the proceeds of that property, into whose hands soever they may go, and these proceeds may be attached in the admiralty." Benedict, Adm. Pract. § 290 (3d Ed.), where the authorities are collected in the note.

It is contended for the appellant that the lien in this case ceased when Perry collected the freights and deposited them in bank. This argument can be valid only if the parties by their agreement contemplated that the lien should then cease, or if, by reason of what subsequently occurred, the libelant waived the lien. The lien, being the creature of the contract, ceased to exist only when the contract contemplated it should be at an end. The parties were at liberty to agree that the freight in solido should be set apart for the satisfaction of the advances, or that either should collect the proceeds, or that Perry should do so, and deposit them

in his own bank, and apply so much of them as was necessary to satisfy the advances.

If we could only ascertain the intention of the parties from the proposition in the letter requesting the advances in controversy, and the acceptance implied by making the advances, the terms of the hypothecation in controversy would be so indefinite as to leave much open to discussion; but the particular hypothecation was made pursuant to the previous course of business between the parties, and its meaning is to be ascertained by their understanding in the previous similar hypothecations. The previous hypothecations contemplated, as the assignment of the charter in each instance shows, that the libelant should be at liberty to intervene and appropriate the freights, and forestall Perry's collection of them, for the purpose of realizing its advances, if at any time it might find it desirable to do so; but they as obviously contemplated that Perry should ordinarily collect the freights, deposit them in bank in his own name, apply such part of them as were in excess of the advances to his own use, and apply the balance to the payment of the advances, acting as agent for the libelant in collecting the freights and retaining such of the proceeds as belonged to the libelant. Indeed, the proofs show that it was expressly understood between them that when he collected the freights he should act as the agent for the libelant. Such an understanding is wholly inconsistent with the presumed intent of the parties that the lien should not exist in the instances in which Perry should be permitted to collect the freights. We think the hypothecation imported that the lien should survive so long as the advances should be unpaid, whether the freights were unpaid by the consignees and remained in their hands, whether they were in Perry's hands in the form in which they had been paid, or whether they were in his custody in the form of proceeds deposited in his bank account. In the Freights of the Kate (D. C.) 63 Fed. 707, the subject of hypothecation of freights for advances was exhaustively discussed by Judge Brown, and in that case he decided, in view of the terms of the hypothecation, and the extrinsic facts connected with the transaction, that the lien was intended to be a general one, extending to all freights earned by the vessels of the borrower, including those chartered subsequently to the loans. He said:

"They plainly intended both a specific and a general lien on all the profits of the company's line; and, if that was the intent, effect must be given to it, so far as it was lawful, and not incompatible with the rights of others."

So, here, if the parties intended that the lien should extend to the proceeds from freights deposited in bank by Perry in his own name, effect should be given to that intention.

If it appeared by the proofs that during the period of the advances Perry had been using the libelant's part of the freights for his own purposes, with the knowledge of the libelant, there would be substantial ground for holding that there had been a waiver of the lien. A principal who customarily permits his funds to be mixed by his agent with the agent's own funds, and used by the agent as his

own, occupies no better position with respect to the common fund than does any other creditor of that agent, and may well be deemed to have waived any equitable lien upon it arising from the misappropriation of the fiduciary. It does appear that the libelant was aware that Perry was depositing the proceeds in his general bank account, and that he was drawing checks against the account for other purposes than paying the advances; but, so far as appears, the libelant had no reason to suppose that these checks were not drawn against Perry's own part of the fund.

Concluding, as we do, without any hesitation, that the libelant's lien extended to the deposits in Perry's bank account, we think it clear that the libelant was entitled to assert its lien upon those proceeds in a court of admiralty to the extent to which they could be traced, and by an action in rem. The action being one to enforce a maritime hypothecation, jurisdiction is complete. Cutler v. Rae, 7 How. 731, 12 L. Ed. 890; Sheppard v. Taylor, 5 Pet. 675, 8 L. Ed. 269; American Steel Barge Co. v. Chesapeake & Ohio Coal Agency Co., 115 Fed. 669, 53 C. C. A. 301; The Kalorama, 10 Wall. 210, 19 L. Ed. 941; The Mary, 1 Paine, 671, Fed. Cas. No. 9,187. And it is quite immaterial that, superadded to the lien and the remedy in admiralty, the libelant may also have had an equitable lien, and a remedy in a court of equity to reach the proceeds in the bank account of Perry as its fiduciary.

It is insisted for the appellant that the libelant has recovered $2,500 more than the amount of the hypothecated freights which have been traced as remaining in his bank account. It appears that on May 6, 1901, Perry drew a check which depleted the freight moneys remaining in his account in the sum of $3,479. This check was not paid by the bank or charged to his account until May 8, 1901. Before it was paid, and on May 7th, he deposited $2,500 of his own moneys. This is the sum which it is argued was improperly allowed to the libelant. The court below gave its reasons for the allowance as follows:

> "If the $3,479 transaction had not taken place, the fund would have been that much larger for the benefit of the libelant. Having taken place, however, to the detriment of the libelant, and $2,500 having been subsequently deposited on the same account, it would seem that equity would appropriate the money to repay the loss to the extent it would go, and in this view the $2,500 should be applied on the payment of May 6th, leaving the original account unimpaired by that transaction."

If it had appeared that Perry had delivered this check previously to depositing the $2,500, we should be of the opinion that the amount ought not to have been allowed, but that fact does not appear. The rule in equity is that if a person holding money in a fiduciary capacity intermingled in his account at his bankers with his own money, draws checks upon his account generally, he is to be regarded as having drawn out his own in preference to the trust money; and the ordinary rule attributing the first payment to the first credit does not apply in such a case. Pinkett v. Wright, 2 Hare, 12; Ellicott v. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945; Importers' Bank v. Peters, 123 N. Y. 272, 25 N. E. 319. It is not to be assumed

that Perry intended to misappropriate the part of the account represented by the libelant's moneys, and, upon the analogy of the equitable rule mentioned, it is to be presumed that, to the extent that the account represented his own moneys when he delivered the check, it was drawn against that part of the account. We are satisfied the amount was properly allowed.

The decrees are affirmed, with costs.

SHIELDS v. MONGOLLON EXPLORATION CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1905.)

No. 977.

1. CIRCUIT COURT OF APPEALS—JURISDICTION—STATUTES—DISTRICT COURTS OF ALASKA.

The appellate jurisdiction of the Circuit Court of Appeals for the Ninth Circuit over appeals and writs of error from the District Courts of Alaska is not ruled by Act Cong. April 7, 1874 (18 Stat. pt. 3, p. 27, c. 80), relating to appeals from judgments and decrees of territorial courts, but by the Alaska Civil Code (31 Stat. 414, c. 51), authorizing such appeals.

2. SAME—MODE OF REVIEW—APPEAL OR ERROR.

Under Civ. Code Alaska (31 Stat. 414, c. 51), § 504, conferring on the Ninth Circuit Court of Appeals the same jurisdiction to review by writs of error or appeal final judgments or orders of the District Courts of Alaska that was given by the act creating the Circuit Courts of Appeals to review final decisions of District and Circuit Courts, and section 508, declaring that all provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States or to the United States Circuit Court of Appeals for the Ninth Circuit, except in so far as the same may be inconsistent with any provisions of the act, shall regulate the procedure and practice in cases brought to such courts respectively from the District Courts for the District of Alaska, the Ninth Circuit Court of Appeals had jurisdiction to review a decree in an action to recover an interest in a mining claim tried to the court by writ of error.

3. SAME—WAIVER OF JURY—NECESSITY OF WRITING.

Under the Alaska Civil Code (31 Stat. 363, c. 19), providing that a trial by jury may be waived by the parties to an issue of fact by written consent and by oral consent in open court entered on the minutes, where it appeared both in the bill of exceptions and in the judgment that a jury was waived by stipulation of the parties in open court, the Circuit Court of Appeals was not precluded from reviewing assignments of error relating to the admission or exclusion of evidence, because the waiver was not in writing and filed as provided by Rev. St. U. S. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570].

4. SAME—EVIDENCE.

Where, in an action to recover an interest in a mining claim, defendants claimed that such interest was conveyed to plaintiff's prior grantor by mistake as a part of the settlement, it was not error to permit one of the defendants with whom such settlement was made to testify what plaintiff's prior grantor did pursuant to the agreement of settlement offered in evidence.

5. SAME—PREJUDICE.

Where, in an action to recover an interest in a mining claim, defendants contended that such interest had been included in a settlement deed to plaintiff's prior grantor by mistake, and plaintiff had the benefit of

such grantor's uncontradicted testimony that it was agreed that the property in controversy should be transferred as a part of the settlement, plaintiff was not prejudiced by the court's refusal to permit one of the defendants who made such settlement to testify whether such proposition had not been made.

SAME—PLEADING.

In an action to recover an interest in a mining claim conveyed to plaintiff's prior grantor as a part of a settlement between him and K., acting for a corporation, defendants claimed that such interest was conveyed to plaintiff's grantor by mutual mistake, and K., who was a party, answered, and alleged that a settlement was made between the corporation and plaintiff's grantor, and was intended only to affect property in which those parties were interested, and not the interest in question, which belonged to K. individually, and that K. executed a deed without any negligence, believing that it conformed to the agreement, and did not contain the interest in controversy, and prayed a reformation of the deed. *Held*, that such answer was not objectionable, as not constituting a defense or furnishing ground for reformation of the deed, on the theory that, if K. acted only for the corporation, the deed did not convey his individual property.

SAME—EJECTMENT—EQUITABLE DEFENSES—FINDINGS—REVIEW.

Under Alaska Code (31 Stat. 393, c. 38), making certain provisions for the trial of actions of an equitable nature, and providing that the section shall not be construed to bar an equitable owner in possession of real property from defending his possession by means of his equitable title, where defendants pleaded an equitable title to an interest in a mining claim sought to be recovered in ejectment, and prayed reformation of a deed to plaintiff's prior grantor for mutual mistake, the trial court's findings of fact on a jury being waived did not have the conclusive effect on appeal of a verdict of a jury.

SAME—FINDINGS OF FACT—CONFLICTING EVIDENCE—REVIEW.

Where an action of ejectment, in which an equitable defense was raised, was tried by the court without a jury, the court's findings of fact, made on conflicting evidence, could not be reviewed on appeal, unless a serious and important mistake appeared to have been made in consideration of the evidence or in the application of the law.

SAME—INNOCENT PURCHASER.

In an action to recover an interest in a mining claim, evidence *held* insufficient to show that plaintiff was an innocent purchaser, without notice of defendants' equity.

SAME—DEEDS—MUTUAL MISTAKE—EXECUTION—FAILURE TO READ.

Where, in executing a deed in pursuance of a settlement, the grantor relied on the representation of his attorney, who informed him that the deed was "all right, and according to a memorandum" which the grantor had furnished, he was not guilty of such negligence, in failing to read the deed, as precluded a subsequent reformation thereof, so as to exclude an interest in a certain mining claim included by mutual mistake.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

On August 26, 1899, the J. S. Kimball Company, a corporation, entered into written contract at San Francisco, Cal., with Conrad Siem, by which it ployed him as its agent to take charge of its store and trading station at me, Alaska, to manage its business at Nome and elsewhere as might be reed upon, and to pay him for his services as such agent and for services eretofore rendered by him an amount equal to one-third of the net profits the business of said store and trading station from the time of its estabshment to the termination of said contract, and it was stipulated that the ntract might be terminated by the mutual agreement of both parties or upon ritten notice of its termination by either thereof. In pursuance of said ntract the said agent took possession of the store and business of said cor-

poration at Nome, and remained there in charge thereof during the winter of 1899 and until the spring of 1900, when the corporation terminated the agency, and directed said agent to turn over to the Kimball Steamship Company all of its property covered by the agreement in his possession or under his control. In the latter part of June, 1900, the J. S. Kimball Company took forcible possession of its store and business, and ejected said agent therefrom. About July 28, 1900, J. S. Kimball arrived in Nome, and commenced negotiations to close up the business between the corporation and Siem. The negotiations which were carried on between Siem and J. S. Kimball representing the corporation resulted in the execution on August 27, 1900, of the deed to Siem under which the plaintiff in error claims an interest in the property in controversy, namely, an undivided one-fourth interest in and to a placer mining claim known as "Bench Claim No. 1 Below Snow Gulch, First Tier on the Northwest Side of Glacier Creek in Cape Nome Recording District, Alaska." On August 29, 1899, J. D. Morgan, then the owner of said claim, conveyed unto John S. Kimball and John H. Bullock an undivided one-half thereof. On March 12, 1900, Kimball conveyed to Brander an undivided one-twelfth interest therein, and on July 14, 1900, he conveyed to Tyson an undivided one-eighteenth; so that on August 27, 1900, the date of the deed under which the plaintiff in error claims to have received an undivided one-fourth interest therein, Kimball was the owner of only an undivided one-ninth interest. The plaintiff in error, in her amended complaint, predicated her right to recover an undivided one-fourth interest on the theory that the conveyance from Morgan to Kimball and Bullock conveyed to Kimball individually, and for his own use and benefit, an undivided one-fourth interest, and that by the terms of the settlement between the J. S. Kimball Company and Siem all the interest of J. S. Kimball in the claim in controversy was to be conveyed to the latter. The defendants in error defended on the ground that the interest of J. S. Kimball in the claim in controversy was his individual property, acquired by purchase, and was not considered in the settlement between the J. S. Kimball Company and Siem, and was not intended to be conveyed to the latter under said settlement, but that the conveyance thereof was the result of a mutual mistake between the parties to the said settlement. The action was tried before the court without a jury. The court made findings of fact which are in substance as follows: First. That on August 29, 1899, J. D. Morgan, being the owner of the mining claim in controversy, conveyed to John H. Bullock and John S. Kimball an undivided one-half interest in that and other mining claims, and that the grantees in said deed thereby became the owners each of an undivided one-fourth interest therein. Second. That on February 28, 1900, Kimball conveyed to A. J. Brander an undivided one-twelfth interest in said claim, and on July 14, 1900, conveyed an undivided one-eighteenth interest therein to Robert J. Tyson, and said grantees entered into possession of said claim; that on August 27, 1900, there was vested in John S. Kimball an undivided one-ninth interest in said claim, and no more. Third. That during the continuance of the agency of Conrad Siem for the J. S. Kimball Company from August 26, 1899, to July, 1900, the said agent caused to be entered and located by various persons, through and by means of his connection with such corporation, a large number of mining claims in sundry mining districts in Alaska for said corporation, and caused some thereof to be located under his own name, others in the name of said corporation, and others in the name of J. S. Kimball, who was the president of said corporation, but all of said claims were located for the benefit of said corporation, and were held by it subject to the agreement between it and its said agent. Fourth. That on or about August 27, 1900, it was agreed between the said J. S. Kimball Company, through its said president and said Conrad Siem, that in full settlement of the accounts between said corporation and Siem the latter should take and receive, and the former should transfer and convey by quitclaim deed to him, all the mining claims of every nature and kind then owned by the said J. S. Kimball Company and Siem or either thereof, or located by any person for them or either of them, or then of record in their names or the name of either of them, save and excepting therefrom certain mining claims thereafter in the findings described. Then follows the description of numerous mining claims so reserved, one of which is the right, title,

interest of J. S. Kimball in the claim in controversy in this suit. Fifth. t after said settlement had been made the attorney for the J. S. Kimball ıpany and the attorney for Conrad Siem prepared a deed of conveyance, presented the same to said corporation and to said Siem, and said at- ıeys represented that the said deed was prepared in conformity to and in ordance with the terms of said agreement and settlement. On August 27,). said J. S. Kimball and the J. S. Kimball Company and Conrad Siem, ı relying on the statements so made by said attorneys, accepted said in- ıment, and thereupon the said corporation, by its attorney in fact and said J. S. Kimball, executed and delivered to Conrad Siem the deed bear- date August 27, 1900, wherein and whereby there was conveyed to the Siem all the mining claims and parts of mining claims of every kind ıtsoever now owned by the party of the first part or either of them, or ted by any person for them or either of them, or now of record in the ıe of them or either of them, or to which they or either of them is entitled virtue of any contract made with any person, etc., saving and excepting refrom claims which were therein thereafter described; that by mutual take of the parties there was omitted from the exceptions which were in- ded to have been inserted in said deed the premises in controversy in this and certain other mining claims not necessary here to specify, all of ch were acquired by purchase by J. S. Kimball as his individual property, in none of which said Siem had any interest. Sixth. That said J. S. ıball executed said deed for the sole purpose of executing in accordance ı said agreement of settlement the conveyances that were thereby agreed ɔe made to said Conrad Siem, and that he relied upon the statements and ırances of his attorney and the attorney of Conrad Siem that the same tained all the reservations and exceptions which had been agreed upon; t at the time of the execution of said deed the J. S. Kimball Company and l Conrad Siem had no right, title, or interest of any kind or nature in the l mining claims mentioned in said reservations and exceptions which were ɔmitted from said deed, but said J. S. Kimball was the owner of and enti- to an undivided one-ninth interest in the claim in controversy, and no ɔe; that on April 19, 1901, Conrad Siem conveyed all his right, title, and rest in all properties in the District of Alaska to the Behring Sea Im- vement & Trading Company, and on August 31, 1901, the said last-named ɔoration conveyed the same to the plaintiff in error; that on April 19, 1, the time of making his said conveyance, Conrad Siem had full knowl- e and notice of the mistake in said deed of August 27, 1900; that on said e he was the president and attorney in fact of said Behring Sea Improve- it & Trading Company, and the principal and only beneficiary stockholder rein, and that said corporation had full knowledge and notice of said mis- e, and of the equitable rights of the defendants in error. Seventh. That plaintiff in error is the wife of H. E. Shields, who, at the time of the set- ıent so had on August 27, 1900, was the attorney and adviser of Conrad n, and he and the plaintiff in error had full, complete, and actual knowl- e of said mistake in said deed and of the equitable rights and interests the defendants in error in said mining claim long prior to the date of the veyance thereafter made, and knew that the defendants in error were in session of said mining claim as tenants in common, and holding the whole same according to their respective interests. Eighth. That prior to the king of the deed to the plaintiff in error, Conrad Siem, as attorney in fact said Behring Sea Improvement & Trading Company, and in his own proper son, was requested to reconvey or cause to be reconveyed the said mining ms so conveyed to him by mutual mistake on August 27, 1900, or to correct l mistake, but he refused to comply therewith; that the plaintiff in error not, nor has ever had, any title or interest in the said mining claim in troversy, but that Helen W. Kimball is, and has been since March, 1901, owner of an undivided $^{27}/_{72}$ thereof, and the defendant John S. Kimball he owner of an undivided $^{9}/_{72}$ thereof; that John H. Bullock is the owner an undivided $^{8}/_{72}$ thereof, and the Mongollon Exploration Company is the ıer of an undivided $^{28}/_{72}$ thereof; that said deed of August 27, 1900, and subsequent conveyance of Conrad Siem to the Behring Sea Improvement Trading Company constitute a cloud upon the title of the defendants in

error; and that the amended answer of said defendants in error is in all respects true, and that the reply of the plaintiff in error is untrue. The court thereupon made conclusions of law in accordance with said findings of fact, and entered a judgment in favor of the defendants in error.

Bishop, Wheeler & Hoefler and H. E. Shields (J. F. Bowie, of counsel), for plaintiff in error.

James E. Fenton, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We are met at the threshold of this case by the motion of the defendants in error to dismiss the writ of error on the ground that the appellate jurisdiction of this court can be invoked in the present case only by an appeal. The motion is based upon the act of Congress governing the practice in territorial courts and appeals therefrom, approved April 7, 1874 (18 Stat. pt. 3, p. 27, c. 80), which provides that the judgments and decrees of territorial courts in actions at law wherein there is not a trial by jury, and wherein the issues of law and fact are submitted to and tried by the court without the intervention of a jury, can be reviewed only by appeal, and not on writ of error. The Supreme Court, in Stringfellow v. Cain, 99 U. S. 610, 25 L. Ed. 421, Hecht v. Boughton, 105 U. S. 235, 26 L. Ed. 1018, Bonnifield v. Price, 154 U. S. 672, 14 Sup. Ct. 1194, 26 L. Ed. 1022, and in several other decisions, has held that by virtue of this statute the appellate jurisdiction of the Supreme Court over the judgment or the decree rendered by a territorial court in a case not tried by a jury can only be exercised by appeal, and dismissed cases of that nature which had been brought before it on writs of error. But the appellate jurisdiction of this court over appeals and writs of error from the District Courts of Alaska is not ruled by the act of April 7, 1874, but by chapter 51 of the act of June 6, 1900, providing a Civil Code for Alaska (31 Stat. 414). Section 504 of that chapter gives to this court the same jurisdiction to review by writ of error or appeal final judgments and orders of the District Courts of Alaska that was given by the act creating the Circuit Courts of Appeals to review final decisions of District and Circuit Courts; and section 505 provides that:

"All provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States or to the United States Circuit Court of Appeals for the Ninth Circuit, except in so far as the same may be inconsistent with any provision of this act, shall regulate the procedure and practice in cases brought to the courts respectively from the District Court for the District of Alaska."

The motion to dismiss is therefore denied.

The defendants in error deny the power of this court to consider the assignments of error so far as they relate to the rulings of the trial court in admitting or excluding evidence, or to the alleged insufficiency of the evidence to support the findings of fact, on the ground that it does not appear from the record that written consent of the parties to waive a jury trial was filed in the court below.

hey rely upon sections 649 and 700 of the Revised Statutes [U. Comp. St. 1901, pp. 525, 570], in which it is provided that issues f fact in civil cases in any Circuit Court may be tried and deter-ined by the court without the intervention of a jury whenever e parties or their attorneys of record file with the clerk a stipu-tion in writing waiving a jury, and that when an issue of fact s so tried the rulings of the court in the progress of the trial, if xcepted to and duly presented by a bill of exceptions, may be re-iewed by the Supreme Court; and they cite the decisions of that ourt in County of Madison v. Warren, 106 U. S. 622, 2 Sup. Ct. . 27 L. Ed. 311, and Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 6, 28 L. Ed. 835, and other cases thereafter decided, in which it as been held that while prior to the enactment of these sections f the statutes the appellate court had no authority to revise the ulings of a Circuit Court upon the admission or rejection of testi-ony, or upon any other question of law arising out of the evi-nce where the parties had waived a trial by jury and had sub-itted the facts to the determination of the Circuit Court upon the vidence, after the statute such power could be exercised only upon roof of the filing of the written waiver as required thereby. If is were the ordinary case of a writ of error to review the proceed-gs on a trial in a Circuit Court of a civil law case without the ntervention of a jury, the objection now interposed would be well ken, for the record in this case fails to show that there was a ritten waiver of a jury trial. But the act of June 6, 1900, adopt-g a Civil Code for the trial of causes in Alaska (31 Stat. 363, c.), provides that trial by jury may be waived by the parties to an sue of fact not only by written consent, but by oral consent in en court entered in the minutes. It appears both in the bill of xceptions and in the judgment of the court below that a jury trial as expressly waived upon the stipulation of the respective par-rs. There can be no doubt, therefore, that such oral consent, thus videnced by the record, is as effective to preserve the right of a laintiff in error to review the rulings of the court below as would ave been a written consent under the provisions of section 649 of e Revised Statutes.

The plaintiff in error contends that the court erred in overruling e objection to the question addressed to J. S. Kimball, a witness r defendants in error, when he was asked, "What did Conrad em do pursuant to the agreement that has been offered in evi-nce here, if you know?" The objection was that the evidence ked for was incompetent, irrelevant, and immaterial. The court lowed the witness to give the details of the negotiations prior the final agreement of settlement. We see no error in the rul-g. It certainly was not such plain error as to require this court take notice of it in the absence of an assignment, and it was not signed as error.

Error is assigned to the ruling of the court in sustaining the ob-ction of defendants in error to interrogatories propounded to said itness after he had testified that Geary was not acting as his at-rney at the time of the settlement, when he was asked, on his

cross-examination, in substance the following questions: Did not T. J. Geary act as attorney for the J. S. Kimball Company, and did not you treat this property of the J. S. Kimball Company as your property? Did you not go, upon August 6th, to the office of Mr. Geary, and enter into that agreement with Conrad Siem in the presence of Mr. Shields? On or about August 20th, or on or about August 15th, did not you come to terms of settlement with Conrad Siem? The evidence called for by the first of these questions could not be material under the allegations of the amended complaint of the plaintiff in error. She alleged therein that on August 27, 1900, J. S. Kimball by his deed sold and conveyed unto Conrad Siem an undivided one-fourth interest in the mining claim in controversy. It was not the theory of the complaint or of the testimony of the plaintiff in error that J. S. Kimball held an interest in the claim in controversy in trust for the J. S. Kimball Company. It is true that in the complaint in intervention in the case of J. S. Kimball and John H Bullock against Stewart and Richards the plaintiff in error so alleged, but her amended complaint in the case at bar must be regarded as a distinct abandonment of that theory. In addition to this, there is nothing to show that the interest of the plaintiff in error was prejudiced by the exclusion of the testimony so sought, nor by the exclusion of the testimony of the witness as to what agreements had been negotiated, but not consummated, on August 6th or on August 20th. The offers of proof of the plaintiff in error in connection with this rejected testimony were, in substance, that on August 6 and on August 20, 1900, J. S. Kimball and the J. S. Kimball Company and Conrad Siem reached terms of settlement, one of the features of which was that Kimball was to convey to Siem all the mining property in Alaska that had been located in or stood in the name of John S. Kimball or the J. S. Kimball Company. It is urged that this testimony so excluded was competent and was material, for the reason that it tended to contradict certain testimony given by J. S. Kimball on his direct examination. That testimony was that three certain named claims, including the claim in controversy, were his own individual speculation, and that in the final agreement none of them was to be conveyed to Siem, either by himself or by the J. S. Kimball Company, and that the company never had any interest in either of them. Then followed the question:

"At the time you signed this deed, you may state whether or not you had any knowledge whatever of it describing or omitting therefrom the mining claim in controversy known as 'Bench Claim No. 1 Below Snow Gulch, first tier'? A. I never had dreamed of any such thing as that being in there."

Counsel for plaintiff in error argue that this answer of J. S. Kimball is a denial that at any time he had entertained the idea of, or discussed, a transfer of the claim in controversy in the settlement with Siem. We do not so understand it. To us it seems clear that the witness meant to say that in the final settlement he had never entertained the thought of transferring to Siem the claim in controversy. If such was the true meaning of his answer, the prof-

ered evidence did not tend to contradict it, and there was no er-
or in its exclusion. But if, indeed, there was error, it became
armless, for the reason that thereafter Siem testified as to the
erms of the proposed settlement of August 6th and August 20th,
nd his testimony was not contradicted by any witness. The pro-
osed settlement of August 6th is evidenced in the record by the
repared instrument of agreement which was to have been signed
n that date. It contains no suggestion that Kimball was to trans-
r his interest in all claims in Alaska then standing in his name.
n the contrary, the list of claims which was attached thereto
mits any mention of the claim in controversy. Of the proposed
ettlement of August 20th Siem testified that the proposition of
imball was to convey to him "all the mining property then owned
y J. S. Kimball and the Kimball Company in Alaska, if I gave
m a mortgage for $20,000." It may be doubted whether the true
onstruction of this proposition, in view of the surrounding cir-
umstances, was that property was to be included in the proposed
ansfer other than that in which both of the contracting parties
ere jointly interested. But if, indeed, such was the meaning of
e proposition, the plaintiff in error had the benefit of Siem's
ncontradicted testimony that such a proposition had been made,
nd it is not reversible error that she was not permitted to inquire
Kimball whether that proposition had not been made.

It is contended that the trial court erred in overruling the objec-
on of the plaintiff in error to the second affirmative defense of the
mended answer. The objection was made on the trial on the
round that the matter so pleaded did not constitute a defense or
rnish ground for the reformation of the deed. No objection was
terposed on the ground that the relief thereby sought could not
roperly be obtained in an answer to an action of ejectment. It
urged that the affirmative matter so pleaded afforded no ground
r reforming the deed, because it states that the agreement which
lminated in the settlement of August 27th was made between the
S. Kimball Company and Conrad Siem, and that in the execution
ereof the attorneys who prepared the deed represented to the par-
es thereto that it was prepared in accordance with the contract,
nd that the J. S. Kimball Company (not J. S. Kimball) and Conrad
em intended at the time of its execution to make exceptions of
rtain properties from the deed—properties which belonged not
the Kimball Company, but to J. S. Kimball—and that the excep-
ons so intended to be made were not in fact made. It is argued
at on these allegations it does not appear that the deed in ques-
on at law conveyed the land in dispute, since it operated only on
e interest of the Kimball Company, which company, according
the answer, had no interest in the claim in controversy herein;
nd that, since the answer further alleges that the only description
the deed of property on which it was to operate was that of the
roperty of the J. S. Kimball Company, the mistake, so far as that
ompany is concerned, is immaterial, and equity will not interfere
correct it; and that as to J. S. Kimball, he was not, according
the terms of the alleged contract, a party to the agreement of

settlement, and the descriptive part of the conveyance, if it followed the contract, would not convey away any of his private property. We think that this contention ignores some of the allegations of that portion of the answer which was objected to. One of the parties who made the answer was John S. Kimball. The prayer of the answer was for the correction of the deed on the ground of mutual mistake. It is true that in the portion of the answer which is objected to it is alleged that the settlement was made between the J. S. Kimball Company and Conrad Siem, and was intended to affect property in which those parties had an interest: but it is alleged further that the attorney for the respective parties to the settlement represented not only to those parties, but to J. S. Kimball, that the deed was drawn in conformity to and in accordance with the agreement, and that J. S. Kimball, as well as the others, relied upon such statements, and that he, as well as the others, without fault or negligence, executed the same; and the answer then proceeds to set forth what he and they all supposed to be contained in the conveyance, specifies the error in the deed, and alleges that from the deed executed by the company and Kimball to Conrad Siem reservations were omitted, by mutual mistake, of property belonging to Kimball individually. Kimball, having executed the deed in his individual capacity, and having executed the same by mistake, was shown by the allegations of this answer, if they were true, to be entitled to the relief which was prayed for.

The plaintiff in error contends that the findings of fact of the trial court are not supported by the evidence. The defendants in error contend that the findings, having been made under a waiver of a jury trial, have the same conclusive effect as a verdict of a jury, and must stand, unless it appear that there was no evidence whatever to sustain them; citing Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457, and McKinley Creek Min. Co. v. Alaska Min. Co., 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331. This leads us to inquire whether the findings which are here for review are findings of a court of equity or of a court of law. Under the system which prevails in the Circuit Courts of the United States, if a defendant, after being brought into a court of law to answer the plaintiff's complaint, discovers that his defense lies in a reformation of his written contract or deed, his remedy is to file a bill in equity praying for such reformation, and for an injunction against the prosecution of the law action until a decision of the suit in equity. The Alaskan Code (31 Stat. 393, c. 38), making certain provisions for actions of an equitable nature, contains the proviso: "This section shall not be construed so as to bar an equitable owner in possession of real property from defending his possession by means of his equitable title." This provision was adopted from the laws of Oregon (B. & C. Comp. § 392), after it had been held in that state that the equitable defense so allowed to be pleaded could be used only for the purpose of defending possession, and not for the purpose of obtaining affirmative relief. Spaur v. McBee, 19 Or. 76, 23 Pac. 818. But the plaintiff in error does not, and did not in the court below, question the power of the trial court to deal with the

quitable defense which was interposed in the present case, nor its ower to proceed and decree the affirmative relief which was ac- orded in ordering the reformation of the deed. Of course, the niting of law and equity in one suit, as thus sanctioned by the ode of Alaska, does not have the effect to confuse the two, but equires that, while both branches of the case are to be tried in ne court, the issues in equity must be tried by the judge as a hancellor, and the issues in law must be tried by the same judge ith a jury, unless a jury trial be waived. The conclusion is that ne findings of fact in the present case having all been made upon ne issues presented by the equitable defense, are not attended with ne presumptions which apply to the findings of the court in a law ase where a jury trial has been waived. We find in the evidence o ground for saying that the trial court disregarded the rule that n each case the burden rests upon the moving party of overcoming ne strong presumption arising from the terms of a written instru- ent, and that, if the proofs are doubtful and unsatisfactory, and nere is a failure to overcome the presumption by testimony entirely lain and convincing beyond reasonable controversy, the writing ill be held to express correctly the intention of the parties. Nearly ll of the testimony was taken in open court, and the judge who eard the case had the opportunity to observe the demeanor of the itnesses, and to judge concerning their credibility. There was estimony to the effect that Conrad Siem had, prior to the com- encement of the suit, expressly admitted the mistake. Findings f fact so made on conflicting evidence cannot be reviewed by this ourt unless a serious and important mistake appears to have been ade in the consideration of the evidence, or an obvious error has ntervened in the application of the law. This rule is so firmly stablished by the decisions of this and other courts as to require o citation of authorities.

It is contended that the plaintiff in error is an innocent purchaser f an interest in the mining property in controversy, and is there- ore entitled to prevail in the action. The plaintiff in error is the ife of H. E. Shields, who was the attorney for Siem in the nego- ations leading up to the settlement and in the settlement effected n September 27, 1901. After obtaining the deed which was made t that date, Siem, on April 20, 1901, for an expressed consideration f $1, conveyed by deed of bargain and sale to the Behring Sea mprovement & Trading Company, a corporation of the state of alifornia, all his right, title, and interest in any claim to property, eal, personal, or mixed, of every kind or description, in the dis- ict of Alaska, which deed was recorded on July 24, 1901. On ugust 31, 1901, that corporation and Siem each executed to the laintiff in error, by a deed of bargain and sale, for an expressed onsideration of $500, all the right, title, and interest of the grantors n the mining claim in controversy. Those deeds were recorded n September 6, 1901. On April 2, 1901, J. S. Kimball and J. H. ullock, as plaintiffs, commenced an action in the District Court f Alaska, Second Division, against A. G. Stewart and E. Richards nd others, alleging in their complaint that the plaintiffs were the

owners of placer bench claim No. 1 on Glacier creek, being the same property that is in controversy in the present action; that on March 17, 1901, the defendants in said action had ousted the plaintiffs therefrom; and the plaintiffs demanded judgment for the restitution of said claim and for damages. In that action Siem, by leave of the court, intervened, and alleged that Morgan, the locator of said claim, on August 29, 1899, conveyed to J. S. Kimball and J. H. Bullock an undivided one-half interest in the same, that the conveyance was made to said grantees in trust for the use and benefit of the J. S. Kimball Company, that the latter, in September, 1900, conveyed to the intervener its undivided one-half interest in said property, in which conveyance J. S. Kimball joined, and that the defendants Stewart and Richards ousted and ejected the intervener from said claim. The intervener demanded judgment for the possession of the premises and for damages. That complaint was signed by Shields and Reid as attorneys, and on June 13, 1901, H. E. Shields made oath thereto. It is clear that Kimball and Bullock claimed to be the owners of the whole of the property in controversy. It was admitted in open court on the trial of the present case in the court below that H. E. Shields was the agent of the plaintiff in error in the matter of procuring the conveyances to her from Siem and from the Behring Sea Improvement & Trading Company, and that he transacted all of said business. It further appeared from the evidence that the plaintiff in error paid no money whatever either to Siem or to the Behring Sea Improvement & Trading Company as consideration for the conveyances, but that the $500 referred to in the deed as consideration represented attorneys' fees owing from Conrad Siem to H. E. Shields for services in connection with the settlement of August 27, 1900, and that it was in payment of said indebtedness that the conveyances were made. The plaintiff in error cannot, therefore, claim to be an innocent purchaser of an interest in the property in controversy. Nor can she claim to have succeeded to the right of an innocent purchaser, unless it can be shown that her grantor, the Behring Sea Improvement & Trading Company, was an innocent purchaser from Siem. It appeared from Siem's testimony that he owned nearly 51 per cent. of the stock of that corporation, and that 49 per cent. is treasury stock not yet issued. In other words, Siem held all the issued stock of the corporation excepting a few shares which evidently had been placed to qualify others to act as directors. In addition to this, it further appeared that he was the president of the corporation. The knowledge that he had of the transaction between him and Kimball must therefore be imputed to that corporation. The corporation therefore was not an innocent purchaser.

It is said that equity cannot relieve the defendants in error from the result of J. S. Kimball's negligence in failing to read the deed before he signed it. It is true that equity in certain cases refuses to relieve men from the consequences of their own carelessness, but there is no hard and fast rule that one who fails to read a deed before signing it may not seek its reformation in equity in a case where there has been a mutual mistake. In the present case there

was evidence tending to show that before signing the deed J. S. Kimball asked Mr. Geary, the attorney for the J. S. Kimball Company, if the deed was all right and according to the memorandum which he had furnished, and was answered in the affirmative. The question whether the failure to read a conveyance before its execution is fatal to the right to obtain its reformation must in each case depend upon the attending circumstances. In view of the evidence in this case and the general principles announced by the authorities, we cannot say that the court erred in holding the negligence excusable. West et al. v. Suda, 69 Conn. 60, 36 Atl. 1015; Barry v. Rownd (Iowa) 93 N. W. 67; Boulden v. Wood (Md.) 53 Atl. 911; Conn v. Hagan (Tex. Sup.) 55 S. W. 323.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

MUTUAL RESERVE LIFE INS. CO. OF NEW YORK v. DOBLER.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1905.)

No. 1,126.

1. INSURANCE—APPLICATION—ANSWERS—OTHER INSURANCE.
   An application for life insurance requested insured to answer whether he then had any insurance on his life, which he answered, giving the name and amount of a life insurance policey, and the name of the company writing the same, and contained a further question, "Have you any other insurance?" which he answered, "None." *Held*, that such questions did not call for an answer as to other than life insurance, so that insured's failure to disclose that he then had certain policies of accident insurance did not constitute a breach of warranty.

2. SAME.
   Where questions asked by an insurance company in an application were of doubtful import, insurer was bound by an answer to which the questions were properly susceptible.

3. SAME—CONSULTING PHYSICIANS.
   Where insured answered certain questions with reference to when he last consulted a physician, the name of the physician, the reason, etc., by stating that he did not remember when he had consulted a physician, that it was years ago, the fact that on several occasions a physician, who was a friend of insured, made physical examinations of him without charge, for the purpose of ascertaining his physical condition, on the physician's own initiative, and without finding any physical infirmity, and without his prescribing for insured, did not show that such answers were untrue.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

On October 20, 1902, Frederick C. Dobler made application in writing to the plaintiff in error, a life insurance company of the state of New York, for a policy of insurance in the sum of $10,000. The application was made at Baker City, Ore., and was there delivered to W. H. Stalker, a representative of the plaintiff in error, who forwarded the same to the home office of the latter in New York. The application was there accepted, and the policy was accordingly issued and forwarded to the said representative of the company at Baker City, by whom it was delivered to the insured upon the payment of the premium. In March, 1903, the insured was accidentally killed

by a snowslide. Due notice and proof of his death were thereafter delivered to the plaintiff in error. The latter denied its liability on the policy, but retained the premium. The defendant in error, who was the beneficiary under the policy, brought this action to recover thereon. The plaintiff in error defended on the ground that there was a breach of warranty, in that the insured had failed to answer the question, "Have you any other insurance on your life?" and, second, that there was a breach of warranty in that he did not truly answer the question, "When did you last consult a physician and for what reason?" On the trial of the cause before a jury it appeared that the application of the insured contained the following questions and answers: "Q.10. Have you now any insurance on your life? If so, where, when taken, for what amounts, and what kinds of policies? A. $5,000.00. Washington Life. Combination bond. May, 1900. Q. Have you any other assurance? A. None." It was claimed by the plaintiff in error that these answers were not full, complete, and true, and it was shown that at the time of making said written application said insured held an accident insurance policy of $5,000 in the Travelers' Insurance Company, and another accident policy of $1,000 in the same company. The defendant in error was permitted, over the objection of the plaintiff in error, to introduce the oral testimony of W. H. Stalker, who testified that the insured told him at the time of preparing the application that he was carrying the said accident policies. The witness said: "He took particular pains to explain to me all his business affairs in connection with insurance. I told him that the $5,000 accident insurance, likewise the $1,000 accident policy, was not called for in answer to question 10 in the application." On this branch of the case the court instructed the jury as follows: "If you find from the evidence that a doubt might reasonably and fairly be entertained as to whether this question called for disclosure of any purely accident insurance that Mr. Dobler then carried, and that Mr. Dobler understood that it did not call for the disclosure of purely accident insurance, but only called for the disclosure of life insurance, and if such was the understanding of the defendant's agent at that time soliciting the insurance and receiving the application, then you may conclude this answer to this question was full, complete, and true." The application also showed the following questions and answers: "Q. When did you last consult a physician and for what reason? A. Do not remember—years ago. Q. How long since you consulted or were attended by a physician? Give date. A. Do not remember; long time ago." To show that these answers were untrue, the plaintiff in error introduced the evidence of Dr. Phy, who was asked whether he had ever attended or been consulted as a physician by the insured for any disease or ailment during his lifetime, to which he answered, "No," and thereafter said: "I may add further that I was an intimate friend of Frederick C. Dobler during the last six years of his life, and in conversation with him during our early friendship I had mentioned to him the advisability of persons in general having frequent physical examinations by their physicians as a matter of precaution. Mr. Dobler seemed impressed with this idea, and during the remainder of his lifetime I made several physical examinations of him. At no time did I find any physical ailment. All of these examinations were a matter of precaution with Mr. Dobler, and not with any idea that he had any physical ailment. I never prescribed any medicine for him. I did on several occasions advise him concerning hygienic measures which every one should follow to preserve their health." He was asked further whether in his personal knowledge the insured was ever afflicted with any disease or ailment, to which he answered, "No." Concerning these questions and answers the court charged the jury as follows: "You are instructed that these questions call for a disclosure of any and all instances, if any, in which Mr. Dobler, the deceased, had consulted or been attended by a physician for some disease or ailment that he had or supposed he had; and unless the evidence in the case is such as to show that he had consulted or been attended by a physician for some ailment which he had or supposed he had, you are instructed that those answers to those questions are full, true, and complete, and you may disregard that evidence." The jury returned a verdict for the defendant in error for the full amount sued for, and judgment was rendered thereon.

Galusha Parsons and Edward L. Parsons, for plaintiff in error.
Warburton & McDaniels, for defendant in error.
Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, deliv-
d the opinion of the court.
The application for the policy of insurance was made in the state
Oregon under the direction of W. H. Stalker, an agent of the
ntiff in error, who, as such agent, received the same and for-
rded it to the home office of the plaintiff in error. The risk was
epted, and the policy was sent to Stalker, and he delivered it to
insured upon his paying the premium. Stalker had been ap-
nted the agent of the plaintiff in error by a written instrument
ting that he was "appointed the representative of said company
the purpose of procuring applications for assurance therein in
territory embraced in this agreement, and for the further pur-
e of appointing suitable subagents on terms to be approved by
company, subject to the terms and conditions herein." The in-
ument stipulated that the representative shall "possess no au-
rity not herein expressly granted, shall not make, alter, or dis-
rge any contract, nor waive forfeiture." It further provided that
agent was to devote his entire time and best energy to the serv-
of the company, and to occupy and work efficiently the territory
igned to him. The application contained the stipulation that
person soliciting or taking the same, and also the medical ex-
iner, should be the agents of the applicant as to all statements
answers in the application, and that no statements or answers
de or received by any person or to the company should be bind-
upon the latter unless reduced to writing and contained in the
lication. It also contained the express warranty of the appli-
t "that I have not nor has any one on my behalf made to the
nt or medical examiner or to any other person any answers to
questions contained in this application other than or different
m the written answers as contained in this application," and that
have not nor has any one on my behalf given to the agent or
dical examiner or to any other person any information or stated
facts in any way contradictory of or inconsistent with the truth
the answers as written," and the further stipulation that the
idity of the policy was to be dependent on the truth or falsity of
written answers.
Did the trial court err in admitting in evidence the testimony of
agent of the plaintiff in error? In the written application it
peared that to the question, "Have you now any insurance on
ur life?" the insured answered, giving the name and amount of
olicy which he carried in the Washington Life. To the further
estion, "Have you any other insurance?" he answered, "None."
e application, it is true, brought notice to the insured that the
nt of the company was to be his agent as to all statements and
wers in the application, and the insured therein warranted that
had not made answers other than those which were written, and
t he had not given to the agent information or statements con-

tradictory of or inconsistent therewith. We come, then, to the question whether the oral answers which he made were inconsistent with or contradictory of the written answers, and what was required to be disclosed in answer to the question whether the insured had other insurance on his life. The proof was that at that time he held two accident insurance policies which he did not mention in the written application. It seems to us reasonably clear that the first of these questions does not call for a disclosure of any insurance except that which is known as life insurance. In the ordinary understanding and usage there is a well-defined distinction between life insurance and accident insurance. In the latter the contract is to pay a fixed sum in case of death resulting from external, violent, and accidental means, and ordinarily for the payment of a fixed sum periodically during incapacity caused by accidental injury. The policy covers a short period of time, ordinarily not longer than a year. Generally no inquiry is made as to the age or health of the applicant, and the liability is often restricted to injury resulting from accidents of a particular nature, or accidents pertaining to a particular occupation, or accidents occurring while the insured is traveling by public conveyance. It is not shown what kind of accident insurance the insured in this case was carrying, but from the name of the company, "The Travelers' Insurance Company," it may be assumed that the insurance was of the last-named class—insurance against accidents in traveling. Life insurance companies, on the other hand, insure the payment of a fixed sum upon the occurrence of the inevitable event of death. They make careful inquiry as to the age, health, and personal history of the applicant. It may be material to them to know whether the risk has been accepted or refused by other insurance companies. The distinction has been recognized by the courts, and it has been held that legislation referring to life insurance and life insurance companies does not include within its scope accident insurance and accident insurance companies. Fidelity & Casualty Co. v. Dorough, 107 Fed. 389, 46 C. C. A. 364; Ticktin v. Fidelity & Casualty Co. of New York (C. C.) 87 Fed. 543. The courts have also held that mutual aid associations and insurance companies are to be distinguished, and that statutory provisions affecting insurance companies do not affect mutual aid associations, although one of their prominent features is the obligation to pay a fixed sum as insurance upon the death of a member. Dickinson v. Ancient Order of United Workmen, 159 Pa. 258, 28 Atl. 293; Theobald v. Supreme Lodge, 59 Mo. App. 87.

But it is not necessary to rest the decision of this branch of the case upon the recognized distinction between life and accident insurance. In any view of the case, we think that the most that can be claimed in behalf of the plaintiff in error for the questions so propounded to the applicant was that they were so worded as to leave it uncertain whether they called for a disclosure of the accident insurance which he carried at that time. If the insurance company in its printed application employed ambiguous terms or words of doubtful import, it cannot complain if they were construed as

Galusha Parsons and Edward L. Parsons, for plaintiff in error.
Warburton & McDaniels, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The application for the policy of insurance was made in the state of Oregon under the direction of W. H. Stalker, an agent of the plaintiff in error, who, as such agent, received the same and forwarded it to the home office of the plaintiff in error. The risk was accepted, and the policy was sent to Stalker, and he delivered it to the insured upon his paying the premium. Stalker had been appointed the agent of the plaintiff in error by a written instrument reciting that he was "appointed the representative of said company for the purpose of procuring applications for assurance therein in the territory embraced in this agreement, and for the further purpose of appointing suitable subagents on terms to be approved by the company, subject to the terms and conditions herein." The instrument stipulated that the representative shall "possess no authority not herein expressly granted, shall not make, alter, or discharge any contract, nor waive forfeiture." It further provided that the agent was to devote his entire time and best energy to the service of the company, and to occupy and work efficiently the territory assigned to him. The application contained the stipulation that the person soliciting or taking the same, and also the medical examiner, should be the agents of the applicant as to all statements and answers in the application, and that no statements or answers made or received by any person or to the company should be binding upon the latter unless reduced to writing and contained in the application. It also contained the express warranty of the applicant "that I have not nor has any one on my behalf made to the agent or medical examiner or to any other person any answers to the questions contained in this application other than or different from the written answers as contained in this application," and that "I have not nor has any one on my behalf given to the agent or medical examiner or to any other person any information or stated any facts in any way contradictory of or inconsistent with the truth of the answers as written," and the further stipulation that the validity of the policy was to be dependent on the truth or falsity of the written answers.

Did the trial court err in admitting in evidence the testimony of the agent of the plaintiff in error? In the written application it appeared that to the question, "Have you now any insurance on your life?" the insured answered, giving the name and amount of a policy which he carried in the Washington Life. To the further question, "Have you any other insurance?" he answered, "None." The application, it is true, brought notice to the insured that the agent of the company was to be his agent as to all statements and answers in the application, and the insured therein warranted that he had not made answers other than those which were written, and that he had not given to the agent information or statements con-

tradictory of or inconsistent therewith. We come, then, to the question whether the oral answers which he made were inconsistent with or contradictory of the written answers, and what was required to be disclosed in answer to the question whether the insured had other insurance on his life. The proof was that at that time he held two accident insurance policies which he did not mention in the written application. It seems to us reasonably clear that the first of these questions does not call for a disclosure of any insurance except that which is known as life insurance. In the ordinary understanding and usage there is a well-defined distinction between life insurance and accident insurance. In the latter the contract is to pay a fixed sum in case of death resulting from external, violent, and accidental means, and ordinarily for the payment of a fixed sum periodically during incapacity caused by accidental injury. The policy covers a short period of time, ordinarily not longer than a year. Generally no inquiry is made as to the age or health of the applicant, and the liability is often restricted to injury resulting from accidents of a particular nature, or accidents pertaining to a particular occupation, or accidents occurring while the insured is traveling by public conveyance. It is not shown what kind of accident insurance the insured in this case was carrying, but from the name of the company, "The Travelers' Insurance Company," it may be assumed that the insurance was of the last-named class—insurance against accidents in traveling. Life insurance companies, on the other hand, insure the payment of a fixed sum upon the occurrence of the inevitable event of death. They make careful inquiry as to the age, health, and personal history of the applicant. It may be material to them to know whether the risk has been accepted or refused by other insurance companies. The distinction has been recognized by the courts, and it has been held that legislation referring to life insurance and life insurance companies does not include within its scope accident insurance and accident insurance companies. Fidelity & Casualty Co. v. Dorough, 107 Fed. 389, 46 C. C. A. 364; Ticktin v. Fidelity & Casualty Co. of New York (C. C.) 87 Fed. 543. The courts have also held that mutual aid associations and insurance companies are to be distinguished, and that statutory provisions affecting insurance companies do not affect mutual aid associations, although one of their prominent features is the obligation to pay a fixed sum as insurance upon the death of a member. Dickinson v. Ancient Order of United Workmen, 159 Pa. 258, 28 Atl. 293; Theobald v. Supreme Lodge, 59 Mo. App. 87.

But it is not necessary to rest the decision of this branch of the case upon the recognized distinction between life and accident insurance. In any view of the case, we think that the most that can be claimed in behalf of the plaintiff in error for the questions so propounded to the applicant was that they were so worded as to leave it uncertain whether they called for a disclosure of the accident insurance which he carried at that time. If the insurance company in its printed application employed ambiguous terms or words of doubtful import, it cannot complain if they were construed as

y were by the applicant, or if the agent so advised him as to their
aning. The agent was appointed for the purpose of procuring
plicati ns, and it is reasonable to assume that, in discharging his
y to the company, it was within the scope of his powers to con-
ie for an applicant for insurance doubtful phrases, if any there
re, in the application. It may be inferred from the policy itself
t it was a matter of indifference to the insurance company wheth-
or not the insured carried a temporary policy of accident insur-
e, for there was nothing in the terms of that instrument to re-
ct his right to take out accident insurance at any time during
life of the policy, and the fact that he had at the time of making
application accident insurance could have been of no value to
plaintiff in error, for such insurance was not based upon a phys-
examination of the insured, nor upon an inquiry concerning
health. But it is said by the plaintiff in error that the insured
s bound to make truthful answers, and that while it may be
ubtful whether the first question, "Have you now any assurance
your life?" called for the disclosure of accident policies, the ques-
n immediately following, "Have you any other assurance?" was
nprehensive enough to require the applicant to make known the
t that he was carrying an accident insurance policy. It is true
t the last question is comprehensive, and, standing by itself,
ght properly include all kinds of insurance, whether life, fire,
rine, or insurance of crops as well as accident insurance. It will
be contended, we assume, that an answer was expected as to
these various kinds of insurance. But, when taken in connection
h the preceding question, it would seem to us that the purpose
the last question was only to inquire whether the applicant had
y answered the previous question, and that its purport was,
ave you now answered as to all life insurance that you carry?"
Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304–311, 10
o. Ct. 87, 89, 33 L. Ed. 341, the court said: "The purport of the
rd 'insured' in the question, 'Has the said party any other insur-
e on his life?' is not so absolutely certain as, in an action upon
policy, to preclude proof as to what kind of life insurance the
tracting parties had in mind when that question was answered.
ch proof does not necessarily contradict the written contract."
Thompson v. Phenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019,
L. Ed. 408, the court said: "If a policy is so drawn as to re-
re interpretation and to be fairly susceptible of two different
nstructions, the one will be adopted that is most favorable to the
ured. This rule, recognized in all the authorities, is a just one,
cause those instruments are drawn by the company"—citing First
tional Bank v. Hartford F. Ins. Co., 95 U. S. 673, 24 L. Ed. 563.
McMaster v. N. Y. Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10,
L. Ed. 64, the court said: "The rule is that if policies of insur-
e contain inconsistent provisions, or are so framed as to be fairly
en to construction, that view should be adopted, if possible, which
l sustain rather than forfeit the contract."
n Penn. Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust
., 72 Fed. 413, 19 C. C. A. 293, 38 L. R. A. 33, the insured was

asked if he had other policies in other companies, and, if so, to state the companies and the amounts. The court held that within the scope of the question the insured was not required to mention certificates of insurance in the Knights of Pythias and the Royal Arcanum Mutual Aid Associations. Judge Taft, speaking for the court, said:

"It will be conceded that those associations which are primarily for social and charitable purposes, and for securing efficient mutual aid among their members, are not usually described as insurance companies. That the certificate which they issue to a member, insuring upon certain conditions the payment of a sum certain to the member's representatives on his death, has much resemblance in form, purpose, and effect to an insurance policy, is true; and, if we were called upon to give the application a wide and liberal construction in favor of the insurance company, we might properly hold that the question embraced in its scope every association or individual contracting to pay money to one's representatives in the event of his death. Such a construction might be warranted by the probable purpose of the question, to enable the company to judge how great a motive his life insurance would furnish the applicant for self-destruction or the fraudulent simulation of death. But we are here considering a contract and application drawn with great nicety by the insurance company, and framed with the sole purpose of eliciting from the insured full information of all the circumstances which the company's long experience has led it to believe to be valuable in calculating the risk. * * * Having in view the well-established rule that insurance contracts are to be construed against those who frame them, * * * and that any doubt or ambiguity in them is to be resolved in favor of the insured, we conclude that a certificate in a mutual benefit and social society was not within the description, 'policy of life insurance in any other company.'"

Of similar import are Fidelity Mut. Life Ass'n v. Miller, 92 Fed. 63, 34 C. C. A. 211, and Equitable Life Assurance Society v. Hazelwood (Tex. Sup.) 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893.

The plaintiff in error cites and relies upon Assurance Co. v. Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. That was a case of fire insurance. The policy expressly and in unambiguous terms provided that the contract of insurance should be void in case other insurance had been or should be made upon the property, and not consented to by the insurer, and stipulated that the agent should have no authority to alter or contradict the express terms of the policy. The insured, at the time of taking out the policy in question, had other insurance on the property. There was evidence tending to show that the agent of the insurance company knew of such other insurance, and with full knowledge of that fact accepted the risk. The court said: "Contracts in writing, if in ambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts." In this expression of the court is found the difference between that case and the case at bar. In the latter, as we have found, ambiguous terms were used, and in such a case it is not a departure from the settled rules of evidence to admit parol testimony to explain the understanding which the parties had of the words in question.

We find no error in the instructions of the trial court to the jury concerning the further defense of breach of warranty by the insured

n his answer to the question whether he had consulted or been attended by a physician. The questions were repeated in various forms, as follows:

"(1) When did you last consult a physician and for what reason? (2) Give name and address of last physician consulted. (3) How long since you consulted or were attended by a physician? Give date. (4) State name and address of such physician. (5) For what disease or ailment? (6) Give name and address of each and every physician who has prescribed for or attended you within the last five years, and for what diseases or ailments, and date. (7) Have you had any illness, disease, or medical attendance not stated above?"

To the first and third of these questions the insured answered: "Do not remember; years ago." "Do not remember; long time ago." To the others he made no answer. It is plain that by these questions the plaintiff in error sought to ascertain whether the applicant had consulted a physician for any disease or ailment or had been attended or prescribed for by a physician for a disease or ailment. In Moulor v. Ins. Co., 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447, it was said that the application for insurance must be understood to relate to matters which have a sensible, appreciable form. In Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708, it was said that the questions in an application do not require the applicant to tell every incident or accidental or slight disease or ailment which left no trace of injury to health, and were unattended by substantial injury or inconvenience or prolonged suffering; and in Hubbard v. Mutual Reserve Fund Life Ass'n, 100 Fed. 719, 40 C. C. A. 665, it was held that the word "consulted," found in such questions, did not relate to the opinion of a physician concerning a slight and temporary indisposition, speedily forgotten. Of similar import are the decisions of the Supreme Court of Michigan in Plumb v. Penn. Mut. Life Ins. Co., 65 N. W. 611, and the Supreme Court of Vermont in Billings v. Metropolitan Life Ins. Co. (Vt.) 41 Atl. 516, and other decisions too numerous to require further specification. In the present case the evidence wholly fails to show that the insured ever consulted or was attended by a physician for any ailment of even the most trivial character. The only evidence is that a physician who was his friend made at intervals physical examinations of him to ascertain the condition of his health, and that this was done, not at the instance of the insured, but upon the physician's own initiative, without charge, and for the sole purpose of rendering a friendly service. It would be a misuse of words as they are ordinarily understood, and especially as they were employed in the application for insurance, to say that in so submitting himself to those examinations the insured consulted a physician or was attended by him.

The judgment of the Circuit Court is affirmed.

WATERS-PIERCE OIL CO. v. VAN ELDEREN et al.

CHAMBERS et al. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. April 29, 1905.)

Nos. 2,042, 2,043.

1. PROCEDURE ON WRITS OF ERROR.

Although two actions for personal injuries by separate plaintiffs against the same defendants, growing out of the same accident, were by consent consolidated for trial, and were so tried to the same jury, who returned separate verdicts, on which separate judgments were entered, and one bill of exceptions, by consent, was made out, yet two separate writs of error directed to the separate judgments were necessary. But where, as in this instance, two separate writs were sued out by the respective defendants, but directed to both judgments, and counsel for defendants in error thereafter stipulated with counsel for plaintiffs in error that the writs of error may be considered and treated as a single writ of error, etc., and then waited until after the lapse of the six months in which new writs of error might have been sued out, *held*, that the objection to the manner of suing out the writs should be overruled.

2. NEGLIGENCE—JOINT DEFENDANTS—EVIDENCE.

Where several defendants are sued jointly for negligence causing personal injury to the plaintiff, to warrant a joint judgment against the defendants the evidence must satisfactorily show that the acts of negligence co-operated concurrently or in continuous successive order, producing the common result.

3. SAME.

Where a gasoline plant was constructed by one defendant for one of the codefendants for lighting the latter's house, and when completed the servant of the latter was instructed by the builder of the plant how he should keep watch at the tank while the gasoline was being delivered by the third defendant, and such third party, on an order from such owner, brought a barrel of gasoline to be delivered into the tank through a receiving box on the outside of the building, where the party delivering it could not see the tank, such third party having no reason to apprehend that any of the appliances about the tank were not in perfect order, *held*, that in so delivering the gasoline into the receiving box such third party was not liable for an injury resulting from any overflow at the tank, unknown to him, while so delivering the fluid.

4. SAME—SUFFICIENCY OF EVIDENCE.

Where the evidence relied upon to support the verdict against such third party for personal injury to a person in said building, consequent upon the explosion of the gasoline which escaped, either at the tank or the receiving box, where the physical facts contradict mere deductions drawn from isolated facts testified to by witnesses, it is the duty of the court to see that a verdict against such third party shall not rest alone on the latter.

The existence of a fact is not proven by evidence of a subsequent condition which is merely consistent with its existence. Where the existence of the required fact rests upon surmises or speculative theory, rather than upon facts affirmatively established, it is the duty of the court to direct a verdict for the defendant.

5. SAME—PROVINCE OF JURY—WEIGHT OF EVIDENCE.

While the credibility of witnesses on disputable facts should be submitted to the jury for their determination, yet, where the evidence in respect of a given situation or fact is overwhelmingly persuasive, it is not to be maintained that any evidence to the contrary, however inconsequential and improbable, should carry the case to the jury.

the end of the 6-inch vertical pipe was attached. This receiving box was about 6 inches long, 5 inches wide, and 6 inches deep, with a hinged lid, and lock for locking the same when the box was not being used. It also had, extending up from the bottom 2 or 3 inches, an open nipple or pipe, with threads on it for receiving a cap. This open nipple was a continuation of the opening in the end of the pipe attached to the bottom of the box. There was also an open nipple extending through its bottom as a ventilating pipe, but not connecting with the apparatus for filling or operating the tank. This box was sunk in the sidewalk a few inches from the retaining wall, with bricks laid around it, and covered with cement, so as to leave about 1 inch of the box projecting above the bricks and the surface of the sidewalk. From the foregoing measurements, there was a continuous line of 1½-inch pipe from the receiving box in the sidewalk to the storage tank, about 19½ feet total length, about 12 feet of which was horizontal, and 7½ feet vertical, extending across the upper part of the coal shed. There was another small pipe, about one-half inch in diameter, connected with the top of the tank, extending horizontally over the outside wall of the engine house, and thence up vertically about 3 feet. The upper end of this pipe was left open, but immediately above it was a little metal hood, which was attached to the wall of the engine house, so as to extend or hang over the open end of the pipe. The principal purpose of this pipe was to permit the escape of vapor gas, which would rapidly form in the tank while the same was being filled, with the idea that otherwise the gas thus generated would prevent the free inflow of gasoline. The upper end of the upright T pipe extended about 3 inches above the mound.

On the 20th day of December, 1902, the gas company had completed the construction of this plant, with the exception of connecting the piping from just above the tank with the receiving box on the sidewalk. On the afternoon of that day, Humphreys, the representative of the gas company who constructed the plant, sent in a telephone order to the plaintiff in error, the Waters-Pierce Oil Company (hereinafter designated as the "Oil Company"), which had a supply house in Hot Springs, to send to the Turf Exchange a barrel of gasoline; such barrel containing about 53 gallons. The barrel was accordingly sent, in charge of one Murray, the deliveryman of the oil company. This barrel was carried down to the sidewalk at the Turf Exchange, and the transfer of the gasoline into the tank was effected by siphoning it by means of a rubber hose into the T pipe. That evening the lighting plant was put into operation, and the building was thereafter so lighted until the time of the explosion hereinafter mentioned. Between the 20th and 24th of December, 1902, the connection of the tank, by piping, was made with the receiving box, when Humphreys claimed that the contract of the gas company with the Turf Exchange was completed.

On the afternoon of the 24th of December, 1902, a telephone order was sent in to the oil company for a barrel of gasoline, to be delivered forthwith at the Turf Exchange. Accordingly, about 4 o'clock p. m., said Murray arrived with the barrel on the delivery

wagon at the pavement near the receiving box, the place where he was advised at the former delivery the next delivery would be made; and, as directed, he entered the poolroom of the Turf Exchange, and, seeing the porter, named Harris, whom he understood was the person to be seen respecting the delivery of gasoline, informed him that he had the barrel outside for delivery. Harris answered, "All right," and said he would get the key and unlock the lid on the receiving box, and accompanied Murray to the wagon. Murray went to a near-by house to get a wrench with which to remove the tap on the barrel, and when he returned the man Harris had the receiving box unlocked and ready. Murray asked Harris if he had a funnel. Being answered in the negative, he made one out of stiff manila paper, and inserted it in the orifice of the pipe in the box, and inserted a rubber hose one inch in diameter in the barrel, at the other end of which was a goose neck three-fourths of an inch in diameter, with which he siphoned the oil out of the barrel into the pipe at the receiving box. After this connection was made, Harris went down to the tank to take his position as he had been directed to do by Humphreys, in the presence of Murray, on the occasion of the delivery of the barrel of gasoline on the 20th of December. Murray held in his hand the hose, so as to maintain the goose neck in its proper position in the funnel. From his position he could not see the tank, and necessarily depended upon Harris for taking observations at the tank. Harris claims that he went to his post of duty on the tank, so as to observe the indicator stick, as he had been directed, but claims that he did not observe any rise or fall of this stick. A patron of the poolroom came down the steps into the areaway to go to the urinal, when he discovered, by the odor, the presence of gasoline, and that it was running in a stream about six inches or more wide, and perhaps an inch deep, on the granitoid pavement from the engine house, in the direction of said sink, and called the attention of Harris, who testified he was sitting on the tank, to this fact. Thereupon Harris hallooed up to Murray to hold on. Murray, not knowing what the matter was, disengaged the goose neck from the funnel, and laid it upon the barrel or wagon, and, after waiting a minute or so, not hearing more, went down and inquired of Harris what the trouble was. When informed by Harris that the gasoline was running on the floor, Murray made examination by putting his hand into the gasoline and smelling it; and, being satisfied that it was gasoline, he undertook to close the doors and put down the windows to prevent accident, but some one probably had a lighted match or cigar, which communicated with the evaporation, and the explosion immediately occurred. The force of this explosion was immediately above the engine room, making a wreck of the poolroom, killing some persons therein, and injuring others. Among the injured were the defendants in error, Van Elderen and Gaskins.

There are other important facts bearing upon the questions involved in this review, which will more fully appear from the following discussion.

Van Elderen and Gaskins brought separate actions for damages, jointly, against said oil company, the gas company, and Chambers & Walker. The charging part of the petitions is as follows:

"The defendants, acting together and in concert, through their agents, servants, and employés, then and there wrongfully, unlawfully, carelessly, and negligently proceeded to transfer said gasoline from the vessel in which it was carried to said lot, and to store the same in said tank or vessel situated on said lot, and in so transferring said gasoline the said defendants wrongfully, unlawfully, negligently, and carelessly allowed a large quantity of gasoline to leak, escape, and run on and under the floor of the building, and unlawfully, negligently, and carelessly allowed and caused said gasoline to explode and wreck said building, and inflict great and serious injuries to the persons then in the building;" describing the injuries received, respectively, by the defendants in error.

As the two cases grew out of the one accident, and depended upon the same state of facts, by consent of parties they were consolidated for the purpose of trial, and were tried to the same jury. The jury returned a verdict in favor of Van Elderen against the oil company and Walker & Chambers, assessing his damages at $12,500, and in favor of Gaskins against the same parties, assessing his damages at $3,000, and returned a verdict in favor of the defendant the Arkansas Gas Company.

To reverse the verdicts against the oil company and Chambers & Walker, they brought the case here on writs of error. While there were separate writs of error sued out by the respective defendants below, they were directed to both judgments. The cases are submitted here on briefs of the respective parties, as well as on oral argument. In the brief filed by counsel for the defendants in error, for the first time, the question is raised that there should have been separate writs sued out by each of the plaintiffs in error against each of the defendants in error, and therefore the writs should be dismissed.

It may be conceded that although the two cases, for convenience and economy, were consolidated for trial, and are covered by one bill of exceptions, yet, where there are separate verdicts and judgments, they are so independent of each other as to require separate writs of error. Louisville & Nashville R. Co. v. Summers, 125 Fed. 719, 60 C. C. A. 487. But there are two considerations apparent in these cases which should disentitle the defendants in error to the benefit of this technical objection. The writs of error were sued out on December 30, 1903, and the transcript of the record and proceedings was filed in the clerk's office of this court February 29, 1904. On the 18th day of March, 1904, the parties, by their respective attorneys, filed herein the following stipulation:

"Waters-Pierce Oil Company, Plaintiff in Error, vs. Johannes Van Elderen et al., Defendants in error. (No. 2,042.)

"R. C. Chambers et al., Plaintiffs in Error, vs. Johannes Van Elderen et al., Defendants in Error. (No. 2,043.)

"It is hereby stipulated and agreed by and between the parties to the above-entitled causes that the writs of error therein may be considered and treated as a single writ of error; that the record in the two causes may be printed, considered, and treated as one and the same record; and that the two causes may be argued as one cause."

Not until the filing of the brief on behalf of the defendants in error, October 25, 1904, after the statute of limitation had run against the right of review by plaintiffs in error, was any objection raised as to the effect of the writs sued out. The stipulation entered into by counsel of the defendants in error on March 18, 1904, "that the writs of error therein may be considered and treated as a single writ of error; that the record in the two causes may be printed, considered, and treated as one and the same record; and that the two causes may be argued as one cause"—was calculated to induce plaintiffs in error to believe that no technical objection would be raised respecting the writs of error. If counsel did not understand that the stipulation waived the present objection, they should have moved promptly, under the circumstances, for a dismissal, instead of waiting until after the expiration of the six months; and for this reason we hold that justice demands that the objection should be overruled.

The oil company seeks a reversal of the judgment against it on the ground that the trial court should have directed a verdict for it on the evidence. This has necessitated a thorough examination of all the evidence. The whole controversy, in its last analysis, ranged around the question as to whether the gasoline escaped after it reached the tank, or whether it occurred at the receiving box. If it was because of the faulty construction of the pipes or the tank, the gas company was liable. If there was no such defective construction, then it is insisted by defendants in error that the injury was attributable to the negligent acts of the two servants, Murray and Harris. To warrant a recovery against both the oil company and Chambers & Walker, the evidence must show satisfactorily that their acts of negligence, if any, co-operated concurrently or in continuous successive order, producing a common result. With the construction and operation of the gasoline tank the oil company had nothing to do. Its first connection with it was on December 20, 1902, when Murray delivered the barrel of oil on request of Humphreys. From instructions then given by Humphreys to Harris, the latter was given to understand two things: First, that the next delivery of oil would be at the outside box; and, second, that Harris was to watch the tank on the inside as the agent of the proprietor of the building to receive it. That the order sent in on December 24th by telephone for the delivery of the second barrel of gasoline came from the Turf Exchange, there is little ground for controversy. Humphreys testified that he did not send in this last order, and that he left Hot Springs for Little Rock at least two hours prior to the time the order was telephoned to the oil company. That Harris, who was the acting porter at the Turf Exchange, understood that he was to receive the oil, is evidenced by the fact that, as soon as Murray said to him, "I have a barrel of gasoline for you," he said, "All right." By their verdict against Chambers & Walker, the jury found that Harris was acting for them. And as defendants in error insisted below that Harris was the servant and agent of Chambers & Walker, they are estopped from disputing this fact.

When Murray delivered the oil at the box at the outside of the building, the designated place of delivery, the vendor had complied fully with its undertaking, unless the evidence shows that his act of delivery was performed in such negligent manner as to occasion the escape of the gasoline on to the floor of the area way. In this connection we will answer the suggestion that Murray was guilty of negligence in not using a rotary pump in transferring the gasoline from the barrel to the receiving box, instead of siphoning it with the rubber hose. This contention is predicated of what occurred between the man Humphreys and Murray on the occasion of the delivery of oil on the 20th of December. It is quite manifest to our minds that the whole incident of siphoning into the tank on that occasion presented the following situation: From the location of the barrel when the gasoline ran directly through the hose into the T pipe, the short pipe not being plugged, the flow of gasoline into the tank caused it to flow out of the short pipe. Humphreys made no protest against siphoning until he discovered the overflow. Then he scolded Murray, and, according to his version, told him never to use the hose in that way, but to use a rotary pump. Humphreys then looked for a plug to close up the open end of the pipe. Murray was then and there informed by Humphreys that the connection of the pipe line with the receiving box would be completed before the next delivery, and Harris, the servant of Chambers & Walker, received particular instructions as to keeping watch at the tank to observe the movement of the indicator stick, which would indicate the flowing of the fluid into the tank. Murray had the right to assume that the appliances at the tank were properly arranged, and that therefore the objection to the siphoning process would not obtain, as, in the nature of things, there could be no escape of the gasoline after it entered the flow pipe at the box if the tank and its appliances were in order and properly watched—a duty that did not devolve upon Murray, as it was well known to all the parties that from his position at the receiving box he could not observe the effect of the delivery at the tank. Unless, therefore, the plaintiffs' evidence tended to show that there was more danger in employing the siphon method at the time and place, within the knowledge of the oil company or its agent, and such method occasioned the injury, no recovery is predicable of the use of the siphon.

The cross-examination of this man Humphreys shows that he was not an expert in the matter of using the siphon under the conditions which existed at the time of the delivery of the last barrel, and that his statement at this trial was mere matter of speculation. The following excerpts from his examination speak for themselves:

"Q. Did you tell him [Murray] never to use a siphon? A. I told him to use a rotary pump. Q. What did you do that for? A. Because I thought it was the proper way to put the gasoline into the tank, because with the rotary pump you can control the flow of the gasoline—put it in fast or slow. Q. Had you ever used a siphon before that time? A. Yes, sir. Q. When was that? A. I don't remember exactly. Probably in my other testimony you attempted to pull it out of me. Q. I am asking you now when and how you used it? A. I don't know the exact date. Q. Had you used it several times?

A. Several times. Maybe once or twice. I used it before, and that is all I am going to say. Q. Didn't you say that you hadn't used it but once, and that was in making a test? A. I have used it before. That's all I am going to say. Q. Can't you regulate the flow of gasoline more readily and stop the flow more quickly with the siphon than the rotary pump? A. Yes; I can stop it quickly by letting it squirt all over my face; but with the pump I can readily control it, and not have it all over my face. Q. If you use the rotary pump and hose, can you absolutely stop the flow of gasoline instantaneously? A. It will not be necessary for the hose to be full. Q. After you have stopped it, won't there still be all the gasoline the hose did hold, to go through it? A. I had my hand over it, using a siphon, and got it all over my face. Q. The reason that you didn't want the siphon used is that the flow would be too great and discharge the oil too readily? A. My objection was that it should be squirting around after it was discharged. With a pump you can stop it before it goes into the hose. Q. I am asking you for your reason for not using a siphon? A. One thing, as I said before, if you raise up the end with it, just as soon as you leave the hole it will squirt right out in the air."

In this connection the court interposed with the statement that it was useless to ask these questions, as "this is not expert testimony, and the jury will judge it by experience and common sense. They know, if you turn the hose up, it won't run out, whatever an expert may say. Expert testimony is only an opinion."

On the other hand, the testimony of the real experts in the case —the men who handled and transferred gasoline from one reservoir to another—was that a rotary pump is used in transferring fluids from a lower to a higher vessel, and a siphon is used in transferring from a higher to a lower vessel. As the witness Humphreys had never in fact experimented with the use of the siphon, and the only fact to which he, in effect, testified was that in disengaging the siphon hose the handler was liable to have the gasoline spurt in his face, no verdict should be permitted to stand, predicated of such imputed act of negligence.

Superadded to all this is the fact that, in the various experiments made with the siphon hose and the rotary pump afterwards from a gasoline barrel through a similar pipe, there was no difference in the effect produced. In fact, this witness Humphreys testified that in the experiments afterwards made by him with the hose and goose neck, without a rotary pump, with a tank properly equipped, there was no escape whatever of gasoline from the tank. It should not, therefore, lie in the mouth of counsel for defendants in error to claim that there was any actionable negligence on account of siphoning the oil out of the barrel into the receiving box.

Again, the uncontradicted testimony of Murray is that at the only other tank at Hot Springs where he delivered gasoline, in delivering it from a wagon into a receiving box, he used the siphon method without any difficulty. The only difference in the two situations was that the latter receiving box was more directly over the tank. But it is not apparent, upon any known law of hydrostatics, how the conveyance of the fluid first through a pipe descending about 12 or 15 inches to the pipe which ran horizontally 7 feet across the coalhouse, and then through an elbow before it had a direct fall into the tank, could occasion any more reflux movement of the fluid

ter reaching the tank, so as to overflow, than a direct, uninterupted flow of the fluid from the box to the tank.

As the defendants in error insisted below, and the jury found, hat Chambers & Walker were liable, it was upon the theory that Harris was guilty of negligence. He could not have been guilty f any actionable negligence without the predicate that the oil esaped after it descended through the pipes to where its running ould pass under the responsible watch of Harris. This proposion unavoidably includes the fact that the oil did not escape at he box, but after it left it and passed beyond the view and conol of Murray, unless the further proposition can be maintained hat the oil escaped simultaneously at both points. This latter osition involves the double attitude that the oil escaped at the eceiving box and also at the tank, and that the two streams, startg from different points, uniting somewhere and somehow, conituted the stream running out from under the engine house, as o other stream was seen or traced elsewhere, and the explosion, eyond reasonable controversy, occurred from the stream that ran ut under the door from the engine house through the area. This ontention, to our minds, involves presumptions against all the phyical facts, and rests upon mere theoretical conjecture.

The only scintilla of evidence touching the overflow of any gasine at the receiving box was that of the witness Cohen. After everal trials had occurred in the courts, growing out of this exlosion, this witness, although he claims to have communicated the ct to Judge Teague, counsel for defendants in error Chambers & Walker, soon after the occurrence, is introduced at this trial, and tated, in substance, that in the afternoon of the next day after the xplosion he was passing by this receiving box in company with gentleman, a resident druggist of Hot Springs, when they disovered in the box the presence of a fluid, which he thought was erhaps an inch deep, and that his companion said it was gasoline. Ie did not examine it, and was unable to say that it was gasoline, ut thought it was. To say nothing of the physical improbability hat so volatile a substance as gasoline of that depth, which the evience shows will evaporate in a very few minutes, would be found n this box 22 hours afterwards, if it were conceded that it in fact as gasoline, it is explained by the uncontradicted testimony of the itness Murray that in disengaging the nozzle of the hose from the nnel he spilled some gasoline in the box. In addition to this, the itness Russell, who examined the box on the evening after the xplosion, testified that the box was then open, and there was no asoline in it. Furthermore, the testimony of Murray that no oil scaped at the box while being delivered into the funnel is corborated by what may be aptly termed the res gestæ. It was broad aylight, and he was standing over the box, holding the goose neck n the funnel, and could not help seeing any overflowing oil. It s contrary to the very nature of things that if oil was escaping at he box it would not at once have attracted his attention, and he ould have stopped the flow. This would have been instinctive. gain, when Murray heard the outcry from Harris to hold on, he

pulled up the hose, and within a minute or two went to Harris with the inquiry, "What is the matter?" which shows that there was nothing where he stood to indicate why he should be asked by Harris to stop. And even when he went down and discovered the stream of oil, he put his hand into it to verify the fact that it was oil.

For the purpose of showing that Murray deserted his post while delivering the oil into the receiving box, and that possibly the oil might have escaped then, defendants in error introduced one Archer, who was in the employ of this Turf Exchange as watchman, claiming to be a constable, and who has a suit pending against these same defendants, growing out of this accident, who testified that just a short time—perhaps five or six minutes—before the explosion he saw Murray in the poolroom. Leaving the credibility of this witness to the jury, it is difficult not to say that as to the question of time, under such circumstances, an honest witness is liable to be mistaken. Murray was in the poolroom, as both he and Harris testified, as he went in there to notify Harris of the arrival of the gasoline. But that he returned to the poolroom after Harris left him is challenged by the physical facts of Murray's situation. Harris left him holding the hose with the nozzle in the paper funnel when he went down to the tank, and it was necessarily but a few minutes thereafter when Harris called out to Murray to hold on. Murray was then at his post. Necessarily he had to hold the hose with the nozzle in the paper funnel. The nozzle would have dropped from the funnel the moment he let it go. The testimony of Cohen so challenges the common sense and experience as to disentitle it to any consideration whatever.

We are now brought in this discussion to a consideration of the physical facts, which, in our judgment, absolutely forbid giving credence to the theory that the gasoline which ran from under the engine house escaped at the receiving box. There were but two ways possible for the oil to have thus passed from the receiving box—either by overflowing at the box and passing over or through the wall, and traversing the coalhouse, and passing by the south end of the tank into the engine house, or by overflowing at the mouth of the pipe in which the funnel was inserted, and running into the vent pipe, and thence, from the bottom thereof, through the wall, and reaching the engine house, as above indicated. Against the first theory there are insurmountable physical obstacles. The evidence, by an overwhelming weight, shows that the surface around the top of the receiving box was cemented, and so constructed as that the flow of the fluid would have been from the building toward the street. It is true that some witness for the defendants in error testified that, in times of rainfall, water sometimes would run from the sidewalk over this wall into the coalhouse. But there was no evidence that this had occurred after the construction of the cement mound around the receiving box, or that the oil could have run from the box over this wall. Against the other theory, that the oil descended through the vent pipe, is the uncontradicted fact that the orifice where the funnel was insert-

d was lower than the mouth of the vent pipe, and, further, that the ent pipe rested on hard ground, which resisted the penetration of stick inserted therein to test this very fact.

As a dernier ressort, it is contended that the gasoline might have assed through the 15-inch retaining wall, through the aperture ade therein for the passage of the 1½-inch pipe which connected ith the receiving box, and that, having passed either over the wall r through it, it was conveyed by a door used as a shelf in that nd of the coalhouse to the partition wall between the coalhouse nd the tank, and down this wall and underneath thereof, and thence round the south end of the tank into the engine house. This is mere theory conjured up in the fertile mind of counsel, without ny substantial basis of fact for it to rest on. No experiment was ade to demonstrate the fact that a fluid which overflowed at the eceiving box would run thence over the retaining wall and down nto this door. No experiment was made to show that any fluid oured into the vent pipe would pass through the hard soil at the ottom thereof through this aperture in the wall, and would thence un on the door. It is true that there was evidence tending to ow that the door which was used as a shelf in the coalhouse rest- d at one end on a shoulder in the wall. To give any color of sup- ort to the theory that this rapidly evaporating substance of gas- line could have run the length of the door, and by that means have eached and passed around the south end of the tank, the evidence hould have shown that the door lay at such an angle as that the asoline would run in the required direction, and how it could pass ff at the end of the door and reach the required destiny. There s not one word of evidence to establish this essential fact. On the ontrary, the evidence is that the other end of the door rested upon ome barrels. Whether or not that end of the door joined up gainst the partition wall of the coalhouse is not shown. If the asoline had run the whole length of the coalhouse—seven feet and ore—along the door, necessarily it would have passed therefrom own into the coalhouse. The coalhouse had coal in it, with a uantity of débris, consisting of boxes and straw; and beneath the ooden floor of this coalhouse was dirt, the floor of which was ower than the cement floor where the tank and engine house were. ecessarily the gasoline would have passed that way and been ab- orbed. In addition to this, experiments afterwards made, in which arrels of water were discharged from the outside into this coal- ouse, showed that not a particle of the fluid escaped from the coal- ouse, but was retained or absorbed therein. Experiments made howed that, in running down a plank eight or ten feet long the asoline almost entirely disappeared by evaporation. No explosion ccurred in the coalhouse, which necessarily would have been the ase, had there been a continuous stream from the receiving box o the engine house.

If the imagination could be indulged to the extent of carrying the asoline through the wall and onto the door, and down the door over s end to the floor beneath, then to reach the engine house, counsel or defendants in error was driven to the further contention that

it passed between the cement mound around the tank and the wall. The witness McMullen, who did the brick and cement work around the tank, testified that the cement mound extended close up against the south wall. His evidence excites belief, because he entered into particularities indicative of an actual occurrence. He says that the end of the tank lacked three inches of coming to the wall, and told how he fixed this by filling up the space between that and the wall with brick and cement. It is true that the witness Archer, who testified about seeing Murray in the poolroom just before the explosion, testified that, on some occasion when interrogated by him, McMullen said, in effect, that this space was not cemented up to the wall. As he was sent to McMullen for the purpose of trying to entrap him, no honest mind should be influenced by his testimony. Dr. Shaw, coroner, who examined this space between the tank and the wall carefully just after the accident, testified that the space was cemented up against the wall. A number of other disinterested witnesses testified to the physical fact that after the tank was removed there was cement clinging to the wall, evidencing the fact that the space had been so filled. The photograph in evidence, taken of this tank and its surroundings shortly after the explosion, before any question had arisen as to whether or not the space between the tank and the wall was so filled, shows the mound to be continuous to the wall. There is nothing in the evidence to justify the contention in argument that this result was attributable to the position in which the instrument taking the photograph was placed. Should the fragmentary statements of one or two witnesses introduced by defendants in error, to the effect that they thought there was a space not closed up between the tank and the wall, prevail over these well-established facts? The now better recognized rule is that, where the evidence in support of a given situation or fact is overwhelmingly persuasive, it is not to be maintained that any evidence to the contrary, however inconsequential and improbable, should carry the case to the jury for their determination.

The tank reservoir held 67 gallons, and the barrel contained 53 gallons of gasoline. After the delivery from the barrel on the afternoon of December 24th, there were left in the barrel, according to the testimony, about 17 gallons. So that about 36 gallons had been delivered at the receiving box. There were 40 gallons in the tank after the explosion; and if, as the testimony tends to show, there were about 12 or 16 gallons in the tank when the filling began, from 24 to 28 gallons undoubtedly ran into the tank from the receiving box. If that number of gallons ran into the tank, why did not the other gallons run in? What would stop the flow from the receiving box into the tank, except the filling of the tank, or the escape therefrom after it had descended through the pipe? All the evidence worthy of credence, from all the experiments made, shows that when the gasoline runs through the pipe into the tank, the fact would be indicated by the rising and falling of the indicator stick; and yet the man Harris, to avoid his responsibility, testified that the stick did not move during the process of filling. This demon-

rates to an absolute certainty one of two things—either that Harris was not watching, or that the tank or its escape pipes were not as they should have been. The physical facts utterly discredit Harris as a witness, and the jury disbelieved him; otherwise it could not have found a verdict against Chambers & Walker.

Furthermore, after the accident in question the oil company made different experiments under like conditions, which demonstrated the fact that gasoline conveyed from a barrel at the same distance and the same elevation, and with the same appliances, into the receiving box, descended into the pipes without any overflow at the box. The experiments were not only conducted by the use of the hose siphon, but with the rotary pump, with the same result. To one of these demonstrations everybody at the courthouse, by proclamation, including the counsel for defendants in error, were invited to be present. Said counsel and friends did attend the experiment. There was no interested performance not visible to the eye of the adversary parties. These experiments demonstrated that out of about 25 gallons of oil thus delivered through the pipe into the tank, about 9 gallons overflowed through the T pipe; thus showing how the oil overflowed, and in a quantity that well accounted for the stream of gasoline which was discovered running from under the engine house. Counsel for defendants in error, who was present at this demonstration, entertained the idea that the oil was being delivered too rapidly, and requested that they slow up with the delivery. This was done, with no different result. After the man Humphreys, representing the gas company, was advised of the effect of this test, he made experiments on his behalf, by which he claimed that it was demonstrated that the oil would not thus escape through the T pipe. No unprejudiced, honest mind can read the testimony respecting the experiments conducted by Humphreys without the conviction that it was unfair and dishonest. The president of his company and a stockholder were the principal witnesses, with a few selected outsiders. He gave no notice thereof to the adverse party, and afforded it no opportunity to observe or criticise the manner of its conduct. He took care to see that the barrel of gasoline was not placed at the same elevation as was the barrel at the time of the accident. He took especial pains to manipulate the hose himself, letting it run a few minutes at a time. One spectator would look at it for a few minutes and leave, and another would be brought in to observe under his manipulation. His own experiment, however, demonstrated the fact that during the process of the inflow of the gasoline from the pipe the indicator stick moved up and down. While it may be said that all this was matter for the consideration of the jury, it does but accentuate the fact and deepen the impression that this whole case, as against the oil company, was made to order. The evidence as against it throughout rests upon conjecture and speculative theories, unsustained by reliant affirmative testimony, and by building upon one presumption another presumption. The doctrine of locus ipsa loquitur, invoked by counsel for defendants in error, can have little force, for the reason that the decided weight of the evidence shows there was another place

for the escape of oil, which speaks louder than that at the receiving box.

As said by Mr. Justice Brewer in Patton v. Texas & Pacific Railway Company, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361:

"It is not sufficient for the employé to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In Sorenson v. Menasha P. & P. Co., 56 Wis. 338, 14 N. W. 446, which is apposite, it was said:

"When the liability depends upon the carelessness and fault of a person or his agents, the right of recovery depends upon the same being clearly shown by competent evidence; and it is incumbent upon such plaintiff to furnish such evidence to show how and why the accident occurred—some fact or facts by which it could be determined by the jury, and not left entirely to conjecture, guess, or random judgment upon mere supposition, without a single known fact."

So, in Trapnell v. City, etc., 76 Iowa, 746, 39 N. W. 885, the court, speaking to a like condition, predicated of circumstantial evidence, said:

"While an injury by external force might have caused it to develop, it may also have developed without such cause. Before the plaintiff can recover on account of the expenses and suffering caused, * * * she must establish that the relation of cause and effect existed between the fall and them. But when we look into the evidence we find that it merely establishes a condition which might have been caused by an injury to the breast at that time, but whether such injury did occur is, under it, but a matter of surmise. The existence of a fact is not proven by evidence of a subsequent condition which is merely consistent with its existence."

Our conclusion is that the court below should have given the instruction requested, directing a verdict in favor of the oil company.

In respect of the verdicts and judgments against Chambers & Walker, no question is made as to the sufficiency of the evidence to go to the jury. The only serious error assigned and discussed as ground for reversal is as to the portions of the charge of the court to the jury touching the responsible agency of the colored man, Harris. This objectionable feature of the charge is as follows:

"Do you find that reasonable diligence was exercised by the person in selecting him—in putting him in charge—as shown by the evidence; and, if so, did Arthur Harris exercise such reasonable diligence commensurate with the danger of this plant? * * * If you answer either of these questions in the negative, then the party in whose employ he was at that time and in this particular matter is liable, if his negligence caused or contributed to the explosion."

It must be conceded that it was improper to inject into this case ny question respecting any negligence on the part of Chambers & Walker in employing Arthur Harris to perform, or as to his ompetency for, the duty assigned him, for the palpable reason that o such issue is tendered by the pleadings. But how can the plainiffs in error Chambers & Walker avail themselves of this error? t is not apparent how it could possibly have affected or prejudiced heir defense. Although the jury might have found that reasonble diligence was not exercised in selecting Harris and putting him n charge, yet, as the liability of Chambers & Walker was ultimately nade to depend upon the question of fact as to whether or not, at he time and place, Harris' "negligence caused or contributed to he explosion," it is made apparent that no harm was done to Chambers & Walker by the first part of the charge. On the contrary, he effect of the charge was rather to increase the burden of proof n the part of the plaintiffs below. This will at once be made manfest by assuming that the verdict had been for the defendants beow. With irresistible effect the plaintiffs below could have complained that the charge laid upon them the additional burden of proving the want of due care in selecting a servant, or the fact of is competency, with knowledge on the part of the employer, and hat the verdict of the jury might have been influenced by the fact hat they believed that Harris was a competent servant, and that hat fact might have influenced their conclusion that on this paricular occasion he was not guilty of negligence causing or conributing to the explosion. But in so far as Chambers & Walker re concerned, the jury were instructed, in effect, that, if they found hat reasonable diligence was not exercised in selecting and putting Harris in charge, there could still be no liability attaching to Chambers & Walker, unless Harris' "negligence caused or contributed to he explosion."

Other matters discussed by counsel in behalf of Chambers & Walker are not deemed of sufficient importance to further prolong his opinion.

It results that the judgments against Chambers & Walker are affirmed, and the judgments against the Waters-Pierce Oil Company are reversed, and the cases as to it are remanded for further proceedings in accordance with this opinion.

AMERICAN BONDING CO. OF BALTIMORE v. CITY OF OTTUMWA.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1905.)

No. 2,131.

. PRINCIPAL AND SURETY—NOTICE TO SURETY.

Under a contract to keep in repair the pavement of a street for seven years, which provided that such repairs would be made on notice from the city engineer and street committee, where one or more previous notices were signed by the city solicitor, reciting that it had been so ordered by the city council, and the guaranty company had recognized the

sufficiency of such notice by making the required repairs and paving therefor, *held*, that these facts justified the reliance of the indemnitee upon the sufficiency of a third like notice calling for further repairs.

2. MUNICIPAL CORPORATIONS—PAVING—REPAIRS.

A contract called for the paving of a street in the city of Ottumwa, Iowa, to be constructed with a stone curbing, with a foundation of broken stone and sand, and a six-inch concrete superstructure thereon, with a surface layer of two inches of asphaltum, to be kept in repair by the contractor for seven years. After its completion and use it soon became perforated with holes, which the contractor undertook to repair by patchwork. The condition of the asphalt surface continued, however, to grow worse, greatly interfering with the use of the street. After thorough examination by experts, they reported that on account of the rotten material and bad workmanship in the asphalt coating what was left of the asphalt would not be sufficient to make a serviceable binding for the patchwork, and therefore it was in the interests of economy and business judgment to relay the entire surface asphaltum coating. *Held*, that as applied to the whole pavement as a unit this resurfacing was of the nature of repair work.

3 SAME—LIABILITY OF SURETY.

While the undertaking of the surety must be narrowly construed, and can neither be varied nor enlarged, like any other contract it is the spirit as much as the letter that gives to it vital effect. So where the original contract for asphalt coating of the street called for two inches, and the repair work thereof by the city consisted of an asphalt coating of one and one-half inches, with a one-inch binder, and the contract further provided that the estimated qualities for paving, etc., should be considered as approximate, reserving to the city the right to increase or diminish said quality as in its opinion may be necessary, *held*, that such variation did not discharge the surety from its liability for such repair work, it appearing that this change entailed no additional cost to the guaranty company.

4. SAME—ULTRA VIRES.

The defense of ultra vires, based upon the contention that a supplemental contract for paving a street varied in some particular from the original contract, cannot avail the guarantor when its indemnifying bond expressly refers to such supplemental contract, and there is no evidence in the record that the city in making such supplemental contract did not observe the provisions of the state statute in the matter of advertising.

5. SAME—RAISING FUND FOR REPAIR.

Where, under such paving contract, it is provided that the contractor shall guaranty his work for the period mentioned from deterioration caused by improper materials or neglect in the construction of the same, and that upon due notice of such deterioration the contractor shall repair the same, and in default thereof said work shall be done by the city, and that then suit shall be instituted against the principal and his surety for the collection of said cost of repairs, *held*, that it is no defense by the guarantor to an action by the city to recover such cost of repairs that the city council in raising the necessary money with which to make such repairs proceeded under the statute authorizing it to issue bonds, as in the case of an original construction work in grading and paving a street.

6. SAME—INSTRUCTIONS—HARMLESS ERROR.

Although the court in its charge to the jury stated that the guaranty company was organized to transact business of this kind within the state, not as an accommodation guarantor, but for a consideration, *held*, that this could not constitute reversible error, where it is immediately followed with the statement that notwithstanding such fact the guaranty company was entitled to be fairly dealt with; that as a surety it was a favorite in law; that its liability could not be in any way changed or extended; and that it has the rights and privileges that any other surety would have.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Southern District of Iowa.

On the 6th day of July, 1898, the city of Ottumwa, in the state of Iowa, entered into a contract with the Assyrian Asphalt Company, of Chicago (hereinafter for convenience called the contractor), for the grading, curbing, and paving of a portion of West Second street in said city. The portions of said contract bearing upon the questions to be decided are substantially as follows:

The contractor was to furnish all the necessary materials, labor, and tools to grade, pave, gutter, and curb, in a good and substantial manner, West Second street to the east line of Clay street, to be completed on or before the 15th day of October, 1898. The work under the contract was to be staked out by the city engineer. Upon the completion of the grading and setting of the curb the contractor was to notify the city engineer, who should proceed to examine the same. Section 15 of the contract is as follows:

"The contractor expressly guarantees to maintain the pavement and curbing in good order for a period of seven years, and binds himself, his heirs and assigns, to make all repairs which may, from any imperfection in said work or materials, or from any crumbling, or disintegration of the materials become necessary in that time and the said contractor shall, whenever notified by the city engineer and street committee, or if they are not made within the proper time, the street committee shall have the power to cause such repairs to be made and have the cost of the same charged to the said contractor, and deducted from any moneys due under the contract, or that may afterwards become due; or, if in case there be no funds due the said contractor, then suit shall be instituted against the principal and his sureties for the collection of said cost of repairs, and said bond shall be conditioned.

"At the end of the seven year period, the city engineer and street committee must determine whether or not the street is in good order, and the principal and his sureties shall not be discharged from liability on their guarantee and maintenance bond until the city engineer or street committee shall certify in writing that the said pavement is in good order, natural ordinary wear and tear excepted. If at any time during the seven year period, the pavement or curbing or any part of it has deteriorated through neglect in construction or improper material, to such an extent as to require reconstruction in the opinion of the city engineer and street committee, by the consent of the city council, then upon due notice, or within a period of three months from date of said notice, the contractor shall proceed to reconstruct the pavement or such part as is deemed necessary as aforesaid.

"If the contractor fails to do so at the end of three months, the street committee may, with the consent of the city council, proceed to reconstruct the pavement and curbing and the cost thereof shall be collected by suit from the said contractor or his sureties.

"There shall be nothing in the above guarantee clause that shall require the contractor to make repairs, or relay any pavement made necessary to repair or relay by the taking up and relaying of the same by water, gas, steam or plumbing companies, or street railroads, or through any improvements made by the city or by any private parties, of any nature, it being the intention that the contractor shall guarantee his work for the period mentioned, from deterioration caused by improper materials or neglect in the construction of the same; the ordinary natural wear and tear to be excepted.

"The contractor shall execute to the city of Ottumwa a good and sufficient bond, with sureties approved by the mayor, for the faithful performance of the requirements of this guarantee clause to the amount of forty (40) per cent. of the contract cost of all the work covered by this contract, which bond shall be in addition to the bonds required by law and the ordinance of the city of Ottumwa, and shall be executed to the city and approved by the mayor before the certificates herein provided are endorsed and turned over to the contractor."

By section 17 the contractor was required, without cost over and above the contract price per square yard for brick paving, to remove, where necessary, the present stone pavement within the seven-foot strip of the street railway,

and to excavate the entire seven feet to a depth of fifteen inches below the center grade of the finished pavement.

Section 19 prescribed how the railroad company should lay its ties, etc., after the subgrade of the track was prepared, and subsequent provisions directed how the brick should be laid, etc.

After prescribing the grading, section 24 described the foundation for the sheet asphalt pavement between the street railway and the curb. There was to be a base of four inches of hard limestone, vitrified brick, or slag, two inches of clean coarse sand and gravel, each layer of sand to be flooded, the whole well rolled with a steam roller of ten tons. After the lower portions had thus been brought up to the eight-inch surface below the finished pavement, all portions of the surface that are more than two inches, but not more than six inches, below the surface of the finished pavement shall be filled with a layer of hydraulic cement concrete, of such depth that the top surface of the concrete after ramming shall be two inches, and parallel to the surface of the finished pavement. The cement was to be of the best quality, fresh American Natural Hydraulic cement, equal to the Black Diamond Brand of Louisville cement, to be prepared and put down in a specified way. Upon the concrete course should be laid a wearing surface two inches thick, the matrix or binding materials of which should be an asphaltic cement, prepared with 99 per cent. pure asphalt of the best quality obtainable, equal in quality or superior to that obtained from Pitch Lake in the Island of Trinidad. This is followed by a prescription as to the preparation of the asphaltic cement. Specifications for curbing were then made.

The whole contract price for this work was $34,538. The city was not to become debtor or pecuniarily responsible to the contractor for said work; but the city agreed and bound itself to take proper steps to assess and levy a special tax upon the property of the abutting owners upon the lines of the street liable therefor for the just and true proportion of the contract cost and expense of the improvement contracted for, according to the ordinances of the city and the laws of the state; that as to all portions of the street not embraced in the intersections the city was to make the special assessments and levies of taxes for the purposes aforesaid.

On the following September, 1898, the parties entered into a supplemental contract, modifying the provisions respecting the paving of the street railway track, which was to have been filled with brick and sand, by requiring it to be filled with concrete of the kind and character specified in the original contract, within two inches of the top of the paving, said two inches to be of asphaltum. It was further stipulated that the bond originally given by said contractor, the bond to be given after the completion of the work, should embrace and cover the improvement included in said seven feet as the same was modified and changed by the supplemental contract, in all respects as though the same had been constructed and finished as specified in the original contract. The cost of this improvement should be assessed to the street railway company, the contractor to keep the improvements embraced in the seven feet in good repair for seven years after the acceptance of the same as provided in the contract.

After the completion of said work the said Assyrian Asphalt Company, with the American Bonding & Trust Company of Baltimore City as surety, executed bond to the city in the penal sum of $14,000, which, after referring to said contract as the consideration for the execution of the bond, recited the following conditions: "Now, if said Assyrian Asphalt Company shall make good to the city of Ottumwa, Iowa, and furnish in good order and replace any brick, asphalt, concrete or other materials used in said paving and curbing, which may fail from any imperfections in the work or materials, for a period of seven years from the completion of said work, and if the said Assyrian Asphalt Company shall keep the said improvement and pavement in good repair for a period of seven years from and after the acceptance of the same by the city of Ottumwa, then this bond to be void and of no effect, otherwise to be in full force and effect."

The said American Bonding & Trust Company of Baltimore City afterwards became the American Bonding Company of Baltimore, which assumed the guaranty bond of its predecessor.

The construction work on this street was completed by the contractor and cepted by the city, and paid for by the issue of certificates, to be paid by essments and levies on the property owners aforesaid.

t was not long thereafter until the use of the street demonstrated the t that the asphalt coating, from improper material and bad workmanship, s in wretched condition. It wore into holes in many places, greatly inter- ing with travel over it. Notice thereof was given to the contractor and surety company by the city solicitor, under direction of the city council. e contractor responded, and made what it called repairs, by patching the es and worn places. It was not long, however, perhaps in the following r, until greater defects in the asphalt appeared, of a more serious char- er. Upon like notice an attempt was made to again make repairs. After o of such repairs had been made by the contractor it appears that it be- ne insolvent.

Again, on the 15th day of April, 1902, Mr. Jaques, city solicitor for said city, t to said contractor and to said bonding company a written notice, calling ention to the execution of the indemnifying bond aforesaid, with the fol- ing statement: "I am instructed as solicitor of the city of Ottumwa, Iowa, the city council thereof, to notify your company, that the Assyrian Asphalt mpany have wholly failed to comply with their agreement as provided for said bond and in its contract with said city for paving the street therein med. That said pavement is now and has for a long time been out of re- ir, full of holes, the material has become rotten and decayed to such an tent that nearly the whole surface of the street needs replacing. That the y claims that the entire sheet of asphaltum on said street has proven to be inferior and defective material and that it will not stand or last for the en years as provided in said bond and that you are hereby notified to pair and replace the same at once, or within the shortest practicable time; ling to do so the city will hold you liable on said bond. You are further tified that a duplicate of this letter is this day mailed to the Assyrian phalt Company and this is intended to be and is demand upon both you and d company to at once repair said street and put it in that condition provid- for in the contract for paving of the same in your bond to which reference s been made, of all of which you will take due notice and govern your- ves accordingly."

The receipt of this letter of notice was acknowledged on the 18th day of ril, 1902, by William M. Reinhardt, attorney in charge of loss and claim partment of said bonding company, stating "that we will give this matter r immediate attention, and will be pleased to communicate with you again thin the next few days."

On the 13th day of May, 1902, said Jaques wrote to said Reinhardt acknowl- ging receipt of said letter of April 18th, in which he stated: "I am instruct- by the city to say that Mr. McGarry, the representative of your company, s here some three weeks or more ago, and promised that the repairs would made as desired by the city, but in so much as we have not heard anything ce, I am again instructed to call your attention to the fact. The street is tting worse every day, and to request that you use as much expedience in pairing the street as is practicable."

To this letter said Reinhardt replied on May 17, 1902, saying: "In reply uld say that we are in receipt of Mr. McGarry's report, and we have been liged, in the last few days, to submit the matter again to our representatives Chicago, Messrs. C. M. Haven & Co., asking them to give this paving matter eir attention immediately. We realize the necessity of making these re- irs with the least possible delay."

Thereafter the said bonding company sent one St. Clair, who had worked the contracting company on this pavement, to Ottumwa, to make the pairs, who made repairs to the extent of about $600, which were paid for the said bonding company.

It was not long, however, thereafter until the condition of the pavement ew worse, and on the 17th day of February, 1903, said Jaques, city solicitor, nt to the said bonding company the following letter: "Gentlemen: You are reby notified that the city council of the city of Ottumwa at its regular ssion held on the 2d day of February, 1903, directed the undersigned city licitor to inform your company that the pavement of West Second street in

Ottumwa laid by the Assyrian Asphalt Company, whose durability was guaranteed by your company for seven years, has again become greatly out of repair, and to say to your company that unless the same is repaired on or before the 1st day of March, 1903, that the city will cause the same to be repaired as a charge against you under said bond and at your expense. The extent to which said street is out of repair can only be described by saying that it has holes worn in the top or asphaltum coat at many places for its entire length. You will oblige me by notifying me whether your company will undertake to make the improvements or repairs as requested by the city council and as required by the condition of the street."

And on the same day he sent a letter to the said Assyrian Asphalt Company, which is as follows: "Gentlemen: You are hereby notified that the asphalt pavement laid by you on West Second street in the city of Ottumwa, Iowa, is out of repair for nearly if not all its entire length in this that the top or asphaltum coat has worn into holes at places throughout its entire length and that the city council has passed a resolution requiring you to repair the same on or before the 1st day of March, 1903, and has so notified the American Bonding & Trust Company of Baltimore, Md., surety on your bond for keeping the same in repair."

Although the above letter was received, said bonding company paid no attention to it. Thereafter, on May 22, 1903, Jaques sent another letter to said bonding company, as follows: "For your information, inasmuch as you are surety for the Assyrian Asphalt Co. for the maintenance of the pavement therein named, I enclose you notice for bids for repairing the same. The city expects to hold your company responsible to the extent of the bond given, for these repairs. You can bid on the same if you so desire."

This was sent by registered mail, and contained the notice to bidders for said work. The said bonding company gave no heed to this letter.

The city had the best known experts in such paving work to visit the city and make careful examination of the condition of the street, who reported to the city that the asphalt coating was in such condition because of rotten material, so perforated with holes, that in their judgment it was neither in the interest of sound economy or good business judgment to undertake its repair by patchwork. Accordingly the city, after adopting the necessary ordinances, and advertising for bidders, let the contract for the work of relaying the entire surface in Trinidad cement, one and one-half inches in thickness, with a one-inch binder; which work cost $21,639.40, to pay for which the city issued bonds, to be paid by assessments on the adjacent property owners.

Other facts bearing upon the questions to be decided will be discussed in the following opinion.

The city brought action against the bonding company on its bond to recover for the cost of said work to the extent of $14,000, the penal sum expressed in the bond. The bonding company made answer, tendering, in effect, the general issue, and pleading specially that the city did not give it the required notice before undertaking to do said work itself. Afterwards the said defendant filed a supplemental answer, alleging that the bond sued upon is illegal and invalid for the reason that the principal and surety therein were required to keep and maintain said pavement in good repair for a period of seven years without exception or reservation, regardless of the cause necessitating the repairs, whereby the expenses of such maintenance were imposed upon the individual owners of the abutting property because of the cost of combining the original work with that of seven years' maintenance in awarding the contract, etc. And finally it pleaded, in further amendment to the answer, that the city of Ottumwa was without authority in law to enter into the contracts and bonds set forth in the petition, and that the act of the city in so entering into said contracts and bonds was ultra vires.

On trial to a jury verdict was rendered in favor of the plaintiff below in the sum of $14,000, the penal sum of the bond; to reverse which the defendant below prosecutes this writ of error.

William C. Howell and Charles A. Houts (H. Scott Howell and Johnson, Houts, Marlatt & Hawes, on the brief), for plaintiff in error.

W. H. C. Jaques (William McNett, on the brief), for defendant n error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge, after stating the facts, delivered the opinion of the court.

The principal question presented on this record is whether or not the work done by the city was of the nature of repair or reconstruction. The contention of plaintiff in error is that the work done was reconstruction, and not repair, and that it did not receive the required notice stipulated for in section 15 of the contract, in that the notice did not come from the city engineer and street committee, to warrant the work by the city if it was of the nature of repair, and the three-months time after the notice that was given if the work was of the nature of reconstruction.

As the city engineer and street committee were but the ministerial officers of the municipality, which is governed by a board of aldermen, it would seem that when the city solicitor was directed by the board of aldermen to give the notice it should be regarded as of a higher source than if it came from the city engineer and street committee. But be this as it may, it is a sufficient answer to this contention to say that the said bonding company had recognized and acted upon a like notice sent to it by the city solicitor within the year previous to the last notice, and undertook, at its own expense, to make the repairs, and paid therefor. This conduct on its part induced the belief that such notice was satisfactory and sufficient. The condition of the street, as represented in the letter of April, 1902, was as bad if not worse than the condition represented in the letter of February, 1903. And yet the bonding company made no answer thereto, and took no notice thereof, although the city waited three months thereafter before it began the work in question. It should not, therefore, be heard to make this defense after the city has done the work which the guarantor's bond required that it should have done, if the thing done by the city was repair work.

We are therefore brought to a consideration of the question as to whether the improvement was of the nature of repair or reconstruction work. The evidence showed that the defective condition of the street was wholly in the asphalt coating. That portion of it in controversy was honeycombed with holes, worn through to the concrete base. The evidence tended to show that both the workmanship and material in the original construction were essentially bad, so that what was left of it about the holes was, in the judgment of the experts, so rotten and insufficient as not to furnish sufficient support for the walls around the decayed and worn parts when dug out for the reception of the asphalt, and that the only effective remedy for this restoration was the removeal of the whole surface and recoating it. And the jury so found under the charge of the court touching this issue.

It may be conceded that there are some varying shades of difference in the general definition of the term "repair." But there is none more apt and comprehensible than the accepted dictionary definition: "To restore to a sound or good state after decay, injury, dilapidation, or partial destruction." As said by Judge Colt, speaking for the Court of Appeals for the First Circuit, in Goodyear Machinery Company v. Jackson et al., 112 Fed. 146–150, 50 C. C. A. 159, 163, 55 L. R. A. 692:

"Repair is 'restoration to a sound, good, or complete state after decay, injury, dilapidation, or partial destruction.' Reconstruction is 'the act of constructing again.' Reproduction is 'repetition,' or 'the act of reproducing.' These definitions are instructive in bringing home to the mind that repair carries with it the idea of restoration after decay, injury, or partial destruction, and that reconstruction or reproduction carries with it the idea of a complete construction or production over again. * * * It is impracticable, as well as unwise, to attempt to lay down any rule on this subject, owing to the number and infinite variety of patented inventions. Each case, as it arises, must be decided in the light of all the facts and circumstances presented, and with an intelligent comprehension of the scope, nature, and purpose of the patented invention and the fair and reasonable intention of the parties. Having clearly in mind the specification and claims of the patent, together with the condition of decay or destruction of the patented device or machine, the question whether its restoration to a sound state was legitimate repair, or a substantial reconstruction or reproduction of the patented invention, should be determined less by definitions or technical rules than by the exercise of sound common sense and an intelligent judgment."

In Wilson v. Simpson et al., 9 How. 109, 13 L. Ed. 66, the court said:

"When the wearing or injury is partial, then repair is restoration, and not reconstruction. * * * Repairing partial injuries, whether they occur from accident or from wear and tear, is only refitting a machine for use. And it is no more than that, though it shall be a *replacement of an essential part of a combination.*" (The italics are ours.)

The foregoing statement that it would be a repair to replace an essential part of a combination is most applicable to the case in hand. Under the contract the thing to be done by the contractor was in a sense a unit. It was to construct a pavement, the base of which was to be six inches of hard concrete, with a one and one-half inch surface of asphalt, with stone curbing. These constituted the work of construction. Reconstruction is "to construct again, to rebuild, to remodel, to form again or renew." It would therefore follow that to constitute a work of reconstruction of the pavement would involve the rebuilding of the whole unit, including the concrete foundation as well as the asphalt surface, to say nothing of the curbing. Whereas the thing done by the city was to cure the deterioration, owing to the rottenness of the material employed and bad workmanship, whereby what remained of the surface did not possess sufficient cohesion to admit of patchwork, necessitating simply relaying this portion of the structure, leaving all the rest intact. If, as it must be conceded, it would have been repair to have dug out throughout the length of the street the holes in the surface and relaid them with new asphalt, no matter how multitudinous the holes or thin the partition walls between them and the relaid portions, it must be a distinction without a difference

making a continuous surface, if that was essential "to restore a sound or good state after decay, injury, dilapidation, or partial struction."

A contract for the building of a house complete includes the ndation, the walls, and the roof. Should the contract provide t the contractor should keep the building in repair for seven rs, and within a year after the acceptance of the work the roof uld begin to leak in various places, it would be repair work in toring the defective parts to a sound condition. If then, within next year, the leaks in the roof should become worse, render- the building practically uninhabitable, it would be repair work he contractor should be called upon to rectify such a condition the roof. If again thereafter, within a few months, the leakage uld continue, throughout almost the entire roof, and a thorough amination of this covering should disclose the fact that the roof s constructed of bad material, and with bad workmanship, that e material was so rotten throughout that mere patching the es would afford no permanent protection against the disintegrat- parts, necessitating the removal of the entire rotten roof and tting on a new covering, why should this be any less a repair of e building? Would it not be a mere restoring of the part "to sound or good state after decay, injury, dilapidation, or partial struction," consequent upon the bad workmanship and the rot- materials used? If one-half of the roof should decay so as to mit through it the rain, snow, and winds, to restore to a sound te would certainly be regarded as repair of the building. Does any the less amount to repair that the decay or dilapidation ex- ds to the other half of the roof?

The result of the court's charge on this issue was that he told e jury that in his opinion what was done amounted to repair d not reconstruction. While the contract did not call for recon- uction, it did call for recoating the pavement with asphalt, which, his judgment, amounted to repair, and not rebuilding or recon- uction. Inter alia, he said:

> It does seem to me like reconstruction would be a revamping, or rework- the whole thing over. The base was not changed; no change of the grade s made; no change in the curb. The change that was made was resur- ing, the recoating of the top; that and the holes of course where the gon wheels would pound down in the concrete, making recoating neces- y."

Criticism is made of the employment of the term "revamping." ow this can avail the plaintiff in error is not apparent. If preju- ial at all, it was rather against the defendant in error. As own by the context, the court merely conveyed the idea to the y that it was the equivalent of "working the whole thing over." The fourth clause of paragraph 15 of the contract provides that e contractor should not be required to make repairs or relay y pavement made necessary to repair or relay by the taking up d relaying of the same by water, gas, steam, or plumbing com- nies, or street railways, or through any improvements made by e city or private parties of any nature; it being the intention that

the contractor shall guaranty his work for the period mentioned from deterioration caused by improper materials or neglect in the construction of the same, natural wear and tear excepted. The plain meaning of this is that the destruction of the pavement after completion by the contractor by tearing up, not only the surface, but the cement beneath, by said improvement companies, or for making improvements by the city or private parties, should not cast the burden upon the contractor of repairing or replacing. But it expressly obligated the contractor "to guarantee his work for the period mentioned from deterioration caused by improper materials or neglect in the construction of the same." Therefore any deterioration resulting from bad materials or bad workmanship in the original construction was to be a work of repair, to be done by the contractor.

It is suggested, as evidencing that the work done by the city was reconstruction rather than repair, that it cost over $21,000, while the entire contract price of the original work amounted to a little over $34,000. There is nothing in this record to enable the court to find what is the relative cost of the asphaltum surface and the other portion of the pavement. If the work done by the city is more expensive than that done by the Assyrian Asphalt Company, it is the difference between genuine and shoddy work. The evidence is that the cost of the work done by the city was not only reasonable, but without profit to the contractor. The opportunity was offered to the plaintiff in error to either do the work itself or bid on it. Its obligation was and is to pay the cost of the repair, if reasonable, no matter how much or how little.

It is conceded to the plaintiff in error that the undertaking of the surety must be narrowly construed. It cannot be varied or enlarged. But like any other contract, it is the spirit as much as the letter that gives to it vital effect. It is substance rather than mere shadow that denotes variation from its terms. The essence of the bond of the plaintiff in error was that for a period of seven years the Assyrian Asphalt Company should furnish, in good order, and replace, any asphalt or other materials used in said paving which might fail from any imperfection in the work or materials; and its bond was only to become ineffective in the event the said Assyrian Asphalt Company "shall keep said improvements and pavement in good repair for a period of seven years"; the spirit—the clear meaning—of which is that whenever during that period the work done by the Assyrian Asphalt Company should fail to give a good pavement by reason of any imperfections, either in the workmanship or the materials employed, it should be replaced so as to effectuate the purpose of giving the city a serviceable street for said period, when built right with the materials prescribed or their equivalent. If it failed to do so, then, after due notice, the city was authorized to make the required repairs at the cost of the asphalt company or its surety.

The authorities cited by counsel for plaintiff in error, for the purpose of showing that the work done by the city was of the nature of reconstruction and not repair, are not apposite. In State

x rel. v. Corrigan Street Railway Company, 85 Mo. 263, 55 Am. ep. 361, the street railway track was put upon Union avenue when was an unpaved street. The city ordered it graded and paved, rescribing the materials and the manner of construction. By rdinance it demanded of the street railway company that it pave etween its rails and for two feet on the outside thereof, in the me manner as that done by the city. This ordinance was re- sted by the street railway company, on the ground that it required it a complete work of construction, by putting in the foundation d the whole material as for paving a street in the first instance; hereas, under the law governing the obligation of the street rail- ay company, it was only required to keep in repair the space be- veen the rails and for two feet on the outside. This was clearly work of construction from top to bottom.

In the case of Farraher v. City of Keokuk, 111 Iowa, 310, 82 N. . 773, under a statute which gave to the city the right to make pairs without notice, and assess the cost against the abutting roperty, a sidewalk was taken up from top to bottom and relaid, digging a ditch, filling in a new substratum of sand, and putting own a new sidewalk, employing in this work only a small amount the old material. This was held to be essentially the creation a new pavement.

In Chicago v. Sheldon, 9 Wall. 50, 19 L. Ed. 594, the street rail- ay company agreed that "as respects the grading, paving, macad- mizing, filling or planking of the streets or parts of streets, upon hich they shall construct their said railways, or any of them, eep eight feet in width along the line of said railway on all the reets where one track is constructed, and sixteen feet in width ong the line of said railway where two tracks are constructed, good repair and condition." It was held that this did not make e company liable for curbing, grading, and paving streets with an ntirely new pavement, as the obligation of the company extended nly to repairs. Clearly that is not this case.

Other cases are cited by counsel, like that where, by the con- act, the foundation was to be of wood, and one of stone was sub- ituted therefor. This was clearly a reconstruction of the very undation work, with a different and more expensive quality. ut no case has been cited, nor are we able to find any adjudicated se, that sustains the proposition that as to the resurfacing of the rincipal concrete base, necessitated by the unfitness of the material, nd the work being essentially bad, under the circumstances of e case at bar would not come under an obligation to repair.

Complaint is made by plaintiff in error that the city, in the work one by it, used Trinidad asphalt instead of that employed by the ontractor. This was no departure in spirit, for the reason that e contract itself called for pure asphalt equal to, if not better than, itch Lake, in the island of Trinidad.

It is next objected that the city varied from the original contract that it put on an asphalt coating of one and one-half inches, with one-inch binder, whereas the original contract called only for a

two-inch coating of asphalt. By section 34 of the contract it was expressly provided that:

"The estimated qualities for grading, paving, curbing, and guttering streets are to be considered as approximate, and said city of Ottumwa reserves the right to increase or diminish said quantities as in their opinion may be necessary, either in change of grade, alignment or otherwise: and such alterations shall not vitiate or annul the contract entered into relative to said work; nor shall such change constitute any claim for extra compensation. The contractors shall be paid for the amount of work actually performed at the rate specified in his contract, and if any work is ordered, not provided for in the contract, the engineer shall determine the value thereof."

—From which it is clear that the estimated qualities for the paving were to be considered only as approximate. So that if the city, in the progress of the work, had requested and consented to a one and one-half inch layer of asphalt, with an inch binder, if it had entailed no additional expense to the contractor, it was perfectly competent for the city to require the change. How then can it be said that when the city, in making the required repairs, employed a less quantity of asphalt on the surface, that a one-inch binder, which as the evidence shows made no perceptible difference in the cost, constituted a departure from the spirit of the contract?

It is next urged in argument by counsel for plaintiff in error that the contract was ultra vires because the supplemental contract of September, 1903, provided for sheet asphaltum outside of the space between the street car rails and that portion the city was to pave with asphaltum instead of part brick and part asphaltum, as provided in the original contract. This contention is predicated of the assumption that this change was made without advertising for proposals thereon, as the Code of Iowa requires all such work to be let after advertisement for proposals. If it were conceded that any such specific defense was pleaded in the answers, we fail to find in the record any evidence what the advertisement as made contained. The original contract contemplated the giving of this bond by the contractor, and the bond executed by it, with the plaintiff in error as surety, makes direct reference to said supplemental contract, and guaranties that the contractor shall "furnish in good order and replace any brick, asphalt, concrete or other material used in said paving," which may fail from any imperfections in the work or materials for a period of seven years from the completion of said work. As there was no essential difference in the cost of the work, and as the contract provided that this work was to be paid for by the street railway company, and the bonding company, when it gave the bond of indemnity, knew of this change in the contract, it does not lie in its mouth to raise any question about the change. It did not affect the validity of the contract in this controversy. Ottumwa B. & C. Co. v. Ainley, 109 Iowa, 386, 80 N. W. 510. Code Iowa, § 814, expressly provides that the contractor shall give such bond for repairs.

With infinite reiteration, counsel for plaintiff in error argues that the city officials in their report and in the ordinances providing for the method of paying for the work in question spoke of and dealt with the matter as of a work of reconstruction. Reference

made to the report of one of the city aldermen, Kehoe. Quotation is made from the report that "it would be throwing away money to try to repair said street." But this officer further said: "the surface is disintegrating very rapidly, and that the cheapest and about the only way to repair said street so it will last will be to resurface the whole street." The title of the resolution of the board providing for this work is as follows: "Resolution levying special improvement taxes for the payment of the reconstruction of the wearing surface of West Second street;" and reads: "Whereas * * * the Barber Asphalt Paving Company undertook to pay and to repair the asphalt sheet paving in paving districts Nos. 36, 37 and part of 38," etc. The officers were not concerned about the terms they employed. It was the facts as to the actual condition of the street and work done from which the court is to determine its character.

Neither are we able to perceive the merit of the contention that the city aldermen, in adopting the ordinances providing for the issue of bonds to be sold to pay for the work, proceeded under the statute authorizing a work of construction in paving streets. How does it concern this surety company how or in what manner the city undertook to raise the money to pay for the work? How did it affect its undertaking to pay "said cost of repair"? Is it any of its business whether the city raised the necessary revenue by borrowing the money and giving its note therefor, or whether it obtained it on bonds irregularly issued? Did it alter the position or effect of the undertaking of the guarantor that the city, after the obligation of the contractor to make the repairs had attached, undertook one way or another to pay for the work which the contract imposed upon the contractor to do, without cost to the city? Should this court, in this proceeding, in the absence of the holder of the bonds issued by the city, undertake to determine their validity? As the ordinance passed by the city purported to be in pursuance of the statute, and the bonds on their face recited that they were issued in pursuance of such ordinance, they would be binding upon the city in the hands of an innocent purchaser for value.

The contract expressly provided, in section 15, that after the work under the contract was paid for, and the contractor failed to maintain the street according to the contract, "then suit shall be instituted against the principal and his sureties for the collection of said cost of repairs." As the burden of these repairs, when made by the city, was to be laid upon the property owners, the city was authorized by the contract to recover the cost thereof from the contractor and the surety. When collected it would inure to the benefit of the burden-bearers. The contracting parties might have designated any other person as a quasi trustee for the benefit of the taxpayer, to collect from the contractor and the surety such cost. Shall the court, to enable this surety to escape from this express undertaking, after it has issued the bonds to the city and paid for the cost of repairs, anticipate that the property owners will refuse to pay the levies made to meet the

interest and principal of the bonds, and further anticipate that such refusal would be upheld by the courts? There is no issue tendered by the answer in this case that there are any funds due the said contractor. As the burden of these repairs when made by the city was to be laid upon the property owners, the city is authorized to receive the cost thereof from the contractor or his surety, and when collected it would inure to their benefit or the holder of its bonds.

Criticism is made upon the following paragraph of the charge given by the court to the jury:

"Now, this bonding company has the right to contract in Iowa; it is organized for that purpose; the statutes of Iowa authorize it to transact business of this kind within the state; not as you and I sign one another's notes, as a guaranty or accommodation; but it does it for a consideration; that is the way it makes its money. So that, for a money consideration paid it, either by the city of Ottumwa or the Assyrian Company, it signed this bond, agreeing to make good the contract of the Assyrian Company with the city of Ottumwa."

It is claimed that this was prejudicial to the bonding company, because of the statement that it signed such bonds for a money consideration. This was nothing more than the statement of a well-known fact as respects such guaranty companies. But lest such fact might prejudice the defense of the bonding company said statement was immediately followed by the further statement that:

"It is a rule recognized by all lawyers and all courts and perhaps by all people that a surety upon a contract is what is called a favorite in law; that is to say, it must at all times be fairly dealt with; the contract must not be changed. It must not be enlarged upon over and above what the bond company agreed to. * * * You cannot vary it in any way."

And further on the court said:

"So that while a surety is a favorite in law, and this bond company as a surety, I suppose, stands as if you and I had signed this paper, notwithstanding it received a money consideration for signing it, it has the rights and the privileges that a surety would have; but it likewise is under the obligations and responsibilities of a surety."

Taken in its entirety, the tendency of this portion of the charge was rather calculated to guard the minds of the jury against any prejudice on account of the fact, presumptively known, that such company is not a mere accommodation indorser, and that it stood in respect of the law as any other surety.

As a whole, the charge was fair to the plaintiff in error. For while the indemnifying bond executed by the surety after the work was done might have been regarded as an unqualified undertaking for guarantying the work for seven years, the court in its charge gave the plaintiff in error the benefit of conditioning its undertaking upon the performance of all the provisions of the contract between the city and the contractor.

Other objections, of a most hypercritical character, are urged by the plaintiff in error, but they are not of sufficient merit to justify the further prolongation of this opinion. It results that the judgment of the Circuit Court should be affirmed.

KELLEY, MAUS & CO. v. SIBLEY.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,097.

SALES—SEVERAL CONTRACT—CONSTRUCTION.

Negotiations for the sale of bolts at beginning referred only to "machine bolts," and, in answer to an inquiry with respect to the quantity of machine bolts the seller could furnish, he, for the first time, suggested that he had another contract for "carriage bolts" with a different manufacturer, and could also enter an order for a reasonable amount of carriage bolts, but could not guaranty prompt shipment, after which the buyer accepted the seller's offer as to machine bolts, and stated that it assumed that the price for the carriage bolts was the same, and on that assumption ordered a large number, which, however, the buyer required to be put up in packages, after which the seller replied that the buyer's assumption as to the price of the carriage bolts was correct. *Held*, that the contract for the bolts, if any, was several as to each character of bolts.

SAME—OFFER AND ACCEPTANCE.

An acceptance of an order to sell a quantity of machine bolts was not rendered conditional, and therefore insufficient to constitute a contract, by an expression in the buyers' letter of acceptance that it was not of so much importance to have such bolts put up in packages, but that they would like to get at least the smaller sizes in that way if possible.

SAME.

An absolute acceptance of a seller's offer to sell bolts was not affected by a subsequent communication informing the buyer that he assumed no responsibility in the sale, but simply procured the bolts for the buyer provided he could purchase them as he had been assured he could do, which statement was not assented to by the buyer.

SAME.

Defendant's offer for the sale of carriage bolts was accepted, with the condition that the bolts must be put up in packages duly labeled, and contained a request that the order should be placed with the factory immediately, and plaintiffs advised how soon they could look for shipment. Defendant replied, without referring to the condition that the bolts should be put up in packages, that the price was the same as other bolts purchased, and added that he assumed no responsibility in the sale, but would simply get the bolts for plaintiffs provided he could purchase them as he had been assured he could do. *Held*, that plaintiffs' acceptance of defendant's offer was conditional, and insufficient to constitute a contract binding defendant to furnish such bolts at all events.

SAME—SELLER OR AGENT.

Where defendant proposed to sell plaintiffs an unlimited quantity of machine bolts at 80 per cent. off, f. o. b. seller's place of business, at 5 per cent. commission, which bolts he was to get under a contract which he had with nonresident manufacturers, and plaintiffs replied accepting the offer, and requesting that defendant place the order with the factory, and advise plaintiffs how soon they could look for shipment, defendant was a seller of the bolts, and not plaintiffs' agent to buy the same.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

It is sought to reverse a judgment sustaining a demurrer to the amended declaration of the plaintiff in error, who was plaintiff below. The declaration contains two counts. The first count declares upon a contract for the

sale and delivery by the defendant to the plaintiff of 750,000 machine bolts; the second count upon a contract for the sale and delivery of 250,000 carriage bolts. The question involved is whether the facts and correspondence set out in the declaration constitute a valid and binding contract between the parties.

The declaration shows that the plaintiff in error, a corporation, was engaged in business in the city of Chicago, dealing in hardware of various kinds. The defendant was engaged in the business of selling hardware at wholesale and retail at South Bend, Ind. On June 18, 1899, a traveling salesman of the plaintiff called upon the defendant at his place of business, and the defendant informed him that he was prepared and would sell to the plaintiff such quantity of machine bolts as the plaintiff might desire to purchase. The bolts are made of iron, are of various sizes, are used in the construction and operation of machinery, and are quoted and sold by the trade upon the basis of a list price, with certain deductions or discounts. The list price is an arbitrary one established by the trade. The real price is ascertained by deducting the discounts or percentages. The defendant's proposition was that he would sell to the plaintiff the machine bolts in question at a discount of 80 per cent. from the list price, plus 5 per cent. as a commission or profit to himself. This proposition was communicated to the plaintiff, and resulted in the following correspondence.

Plaintiff to defendant, June 19, 1899: "Our Mr. Mitchell informs us you have a quantity of machine bolts to sell for which you will accept immediate specifications at 80% off, f. o. b. South Bend. Our Mr. Lee is at present out of the city. We will communicate with him and advise you further in the course of a few days as soon as we hear from him."

Plaintiff to defendant, June 21, 1899: "Referring to your proposition to Mr. Mitchell to furnish us with what machine bolts we may want at 80% off f. o. b. South Bend, will you please let us know by return mail what quantity of machine bolts you would care to furnish us, also what make they are and how promptly you could make delivery of same."

Defendant to plaintiff, June 22, 1899: "Your favors of the 19th and 21st inst. are both at hand. My proposition with your Mr. Mitchell was, that I could sell you an unlimited quantity of machine bolts at 80% off, f. o. b. So. Bend, and that I would charge you 5% commission on same. These people are getting reasonable prompt shipments. I should of course get these goods under a contract, and you will understand the necessity of not mentioning this fact. The bolts would come from the Upson Nut Co., of Cleveland, O., the price is spot cash, 10 days from date of invoice received from factory. I am informed that I can get any quantity up to 500,000 or even 1,000,000, but specifications must be in promptly, for same, and this contract expires July 1st. I also have another contract on carriage bolts at same price, but am not getting prompt shipments. This contract applies to Oliver Bros., or, rather, Oliver Iron & Steel Co., also, to the Indiana Iron Co. I can enter an order for a reasonable amount with these people, but cannot guarantee prompt shipment on same."

Plaintiff to defendant, June 24, 1899: "Your favor of the 22nd inst. duly received. We are sending you in this mail specifications for machine and carriage bolts based on the proposition you made our Mr. Mitchell. We assume from your letter the same price will apply to both the machine and carriage, viz.: 80 discount F. O. B. South Bend plus 5% commission to yourself. In this connection we would inform you the carriage bolts must be put in packages duly labeled. We could not use them in any other way. It is not of so much importance to have the machine bolts put up in packages, but we would like to get at least the smaller sizes in that way if we could. Kindly place this order with the factory and advise us how soon we may look for shipment."

There was inclosed in this letter an itemized list or statement, or specification, showing the quantities of each size of carriage and machine bolts desired, amounting to 750,000 machine bolts and 250,000 carriage bolts.

Defendant to plaintiff, June 26, 1899: "Your favor of the 24th inst. enclosing lists for carriage and machine bolts, is at hand. I have sent specifications in for these goods, and trust to be able to get same for you. I will use

very effort to get them as promptly as possible. Your interpretation of the rms is correct, i. e., 80% discount, f. o. b. South Bend, plus 5% commis-on for myself. You will of course understand that I assume no responsi-lity in this sale, and simply get them for you in this way, provided I can urchase them, as I have been assured that I could."

The declaration avers that the provisions contained in the plaintiff's letter June 24th respecting the manner of packing carriage bolts were usual and rdinary, and were mere packing or shipping directions, indicating the usual nd ordinary method in which such bolts were packed for shipment and le; that the defendant never objected to the requirement that carriage lts must be put up in packages duly labeled, or to its suggestion that it ould like to have the smaller sizes of machine bolts packed in the same ay. The plaintiff never at any time assented or agreed to the concluding ause of the defendant's letter of June 26, 1899, but insisted that the ac-ptance of the order was valid and that the contract was complete. None the machine bolts was ever shipped to the plaintiff, and but 74,000 of the rriage bolts, the latter being paid for in accordance with the terms of the ntract. The declaration also avers that notwithstanding the readiness and illingness of the plaintiff to accept and receive the bolts and to pay for e same, the defendant has refused to deliver any other than the 74,000 rriage bolts specified, and the suit is brought to recover damages sustained reason of violation of the contract.

William Brace, for plaintiff in error.

Nathan G. Moore, for defendant in error.

Before JENKINS and BAKER, Circuit Judges, and HUMPHREY, District Judge.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

It is undoubtedly true that a mere proposal by one constitutes o bargain of itself. It can only become binding when accepted nconditionally by the other. If the accepting party affixes a con-ition, modification, or change not contained in the original pro-osal, this amounts in law to a rejection of the offer as made, and in fact a new proposal, not effectual until assented to by the first roposer. Carr v. Duval, 14 Pet. 77, 82, 10 L. Ed. 361; Minne-polis & St. Louis Railway v. Columbus Rolling Mill, 119 U. S. 149, 51, 7 Sup. Ct. 168, 30 L. Ed. 376. So that the question here comes own to this: Was there an absolute acceptance by the plaintiff error of the offer of the defendant in error? Or, if there was a ualified acceptance, was that qualification in turn assented to by he defendant in error? These questions must be considered sep-rately with respect to the machine bolts and with respect to the arriage bolts; for, as we view the transaction, there were in effect vo engagements, and the case does not fall within the decision National Bank v. Hall, 101 U. S. 43, 50, 25 L. Ed. 822, that "where contract is a unit, and left uncertain in one particular, the whole ill be regarded as only inchoate, because the parties have not been d idem, and therefore neither is bound." The negotiations at their ommencement had reference only to the sale of machine bolts. n the letter of June 22d, in answer to the inquiry with respect to he quantity of machine bolts the defendant could furnish, he for he first time suggests that he had another contract for carriage olts with a party other than the one with whom he had contracted

for machine bolts; that he could enter an order for a reasonable amount of carriage bolts, but could not guaranty prompt shipment. The plaintiff's letter of June 24th accepts the offer with respect to machine bolts, and states that it is assumed that the price of carriage bolts is the same, and upon that assumption orders 250,000 carriage bolts, which must be put up in packages duly labeled, as plaintiff could not use them in any other way. The defendant's letter of June 26th states that that assumption as to the price of carriage bolts is correct. We think this correspondence evidences two distinct engagements, not interdependent. The defendant had offered to sell machine bolts at a specified price. In answer to an inquiry he states the quantity. He states specifically in writing the offer which he had made verbally. He then suggests that he could also furnish carriage bolts, without specifically naming the price he would charge for them, although he states that his contract for those was at the same price as the machine bolts. He names the party with whom he had contracted, and states that he could enter an order for a reasonable amount of them, but could not guaranty prompt shipment. The plaintiff's letter of the 22d is a clear acceptance of the offer with respect to the machine bolts, unless the suggestion with respect to the packing of them is a condition, which we will consider hereafter. It was not an absolute acceptance of the suggestion or offer with reference to the carriage bolts, because neither the price nor the quantity had been specifically stated by the defendant; but an order is made for them conditioned upon the price being the same and upon their being put up in packages duly labeled. We should therefore scrutinize this correspondence as to machine bolts and carriage bolts separately, and ascertain if there was an unconditional sale as to either or both.

First, as to the machine bolts. The verbal proposition by the defendant was that he could sell the plaintiff an unlimited quantity of machine bolts. The defendant's letter of the 22d of June distinctly so states, and adds that he is informed that he could get any quantity up to 500,000 or even 1,000,000. That offer is as distinctly accepted in the plaintiff's letter of June 24th. The expression, "It is not of so much importance to have the machine bolts put up in packages, but we would like to get at least the smaller sizes in that way if we could," does not impose a condition, but is a simple request. The acceptance of the order is in no way made dependent upon compliance with the request. There being then an absolute offer to sell and an absolute acceptance of the offer, the statement in the defendant's letter of the 26th of June, that "you will of course understand that I assume no responsibility in this sale, and simply get them for you in this way, provided I can purchase them as I have been assured that I could," if it is referable at all to the machine bolts, is unavailing to change the terms of this accepted proposal. One party to a contract cannot modify its terms without the consent of the other party. He had made the offer to sell; he had stated that he had a contract with parties under which he would have the goods; and that he could sell an "unlimited quantity," or any amount, up to 1,000,000. He had made no question of his

ility to deliver. The statement in his letter of June 22d, that as carriage bolts he could enter an order with those from whom he s to obtain them, but could not guaranty prompt shipment, arly shows that as to the machine bolts he made no question of ability to deliver and to perform his contract, and made no such ndition in his offer. That offer having been accepted, he could t afterward qualify his liability or absolve himself from respon- ility.

Second, as to the carriage bolts. The defendant stated in his er of June 22d that he had a contract for carriage bolts, but was t getting prompt shipment; that as to those he could enter an ler for a reasonable amount with the manufacturers, but could t guaranty prompt shipment. The plaintiff's letter of June 24th sumed that the same price would be asked by the defendant for e carriage bolts as for the machine bolts, then states that the car- ge bolts must be put up in packages duly labeled, and adds, indly place this order with the factory and advise us how soon may look for shipment." Up to this time there had been no tement of the quantity that the defendant would undertake to nish or the price that he would ask the plaintiff; but in his let- of the 26th, without referring to the condition that the carriage lts should be put up in packages duly labeled, he accedes to the ms of the sale with reference to price, and adds, "You will of urse understand that I assume no responsibility in this sale, and nply get them for you in this way, provided I can purchase them I have been assured that I could." He had indeed stated in his evious letter that he had a contract with the manufacturer, but at he would not guaranty prompt shipment; and in his letter senting to the price stated by the plaintiff he qualifies the offer th a statement that he assumes no responsibility, and simply gets em for the plaintiff provided he could purchase them as he had en assured he could. There had been up to the date of this let- no absolute offer and no absolute acceptance of an offer. The gotiations were in an inchoate state. The offer being thus re- icted as to liability on the part of the defendant, we are of opin- n that if there was acceptance of the offer at all, as indicated by osequent delivery and receipt of the goods, it was an acceptance on the terms stated in that letter, namely, that the defendant was t to be responsible for nondelivery of the carriage bolts, but that e plaintiff must take the risk of delivery under the manufacturer's ntract with the defendant.

It is insisted, however, that these contracts are not contracts of le, but contracts evidencing agency only. This contention is edicated chiefly upon the use of the word "commission." Un- ubtedly that word is usually employed to mean "the compensa- n allowed agents, factors, executors, trustees, receivers, and other rsons who manage the affairs of others in recompense for their rvices." Bouvier's Law Dictionary, 340. Standing alone, the pression may be strong to show an agency. But in placing a nstruction upon this correspondence we must have regard to the tire agreement to determine the meaning of any part of it. Union

Stock Yards & Transit Company v. Western Land & Cattle Company, 7 C. C. A. 660, 59 Fed. 49. The rule by which courts should be governed in ascertaining the intent and meaning of a contract is stated in Herryford v. Davis, 102 U. S. 235, 243, 26 L. Ed. 160. It does not depend upon "any name which the parties may have given to the instrument, and not alone on any particular provisions it contains disconnected from all others, but on the ruling intentions of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for." Within this rule of construction, is it possible to regard the defendant as an agent of the plaintiff? In his letter of June 22d the defendant states that his proposition was that "I could sell you an unlimited quantity of machine bolts at 80% off, f. o. b. So. Bend, and that I would charge you 5% commission on same. * * * I should of course get these goods under a contract, and you will understand the necessity of not mentioning this fact." He urges promptness in forwarding the specifications, as his contract with the manufacturer expires July 1st. He states that he also had another contract for carriage bolts with other parties. Does an agent offer to sell to his principal the goods which he is employed to purchase? Can he act as agent for the proposing purchaser with respect to goods which he himself had contracted to purchase from another? The price of the goods was to be paid to him, not to the manufacturer. The substance of his correspondence is that he had contracted with the manufacturers mentioned by him for the sale to him of these bolts, presumably at the list price less 80 per cent. discount. He proposed to sell these goods to the plaintiff at the price he was to pay for them, plus 5 per cent. as profit to himself. He calls this "commission." It was not commission, it was a profit; and the misuse of the term cannot convert into an agency what was in fact a sale. We are to look at the essential nature and preponderating features of the letters and not at particular expressions in isolated parts. Misfitting or misleading names may be easily applied, but they cannot be permitted to change the legal nature of a contract. Presumably under his contracts with the manufacturers the goods were deliverable to him at the place of manufacture in Ohio. He undertook to deliver them to the plaintiff free on board cars at South Bend. If this were a contract of agency, and the transaction was simply the placing of an order by the plaintiff with the manufacturers through the agency of the defendant, there would have been no such provision in the contract. They would have been shipped directly from the manufacturer to the plaintiff. If the defendant were simply the agent of the plaintiff to purchase these goods, why should the agent speak of his guarantying prompt shipment? The expression in the plaintiff's letter of June 24th, "Kindly place this order with the factory and advise us how soon we may look for shipment," does not import an agency. Under the defendant's offer to sell, the plaintiff, knowing that the defendant had contracted with certain manufacturers for the delivery to him of these bolts, sent to the defendant the specifications. The plaintiff by this expression, common in business correspondence, merely sought for

pedition in the fulfillment of the contract. Looking at this correspondence from the four corners of it, it is inconceivable to us that any principle of agency can be applied to it.

The judgment is reversed and the cause remanded, with direction to the court below to overrule the demurrer with respect to the first count of the amended declaration, and to sustain it with respect to the second count.

HYGIENIC FLEECED UNDERWEAR CO. v. WAY.

(Circuit Court of Appeals, Third Circuit. May 10, 1905.)

No. 6.

UNFAIR COMPETITION—INDIVIDUAL NAME—RIGHT TO USE.

Defendant Way, while manager of a knitting company, invented a muffler, which he patented. He permitted a corporation to manufacture and sell the article under the name "Way's Mufflet," without objection, during his connection therewith, until the goods became well known in the market under the name "Way" or "Way's"; whereupon, not having sold his patent, defendant severed his connection with the company, and himself began manufacturing and selling the article under the name "Way's Muffler." *Held*, that both the successor of the corporation and defendant were entitled to use the name "Way" or "Way's" in the manufacture and sale of such muffler, provided that such words were used in connection with others clearly indicating the manufacturer of the particular article.

[Ed. Note.—Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

SAME—PATENTS—OWNERSHIP.

Where both complainant and defendant were entitled to use the name "Way" or "Way's" in connection with a patented muffler, but defendant was the owner of the patent, the use of the words "manufactured and owned by Hygienic Fleeced Underwear Co. Inc. Phila.," in connection with such words, by complainant, was objectionable as including the words "and owned," as they indicated that complainant alone had the right to make and sell goods of the kind to which they related.

SAME—TRADE-MARK—DESCRIPTIVE NAME.

A manufacturer of neck scarfs could not acquire a trade-mark in the word "muffler," so as to preclude the use of the word "mufflet" by another, such words being merely descriptive of the article.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 6.

Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to Searle & Hereth Co. v. Warner, 50 C. C. A. 323.]

SAME—"PATENTED."

Where defendant, while in the employ of complainant's predecessor, invented and patented a neck scarf, and complainant thereby acquired an implied license to manufacture and sell the same, but defendant never transferred the patent, complainant had no right to use the word "patented" on neck scarfs manufactured by it.

SAME—PACKAGES—SIMULATION.

Defendant, immediately after beginning the manufacture of patented neck scarfs, adopted a new and characteristic top for the pasteboard boxes used by him, consisting of a white ground, on which were printed in dark blue ink several figures of men and women wearing the muffler, indicated by a dotted line pointing to it directly, with the words, "There it is." The lid also contained the words, printed in blue ink: "A per-

fect chest and throat protector. Don't go over your head. Way's Muffler. For men, women and children. As easily put on as your hat. A sure guarantee against colds." Some of such words and figures had been previously used by complainant's successor, but the combination was wholly new; after which complainant began using a similar lid, printed in a slightly lighter shade of blue, but almost identical in appearance, showing the muffler on figures, with the dotted line, and the phrase, "That's it," the other words being: "Way's Muffler. Don't go over your head. Way's Muffler. For men, women and children. As easily put on as your hat. Way's Muffler." *Held*, that the differences in complainant's package were insufficient to avoid confusion, and that the use of such package constituted unlawful competition.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 81.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 133 Fed. 245.

Hector T. Fenton and Wm. P. Preble, Jr., for appellant.

Henry N. Paul, Jr., and Joseph C. Fraley, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This case was decided below upon bill and cross-bill, the other pleadings, and the proofs. Each party charged the other with unfair competition in trade and with wrongfully using certain trade-marks or trade-names. These charges only are now to be dealt with. No question respecting either the validity or infringement of the patent hereafter mentioned is for present consideration. The appellant was complainant in the original bill. The decree appealed from dismissed that bill, and specifically ordered as follows:

"(2) That the said Hygienic Fleeced Underwear Company, its servants, attorneys, agents, and workmen, be perpetually enjoined and restrained from using the word 'Way' or the word 'Way's' in any manner in connection with its goods; and, further, from marking the goods referred to in the cross-bill with the word 'patented' as of the date of the patent of John Howard Way, or from marking said goods as 'Patented'; and, further, from asserting or indicating that it has any ownership in the patent of the said John Howard Way, relating to said goods, or any proprietary interest therein or license thereunder; and, further, from using the box lid which it has heretofore used and which is similar to the box lid used by the said John Howard Way; and, further, from imitating in any manner the trade dress or package or other advertising matter of the said John Howard Way, or the Way Muffler Company, in such manner as may be likely to deceive the public, or mislead it into the belief that the goods are of the manufacture of the said John Howard Way, or the said Way Muffler Company, or that the business of the Hygienic Fleeced Underwear Company is in any way connected with the business of the said John Howard Way or the said Way Muffler Company."

This decree, though in part correct, was in some respects erroneous. The bill of the Hygienic Company should not have been dismissed, and it should not have been restrained from using the word "Way" or the word "Way's," although it should have been required to connect therewith a clear, and otherwise unobjectionable specification of that company as the manufacturer of the goods. J. Howard Way should have been enjoined from marking the gar-

ments produced by him with the words "Way's Muffler," without, n connection therewith, clearly designating said J. Howard Way as he manufacturer thereof. On the other hand, the Hygienic Company was properly enjoined from using the word "Patented," and rom using a box lid similar to that of John Howard Way.

That, generally, no person has a right to attach to his goods the surname of another dealer in similar goods of course must be conceded. But such a right is not incapable of acquisition, and the record before us shows that the right to use the word "Way" or "Way's," as claimed by the Hygienic Company, was lawfully acquired by it. On November 16, 1897, a patent was issued to John Howard Way for "a chest and neck protector." He was at that time and prior thereto the manager of the Way Manufacturing Company, whose inclusion of his name in its corporate title was approved, and perhaps suggested, by him. Under the license implied from the fact that he had made the invention while in its employ, and with his assent, the Way Manufacturing Company put the patented article on the market, marked "Way's Muffler, patented Nov. 16, 1897." Hence it appears that the use of the words "Way" and "Way's" by the Way Manufacturing Company, in association with the garment in question, was fully authorized; and that its right to so use them devolved upon the Hygienic Company, as the assignee and successor of the Way Manufacturing Company, is indubitable. The contention that the "meaning" of the word "Way's" "was to indicate that the article was invented by, patented to, and therefore owned by, J. Howard Way," cannot be sustained. Mr. Way testified that the word "Way" was adopted as part of the corporate name of the Way Manufacturing Company, because it was "manufacturing goods which the word 'Way' had been associated with, and had gained a reputation which they wished to continue," and we have not been convinced that when the same word was used in its possessive form it was intended to have a different significance. Even in that form it signified to the public, not that the article was patented to and was owned by J. Howard Way, but that the goods with which it was associated were those known as "Way's" and which "had gained a reputation." For this purpose, then, but not for the purpose of indicating ownership of the patent, the Hygienic Company has the right to use both "Way" and "Way's," but only in connection with a clear specification that the article to which it applies either of those words is the product of that company. This condition it has complied with, though not quite satisfactorily, by marking the articles which it produces: "* * * Manufactured and owned by Hygienic Fleeced Underwear Co. Inc. Phila." The objection to this phrase is that the words "and owned," as they occur in it, may be taken to mean that the Hygienic Company alone has the right to make and sell goods of the kind to which it is related, and for this reason those words should be eliminated. In other respects the statement is unexceptionable, and is an adequate one.

J. Howard Way, as well as the Hygienic Company, has a right to use the word "Way" or "Way's." In holding that the latter is

entitled to use them, we have already pointed out that (with Mr. Way's assent) they had been employed and were recognized by the trade as indicative of the character of the goods, and not, necessarily, of the identity of their maker. Therefore, the Hygienic Company, while it is at liberty to use them, has no repressive title to them. They may be rightfully employed by each party. But Mr. Way, like the Hygienic Company, should be required to connect them with a clear specification that the article to which he applies either of them is his product, and not that of his competitor. The reason upon which the imposition of this requirement rests is applicable to both of these parties. Singer Mfg. Co. v. June, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

The name "muffet" belongs solely to the Hygienic Company. It is its trade-mark. But, in our opinion, the word "muffet" is not, under the trade-mark law, preclusive of the word "muffler." That the proprietor of a valid trade-mark is entitled to protection against its simulation by any colorable, though not exact, imitation of it, is undoubtedly true, and the close similarity of the word "muffler" to the word "muffet" is apparent. Yet it has been well settled that no one can acquire the exclusive right to call any article by a common name which appropriately designates it; and "Muffler—anything used to muffle or wrap up" (Cent. Dict.)—is an ordinary English word, which fitly denominates the article here in question. Therefore, the Hygienic Company could not, if it had assumed to appropriate that precise word, have prevented its use by others, and what it could not have directly accomplished it cannot indirectly achieve. Where two persons are engaged in selling like goods, there is no way by which either of them can acquire the exclusive privilege to aptly designate and describe them. Bickmore Co. v. Karns (C. C. A.) 134 Fed. 833; Heide v. Wallace (C. C. A.) 135 Fed. 346.

That the Hygienic Company was properly enjoined from using the word "Patented" is plain. It has no interest in the patent which was issued to John Howard Way, nor any license under it.

That part of the decree which enjoined the Hygienic Company "from using the box lid which it has heretofore used, and which is similar to the box lid used by the said John Howard Way," was fully justified by the facts, which the court below correctly stated as follows:

"In September, 1899, immediately after starting in business for himself, the defendant adopted a new and characteristic top, or lid, for the pasteboard boxes used by him. The ground was white, and upon it were printed in dark blue ink several figures of men and women wearing the muffler, which is indicated by a dotted line pointing to it directly, and by the words 'There it is.' The other words on the lid, which were also printed in blue ink, are as follows: 'A perfect chest and throat protector. Don't go over your head. Way's Muffler. For men, women and children. As easily put on as your hat. A sure guarantee against colds.' Some of these words and figures had been previously used by the Way Manufacturing Company in its placards and other advertising devices, but the combination is wholly new. After the defendant adopted this lid, the Hygienic Fleeced Underwear Company began to use a lid, also a white ground, printed in a slightly lighter shade of blue, but almost identical in appearance. The figures differ somewhat, but each shows the muffler, and several have the dotted line, and the phrase, 'That's

it.' The other words on the lid are these: 'Way's Mufflet. Don't go over your head. Way's Mufflet. For men, women and children. As easily put on as your hat. Way's Mufflet.' There are some differences, as will be observed, but the two lids are so much alike that without careful inspection one might easily be taken for the other."

The decree of the Circuit Court is reversed, and the cause will be remanded to that court, with direction to enter a decree (without costs to either party) perpetually enjoining J. Howard Way, his agents, servants, and representatives, from marking garments manufactured by him with the words "Way's Muffler" without clearly and unmistakably specifying in connection therewith that such garments are the product of said John Howard Way; and perpetually enjoining the Hygienic Fleeced Underwear Company, its agents, servants, and representatives, from marking garments manufactured by it with the word "Way" or the word "Way's," without omitting the words "and owned" from its otherwise sufficient specification that the garments are the product of that company; and from marking the goods referred to in the cross-bill with the word "Patented," as of the date of the patent issued to John Howard Way, or from marking said goods as "Patented"; and, further, from using the box lid which it has heretofore used, and which is similar to the box lid used by said John Howard Way, or from imitating in any manner the trade dress or package of the said John Howard Way in such manner as would be likely to deceive the public or mislead it into the belief that the goods are of the manufacture of said John Howard Way.

It is further ordered that all the costs upon this appeal shall be equally divided, and that each party shall pay one-half thereof.

MAYHEW v. BRODERICK COPYGRAPH CO. OF NEW JERSEY et al.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1905.)

No. 1,135.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

See 131 Fed. 92.

Before JENKINS and BAKER, Circuit Judges.

PER CURIAM. Now this day come the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Walter H. Chamberlin, counsel for appellant, and by Mr. S. O. Edmonds, counsel for appellee, and the court having heard the same and now being fully advised, it is now here ordered, adjudged, and decreed by this court that the decree of the Circuit Court of the United States for the Eastern District of Wisconsin (131 Fed. 92) be, and the same is hereby, affirmed, with costs.

KOTTEN v. KNIGHT.

(Circuit Court, D. Maryland. March 29, 1905.)

PATENTS—INVENTION AND INFRINGEMENT—PNEUMATIC SURFACER.

The Kotten patent, No. 701,580, for a pneumatic surfacer for dressing the surface of stone, embodies a combination of elements some of which were old, but which resulted in producing the first entirely successful machine in the art, and discloses invention. Also *held* infringed.

In Equity. Suit for infringement of letters patent No. 701,580 for a pneumatic surfacer, granted to Herman G. Kotten June 3, 1902. On final hearing.

Arthur Steuart and E. Hayward Fairbanks, for complainant.
John Watson, Jr., Howard A. Coombs, and W. H. De C. Wright, for defendant.

MORRIS, District Judge. This is a bill of complaint in equity in usual form for an injunction and an account for infringement of patent. The complainant's patent is No. 701,580, June 3, 1902, for a pneumatic surfacer frame for holding a traveling pneumatic tool for dressing the surfaces of blocks of granite or other hard stone and producing a true plane. It was conceded at the argument that, if claims 2, 3, 11, and 13 of the patent are valid, the infringement by the defendant cannot be disputed. The following is a general description of the complainant's machine, taken from the brief of complainant's counsel:

"Complainant's machine and patent consist of a hollow post mounted upon a portable base, and having projecting from it a lateral arm capable of being turned about the post and supported at its outer and inner extremities by means of a peculiar and highly advantageous double sheave construction, whereby sagging at the outer end is prevented and the lateral arm is supported at any desired point, while at the same time the strain by means of the double sheave construction is distributed upon opposite sides of the post. The arm is formed by 'I' irons so arranged as to form a rigid support, and carries thereon a carriage of peculiar shape. This carriage is triangular in form, and is mounted upon two upper rollers pivoted in apexes. * * * The cars upon the side of the triangular carriage carry rods which support a suitable pneumatic tool of the type shown in the patent. The construction of the laterally extending arm of the complainant's machine is of such a nature that great rigidity is obtained, and through the medium of the connection 29 [a cord or wire extending from the top of the post to the end of the lateral arm, and which passes over 5 rollers] the arm can be raised or lowered with the greatest facility."

Claims 2, 3, 11, and 13 are as follows:

"(2) The combination of a post, an arm secured to a sleeve rotatably mounted thereon, a carriage movably supported on said arm, a drum carried by said arm, rollers carried by said post, a roller secured to bearings on said sleeve, said bearings projecting therefrom in an opposite direction to said arm, a connection passing around each said rollers and leading from an end of said arm to said drum, and means of rotating the latter.

"(3) In a surfacer-frame, a post, a sleeve surrounding said post and adapted to be moved thereupon, an arm projecting from said sleeve and secured thereto, tracks formed on the upper and lower surfaces of said arm, a carriage movable upon said tracks, said carriage having strips on either side thereof, rods supported by said strips, plates carried by said rods, a pneumatic tool supported upon said plates and means for raising and lowering said arm."

"(11) The combination of a post, a laterally-extending arm rotatably mounted thereupon and having an upper and lower track thereon, a carriage movable upon said tracks, strips on either side of said carriage, rods supported by said strips, plates carried by said rods, a pneumatic tool supported between said plates, a drum carried by said arm, rollers carried by said post, a connection passing around said rollers, and leading from said arm to said drum and means for rotating the latter."

"(13) The combination of a post, a sleeve rotatably mounted thereon, an arm projecting laterally from said sleeve and having tracks thereon, a roller mounted on said sleeve and extending in a direction opposite to said arm, a drum carried by said arm, a cap rotatably mounted on the upper portion of said post, two series of rollers carried by said cap and a connection extending from said drum around one pair of the rollers carried by said cap, thence downwardly around the roller carried by said sleeve, thence upwardly over the other set of rollers carried by said cap, the outer extremity of said connection being secured to an end of said arm."

The defense relied upon is a want of patentable novelty in view of the state of the art as disclosed by the prior patents cited. Of these, those most relied upon, among many other patents, are the patents of Hall, Moore, Oldham, and Marsh, Williams and McCoy. The Hall patent, No. 259,134, June 6, 1882, is for a machine for dressing or polishing stone, constructed as is the complainant's by attaching a crane-like arm to an upright post with a cord arrangement by which the arm can be raised or lowered; but there all resemblance ends. The upright post is rigidly attached to an immovable upright. The arm is not rigid, but is jointed, and is made to carry two vertical shafts by which the grinding and polishing wheel can be moved over all the surface of the stone to be dressed. The grinding wheel is rotated by a system of pulleys and belts operating upon the shafts of the jointed arm. Similarly in the patent to Moore, No. 541,978, July 2, 1895, for a stone-polishing machine, there is no horizontal rigid arm, but a jointed swinging arm with nothing to support it at the end, and with pulleys and belts to furnish power. In these machines the polishing disk rests upon the surface of the stone intended to be polished, so that there is no suggestion of sustaining the tool in a true plane over the stone. It is true that in the various patents for lifting cranes and for stone polishing and cutting devices which have been put in evidence there are found in one and another devices more or less similar to those used in the complainant's machine, but there is no one combination that is its equivalent, or which has proved practically useful. The Marsh, Williams and McCoy stone-dressing machine, patent No. 549,273, November 5, 1895, which is a machine intended to accomplish the same results by somewhat similar means, proved so inefficient that the manufacturers of the defendant's machine discarded it, and replaced it with machines made in accordance with complainant's patent. The evidence is very full to the effect that the merits of the complainant's machine are widely acknowledged, and that it has succeeded where all previous machines have failed. It is testified by those who use it that it is the first practical and satisfactory surfacer placed upon the market; that it does the work of eight or nine men and saves about $20 a day over hand labor. Surely, with this great saving

as an incentive, if any of the earlier patented machines were really practical, there would be manufacturers ready to put them on the market constructed in the most perfect manner. The makers of the defendant's machine attempted this with the Marsh, Williams and McCoy machine, but did not succeed. It is fair to infer that there is something in complainant's combination which the earlier patents did not attain, and which it has required invention to accomplish.

The result which principally distinguishes the complainant's machine is that it makes the pneumatic tool produce a true horizontal surface, and it accomplishes this greatly desired result primarily by two elements in the combination which are not shown in any prior patent. The first is that the extreme end of the long radial arm is guyed and sustained by a wire cord running to the top of post and carried over a revolving cap on its top over rollers down the opposite side of the posts to the back of the sleeve surrounding the post, and thence back over the revolving cap of the post to a drum and ratchet on the arm. This arrangement obviates the difficulty of the end of the arm carrying the tool sagging and destroying the true horizontal surface of the stone. The second important element is that the surfacing tool is held in a carriage made with strips and rods and plates as described in the specification mounted on an arm having an upper and a lower track. The wire cord arranged as described and made fast to the extreme end of the arm prevents the arm from sagging, and the method of constructing the carriage and the double track of the arm give steadiness to the tool. To have constructed a machine which so successfully meets the requirements of a practical machine when so many other patented contrivances were failures does indicate something more than mere mechanical improvement, which an inspection of the machine as compared with the earlier ones confirms.

The only details in which the defendant's machine differs at all from the complainant's are not material. The tool carriage of the complainant has rollers on the upper and on the lower tracks of the "T" beams constituting the horizontal arm, while in the defendant's carriage for the lower rollers there is substituted a sliding shoe—an immaterial substitution of a well-known equivalent. In defendant's contrivance for affixing the pneumatic tube to the carriage and holding it there is some slight immaterial difference of mechanical construction.

Many important patented automatic machines designed to cheapen production by using power instead of hand labor are the result of old elements made to co-operate in some new manner to produce highly beneficial results. In such cases the fact that the new machine at a higher price has superseded machines under earlier patents intended to accomplish the same results is in a doubtful case sufficient to turn the scale in favor of invention. Magowan v. N. Y. Belting Co., 141 U. S. 333-343, 12 Sup. Ct. 71, 35 L. Ed. 781; Walker on Patents, § 40.

I will sign a decree granting the relief prayed and making the injunction perpetual.

GENERAL ELECTRIC CO. v. CAMPBELL.

(Circuit Court, D. New Jersey. May 12, 1905.)

1. PATENT—DEMURRER—WHEN SUSTAINABLE.

A demurrer to a patent can be sustained only when the question of invention is free from doubt. There must be in the mind of the court an absolute conviction of the lack of invention, and if there is any doubt on this point the case must be decided adversely to the demurrant.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 536.]

2. SAME—LAMPS.

Demurrer to patent No. 726,293, for new and useful improvements in exhausting lamps, overruled.

(Syllabus by the Court.)

In Equity.

Richard N. Dyer and John Robert Taylor, for complainant.
A. Parker-Smith, for defendant.

CROSS, District Judge. The bill of complaint alleges infringement of letters patent No. 726,293, granted to one John W. Howell, and assigned to the complainant. The defendant has demurred to the bill; assigning for cause that said patent is void, in law, for lack of patentable invention and novelty.

Various reasons have been given by the courts in justification of the practice of questioning the validity of a patent by a demurrer, but it is unnecessary to refer to these, since the practice has long been thoroughly well established. It is likewise clearly well settled that a demurrer can be sustained in such cases only where the question of invention is free from doubt. There must be in the mind of the court an absolute conviction of the lack of invention. If there is any doubt whatever on this point, the case should be decided adversely to the demurrant. Moreover upon demurrer the court will consider only matters shown upon the face of the patent, and matters of common and general information, known to the court to be reliable, and to have been published prior to the application for the patent. Among the many authorities supporting these views are American Fibre-Chamois Co. v. Buckskin Fibre Co., 72 Fed. 514, 18 C. C. A. 662; Indurated Fibre Industries Co. v. Grace (C. C.) 52 Fed. 128; Dick v. Oil Well Supply Co. (C. C.) 25 Fed. 105; Lyons v. Drucker, 106 Fed. 416, 45 C. C. A. 368.

The patent in suit is for "new and useful improvements in exhausting lamps," and the patentee's method of doing this can best be given in his own language:

"My present invention relates to the manufacture of incandescent electric lamps, and particularly to the now well-known chemical processes of exhausting the bulb. These processes have come into some use, and they depend for their utility upon the fact that the ordinary mechanical or mercurial pumps are incapable, without considerable expense of time, of obtaining the necessary perfection in the vacuum which is required for any extended life of the filament. In order to save the extended treatment necessary under the pump, the chemical processes referred to have been used; they consisting in introducing within the vacuous inclosure, and generally within the same tube which is used in exhausting, and which is afterward sealed off in making the

completed lamp, a chemical which will readily combine, when heated, with the remnant of gases which are released during the final incandescence of the filament in the process of manufacture. In the ordinary ways of using these processes, the selected chemical is placed in the tubulature of the lamp. After the vacuum is obtained as far as desired by mechanical means, the tubulature is sealed below the chemical. The filament is then brought to intensive incandescence, and the chemical heated to drive vapors in the lamp-bulb, which by combination perfect the vacuum. The tube is then sealed above the chemical, or between it and the lamp; the superfluous portion of the tube being, as usual, cut off. The process thus outlined is, however, open to some objections. Among others, it is found that the application of heat to the tube in the first sealing is apt to volatilize too much of the chemical; introducing too much vapor within and tending to discolor the bulb of the lamp. The moment of best exhaustion by the mechanical pump must also be seized to perform the first sealing off of the lamp. This, however, is a definite moment, while the sealing occupies several seconds, at least. In addition, there is more or less loss from collapse of the tubes, permitting air to leak into the bulb. These objections are obviated by the improved method of exhaustion which I adopt. In this I connect the lamp-bulbs, as usual, to the mechanical pump; but I employ for the purpose a piece of very thick and substantial rubber tubing, which is slipped over the pipe leading to the pump, and into the end of which the lamp-tubulature is inserted after the chemical has been placed in the latter. I find this a convenient and reliable form of connection, which is capable of being closed with promptness by an ordinary pinch-cock, and one which will maintain the vacuum unimpaired long enough to effect the final exhaustion of the lamp by chemical means. It is, of course, understood that, so long as the connection to the pump is open, it is difficult to obtain a proper vacuum in the bulb. After the connection to the pump is closed, the lamp-filament is brought to incandescence, the chemical being, if necessary, also heated slightly; but as this operation is, in my process, practically independent of sealing, it may be performed with some exactitude. The tube is then sealed off, and the lamp is completed in the usual way. The essence of my invention therefore consists in the closing of the connection between the lamps and the pump without the use of heat, so that an excess of the chemical used to perfect the vacuum is not volatilized. It consists, also, in the detail of the process by which I am enabled, in addition to the advantages already pointed out, to perform the sealing operation much more expeditiously, and with a saving in the amount of tube necessary under the old process."

There are three claims in the patent, somewhat variant, but, as connected with the invention under consideration, they are limited in the first claim to "closing the pump connection below the chemical without the use of heat"; in the second claim, to "closing the pump connection below the chemical without heating the tube"; and, in the third claim, to "closing the connection between the pump and the bulb without the aid of heat." Thus all of the claims state the invention to consist substantially in closing the connection between the air pump and the bulb without the aid of heat, which appears from the specifications to have been the former method of treatment. The patentee does this by means of a piece of very thick and substantial rubber tubing, instead of glass tubing, which rubber tubing is capable of being quickly closed by an ordinary pinch-cock. The means used are undoubtedly very simple, and both of the elements are old, and probably have been used, and often used, in combination before, but for a purpose entirely different. From the specifications, there would seem to have been various objections to the prior method of closing the tube by heat, and it is not improbable to suppose that this method had become so

ommon and well recognized as to create the impression that it ould not be done cheaply, conveniently, or quickly otherwise. Whether this be so or not, however, can only be definitely ascer-ained by evidence; but, if true, the use of the rubber tube and a inch-cock were so remote from their former use, and from the ormer method adopted for closing the tube, that a new idea was uggested, which appears to involve invention. It certainly seems ovel to use rubber tubing as an element, instead of glass tubing, n a place where intense heat had hitherto been applied. The use of ubber tubing under such circumstances certainly was not obvious. n Western Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 5 L. Ed. 294, a torsional spring, such as had been previously used n clocks, doors, and other articles of domestic furniture, was ap-lied to telegraphic instruments; and, its application thereto hav-ng been shown to be wholly new, the patent was held valid.

The application for the patent in suit was filed November 9, 1897, nd the patent was issued April 28, 1903. The matter, therefore, vas before the Patent Office for a number of years, and undoubted-y received careful consideration at the hands of the examiners. Possibly numerous objections were raised by them and answered efore the patentability of the invention was finally demonstrated. Whether any such objections were made or not, we do not know. Ve do know, however, that the patent was finally issued, and that s issuance is prima facie evidence of novelty and invention. On ne determination of the question raised by this demurrer, there is, f course, no evidence for our consideration. We know nothing of ne prior art, and nothing as to the practical working and general tility of the device. We are called upon to decide the question vithout such knowledge as evidence of the above character might nd probably would impart. If the bill is summarily dismissed, ne complainant is denied the right to support by evidence the pre-umption of novelty and invention which arises from the issuance f the patent. We are not able to say that the want of invention nd novelty is so apparent that no possible evidence could be ad-uced to show the contrary. It is not a clear case, free from doubt. Ve are not convinced that the patent does not disclose invention.

The demurrer is overruled.

EASBEY & MATTISON CO. v. AMERICAN MAGNESIA & COVERING CO.

(Circuit Court, E. D. Pennsylvania. May 2, 1905.)

No. 30.

ATENTS—VALIDITY—MACHINE FOR MOLDING TUBES.

The Keasbey patent, No. 397,869, for a machine for molding tubes, *held* void on the ground that the patentee was not the true inventor.

In Equity. Suit for infringement of patent. On final hearing.

Edward K. Jones and Edmund Wetmore, for complainant.

George W. Mills, Jr., and Kenyon & Kenyon, for respondent.

J. B. McPHERSON, District Judge. The patent in suit, No. 397,860, was issued to Henry G. Keasbey, and is for an improvement in machinery for molding tubes or cylinders. The object of the invention is thus stated in the specification:

"My invention has for its object the production of an apparatus or machine for forming or molding tubes or cylinders of plastic material, such as are employed for covering steam and like pipes, by which the tubes or cylinders are formed perfectly, rapidly, and cheaply.

"To attain the desired objects the invention consists, first, in a peculiar construction of mold for forming the tube; second, in a press of suitable construction for containing the mold; third, in an improved apparatus for feeding the material to the mold; and, finally, in the novel construction, arrangement, and adaptation of parts, all as hereinafter described and claimed."

The first, third, and fifth claims of the patent are involved, but they need not be quoted, since the case must be decided upon other grounds than are usually considered in patent causes. One of the chief matters in dispute is whether the patentee or Wilfred S. Griffiths is the true inventor of the machine in controversy, and upon this point an attempt to reconcile the testimony would be idle. If I had enjoyed the advantage of seeing and hearing the witnesses I should feel better qualified to judge between the two conflicting accounts that have been presented to the court, but, as I have nothing before me except the cold record, I must rely largely upon the tests of inherent probability and corroboration. So far as the former test is concerned, there is not much to choose, I think, between the contradictory statements of the rival claimants. Standing by itself, each account is plausible, and each is susceptible of attack at certain points, as the briefs of counsel have not failed to make clear. In a position of such perplexity I have, therefore, felt bound to give considerable weight to the corroborating testimony of several other witnesses which supports the account offered by Mr. Griffiths. It would be profitless to set out in detail the conflicting evidence, and I have sufficiently outlined my reasons for reaching a conclusion to which I might not have felt obliged to come if the witnesses could have been examined in my presence. I shall therefore only add that, in my opinion, the weight of the evidence seems to establish the fact that the patented device was invented late in the year 1885 by W. S. Griffiths. The patent is therefore invalid, because it has been granted to another person.

A decree may be entered dismissing the bill, at the costs of the complainant.

WESTERN TELEPHONE MFG. CO. v. AMERICAN ELECTRIC TELEPHONE CO. et al.

(Circuit Court, N. D. Illinois. March 7, 1905.)

No. 24,516.

PATENTS—SUPPLEMENTAL BILL FOR INFRINGEMENT—SUCCESSOR OF DEFENDANT. Complainant obtained a decree against an Illinois corporation for an injunction and accounting for infringement of a patent, and thereafter filed a petition, in the nature of a supplemental bill, against a New Jersey corporation having the same name as the original defendant, alleging

that, pending the suit, the latter had transferred to it all of its property and good will, receiving payment partly in cash, but principally in the stock and bonds of the purchasing company. It also alleged that the latter company, after the transfer, conducted the defense in the suit, and prayed that it be brought under the injunction, and also be adjudged to pay whatever damages should be recovered on account of its own and its predecessor's infringement. *Held* that, while the petition stated ground for the injunctional relief, it showed no right to the other relief prayed for, and was, moreover, multifarious, being in its latter aspect essentially a creditors' bill.

n Equity. Suit for infringement of patent. On demurrer to tion in the nature of a supplemental bill filed after decree.

oburn & McRoberts, for complainant.
ulkley & Durand, for defendant.

OHLSAAT, Circuit Judge. This cause comes before the court demurrer to complainant's petition filed in this cause, praying the American Electric Telephone Company of New Jersey be le a party to said cause and bound by the terms of the decree ered herein on June 3, 1904, and for an order restraining said v Jersey corporation from violating petitioner's rights under ent No. 521,461, granted to H. M. Fisk, June 19, 1894, for a com- ed annunciator and spring jack for telephone switchboards; for an accounting as to acts both of itself and the defendant in original suit—the Illinois corporation of the same name—the er, it is alleged, being one of the constituent members of said v Jersey corporation; and for other relief. The petition is in nature of a supplemental bill, but is not in proper form. No eption, however, is taken to the form by defendants. The peti- will therefore be considered as a supplemental bill for the pur- es of this motion.

t is not alleged in the petition, but does appear from the record, the original bill was filed herein on the 19th day of May, 1897. m the allegations of the petition, and from the exhibits at- ed thereto, it appears that after the filing of the bill, and about v 1, 1900, the original defendant, the Illinois corporation, con- ed its assets, good will, etc., to the New Jersey corporation, and ived therefor the following consideration: Debenture bonds he New Jersey Company, $140,000; preferred stock of the New sey Company, $275,000; common stock of the New Jersey Com- y, $900,000; cash, $50,000. The New Jersey Company also ac- red the Victor Telephone Manufacturing Company. So that New Jersey company had the tangible assets of these two plants. a part of the scheme, the New Jersey company was to provide a king capital of $75,000. The principal owners of the stock of Illinois company and the Victor Company thereby became the ers of a majority of the stock of the New Jersey company and ers thereof. Thereafter the Secretary of State for Illinois is- d a certificate to the effect that the charter of the Illinois com- y was canceled. This, however, is not the method prescribed law for revocation of the charter, so that, for the purposes of ling up its affairs, so far as appears in this record, the Illinois

corporation is still in existence. People v. Rose, 207 Ill. 352, 69 N. E. 762. It is not alleged in due form in the petition that the Illinois corporation is insolvent. On the other hand, the defendants insist that the petition shows that the choses in action, book accounts, etc., were never transferred. The petition further charges that the New Jersey corporation has heretofore defended the original suit. This is admitted by the demurrer.

It is complainant's contention that the transaction between the two companies constituted either a consolidation, or continued the Illinois defendant's business under a new name, and that, under the law of Illinois, the New Jersey company is liable in this proceeding to complainant for claims it holds against the Illinois company, at least to the extent of the assets received by it from the latter. It is sought also by this petition, not only to restrain the New Jersey company from infringing according to the terms of the decree of June 3, 1901, but also to subject the property of said company to the payment of all amounts due in an accounting, and for damages from both the original and supplemental defendant. Defendants' demurrer is general and special. The first special ground of demurrer is that the bill is multifarious, and the second sets up similar cause; the third is that the original defendants are not made parties; the fourth is that there is no privity between the two defendant corporations; the fifth is that there exists a misjoinder of defendants, the sixth is that the petition alleges conclusions instead of facts.

Undoubtedly, in a proper case, complainant would be entitled to have the New Jersey corporation brought in by supplemental bill, even after decree. Story's Equity Pleading, § 338. The complainant seeks to obtain relief in this case on the ground that a fraud was perpetrated by defendant when the property was transferred to the New Jersey Company. There is no more evidence of this than the allegation of the petition to that effect. The exhibits to the bill show a transfer of a large amount of cash, as well as bonds, and seem to indicate a valid transaction, as against a mere allegation, even when a demurrer is filed, which ordinarily admits every allegation which is well pleaded. There is nothing in the facts which would give complainant a right to subject the New Jersey corporation to the payment of a mere money decree against the Illinois company. Yet it is here attempted to subject it to the payment of whatever is found due therefrom on accounting, and all damages growing out of transactions of the Illinois company. It may, perhaps, be conceded that in a proper case the New Jersey company, having purchased, pendente lite, whatever right defendants had to manufacture and handle the infringing device, continuing to do so, could be made a party to the suit through the filing of a proper supplemental bill, and subjected to the injunctional order, but it would be beyond the power of a court to combine with this relief an order laying hold of the assets obtained by the New Jersey company from the Illinois company, for a valuable consideration, for the purpose of satisfying a sum alleged to be due from the latter to the complainant. As to this item, it seems clear the bill at-

pts to join an ordinary creditors' bill with one for an injunction estrain the infringement of a patent. For the purposes of accomplishing this latter result, i. e., subjecting the New Jersey company to the injunctional order, there is, I think, clearly a case made the petition for this relief, as well as for an accounting and the ssment of damages against the New Jersey company for its own . When, however, it is sought to combine with that remedy a and that any judgment or decree which may be recovered nst the Illinois company be declared to attach to property cond to the New Jersey company, even though conveyed for the pose of evading the effect of any decree which may be obtained nst the Illinois company, then that part of the bill is not only ign to the purpose of such a supplemental bill, but renders the or petition multifarious. For the purpose, also, of this relief, were proper herein, the defendants in the original suit are necesparties defendant to the petition. There arise cases wherein urt of equity, having obtained jurisdiction for one purpose, will l the case for all incidental relief. But this matter is new, and germane to this defendant's liability as an infringer. The case Kinsman & Goddard v. Parkhurst, 18 How. 289, 15 L. Ed. 385, ed on by petitioner, is an authority for the above proposition. hat case the master had made a report finding that Goddard, whom Kinsman had transferred his rights pendente lite, was liafor profits on sales made by Kinsman before the sale. The rt held that the master had misconstrued the decree, but that, having excepted to the report, Goddard was barred from asing the error. While not affirmatively deciding the point above le, the court gives unmistakable intimation in its opinion that such order, if excepted to, would be error.

The demurrer is therefore sustained.

ERSTATE COMMERCE COMMISSION v. SOUTHERN PAC. CO. et al.

(Circuit Court, S. D. California, S. D. December 12, 1904.)

No. 1,039.

NTERSTATE COMMERCE—SUIT TO ENFORCE ORDERS OF COMMISSION—SUPERSEDEAS PENDING APPEAL.

The provision of section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), that, in proceedings thereunder to enforce an order of the Commission, an appeal shall not operate to stay or supersede the order of the court appealed from, is merely declaratory of the general rule in equity, and does not affect the power of the court, under equity rule 93, to grant a stay pending appeal, in its discretion.

AME.

A Circuit Court will not supersede a decree enjoining railroad companies from violating an order of the Interstate Commerce Commission affecting rates, entered in a suit brought by the Commission pursuant to section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), pending an appeal from such

decree, where it does not appear that the damage to defendants from the enforcement of the decree will be greater than that which would result to shippers from its suspension.

In Equity. On motion to supersede decree.
See 132 Fed. 829.

L. H. Valentine, U. S. Atty., L. A. Shaver, and J. H. Call, Special Asst. U. S. Atty., for complainant.
Wm. F. Herrin, Flint & Barker, T. J. Norton, and E. E. Millikin, for defendants.

WELLBORN, District Judge. There are so many matters of importance in the Circuit Court urgently pressing for immediate attention that it is impracticable, even if the exigencies of the pending motion admitted of the delay, for me to take time now to prepare a written opinion herein; and I shall simply announce my conclusions, and then either make the necessary orders this morning, or if, as indicated by Mr. Millikin, further postponement be desired until to-morrow, continue the matter over until that time for final action.

The provision of section 16 of the commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), that an appeal shall not stay or supersede the operation of the final decree, is still in force. That provision was not expressly repealed by, nor is it repugnant to, either Act March 3, 1891, c. 517, § 2, 26 Stat. 826 [U. S. Comp. St. 1901, p. 547], establishing the Circuit Court of Appeals, nor Act Feb. 11, 1903, c. 544, 32 Stat. 823 [U. S. Comp. St. Supp. 1903, p. 376], and Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1903, p. 363], to expedite interstate commerce and other cases, but all are consistent and may well stand together. The rule that repeals by implication are not favored is too elementary to need any citation of authorities in its support.

I have, in the short time allowed for investigation since this matter was last before me, read the Behlmer Case—Louisville, etc., Railroad v. Behlmer, 169 U. S. 644, 18 Sup. Ct. 502, 42 L. Ed. 889—and am of opinion that it is not antagonistic to, but supports, the conclusion which I have announced.

The next question is as to the effect of said section 16. Is it merely declaratory of the general equity practice which existed at the time the commerce act was passed, or was it intended by Congress thereby to exclude interstate commerce cases from the operation of equity rule 93? This, to my mind, is a doubtful question. There are arguments well worthy of consideration on both sides.

In favor of the former construction, for which defendants contend, it may be said that the phraseology of the section does not necessarily import an intention to limit or otherwise affect the operation of equity rule 93. But it must be conceded, in favor of the other side, that, unless the intention of Congress was to limit the scope of rule 93, there was no necessity for the insertion of the provision in the act.

Judge Toulmin, in Interstate Commerce Commission v. Louisville & N. R. Co. et al. (C. C.) 101 Fed. 146, has held that said rovision is only declaratory of existing law, and not intended in ny way to affect rule 93; and, for the purposes of this motion, I nall resolve my own doubts in favor of that interpretation, and assume that equity rule 93 is unaffected by section 16 of the commerce act, and that there still resides in the trial judge discretion, nder suitable circumstances, to stay or supersede the decree nally rendered by him.

This brings me to the question whether or not the pending mo- on presents a case calling for the exercise of said discretion. In rder to justify the exercise of the discretion, or, stating the matter oncretely, in order to justify the suspension of the decree in this ase, it should be made to appear, first, that irremediable loss will esult to the defendants, during the pendency of the proposed ap- eal, from the enforcement of the decree; and, second, that no uch loss will result to the complainant from its suspension.

The two conditions set forth in the preceding paragraph con- titute substantially the familiar equity doctrine of comparative ardships, which under some circumstances is determinative on pplications for provisional or temporary injunctions; that is to ay, under certain circumstances, without stopping to enumerate vhat such circumstances are, the court will grant an injunction if ne damages resulting to the defendant would be less than those esulting to the complainant from its refusal. This rule, it should e observed, however, is applied by courts of equity in advance f any hearing upon the merits, and is therefore the most favorable ule the defendants in the case at bar could invoke, because here nere have been practically two decrees on the merits against them -one the order of the Interstate Commerce Commission, and the ther affirmation of said order by this court.

It may be conceded that the defendants will sustain by the en- orcement of the decree during the pendency of the contemplated ppeal damages, for which no adequate compensation can be found. his concession I make without going into the details or elements f damage, but with the qualification that the amount of damage, n the nature of things, is unascertainable. When I have said that efendants will sustain damages—large or considerable damages, may be—by the enforcement of the decree during the pendency f the appeal, the amount of which, however, is unascertainable, ne case has been stated as strongly in favor of defendants as its ircumstances will permit.

The next question in logical sequence is as to the effect a sus- ension will have upon the complainant; and by "complainant" I do ot, of course, mean the Interstate Commerce Commission, but the ublic at large, or, more directly, the shippers of citrus fruits, of vhom said complainant, as I held by my written opinion upon the nerits, is but the representative in this litigation. In what condi- on, then, would a stay of this decree leave the shippers of citrus ruits? How would it affect them? The decree restores to these nippers the routing privilege. The stay of the decree would

longer withhold it from them. Denial of said privilege to the shippers, as found in my opinion above mentioned, has utterly destroyed competition for this traffic between the Eastern connections of the initial lines; and, to appreciate the advantages of competition, as estimated by the highest judicial tribunal of the land, we have only to read the opinions of the Supreme Court in the Freight Association and Joint Traffic Association Cases, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259.

Mr. Bissell, in his affidavit filed on this motion, says that the shipments of citrus fruits this season will probably be between 25,000 and 30,000 cars. What the benefits of competition may be to the shippers of that vast product cannot be told accurately in dollars and cents, but it would be difficult to overstate them. The strenuous efforts put forth by both parties in this litigation to secure the routing privilege abundantly testify to its great value.

Of course, when I speak of the value of competition to the shipper, I do not include rebates as an element of such value. Rebates flagrantly violate the commerce act, and it is hard to find language strong enough to suitably condemn and stigmatize them. But the remedy for rebates is to be found in the severe penal sanctions denounced against them, and not in pooling arrangements between competing railroads, which are themselves violative of said act. As I said in my previous opinion, already mentioned, one violation of the commerce act cannot be justified on the plea that it tends to or will suppress or has suppressed another infraction of the act.

I repeat, it does not appear from this motion, and counsel for defendants have industriously and with ability presented all that can be said on their side of the question— It has not been made to appear that the damage to defendants will be any greater from the enforcement of the decree than would be the damage to the shippers from its suspension, and this view of the case is conclusive against a suspension of the decree.

There is one other matter which ought to be adverted to, in view of the discussion I invited from defendants' counsel day before yesterday, and that is whether or not the joint tariff is violative of the anti-trust act.

I said then, and subsequent reflection has confirmed me in the belief, that the question last stated might be material on this hearing, for the reason that, if the joint tariff is confessedly or beyond reasonable controversy a violation of the anti-trust act, then, whatever may be its relation to the commerce act, the court would not entertain favorably an application to suspend the decree, because the inevitable and obvious result would be to sanction and promote unlawful transactions.

The record in the case shows, beyond dispute, that the initial carriers have entered into an agreement for a fixed rate upon citrus fruits. In the very beginning of my opinion I find as follows:

"The defendants are initial carriers for the transportation of citrus fruits of Southern California to points on and east of the Missouri river. The termini of the Southern Pacific Company are at Ogden and El Paso. The Santa

Fé terminal is at Chicago. The points of destination located beyond these termini are reached through connecting carriers.

"Pursuant to a previous agreement between the defendants and their Eastern connections, effected through correspondence opened by the circular letter of R. H. Countiss, agent, dated October 9, 1899, hereinafter set forth, and sent out at the instance of defendants to their said connections, a joint tariff relating to citrus fruits, and fixing a through rate thereon of $1.25 per hundred pounds from Southern California to all points east of the Missouri river, was filed with the Interstate Commerce Commission on January 1, 1900."

This finding was embodied in the decree as follows:

"Issue having been joined, the testimony having been taken, and the cause having been duly argued and submitted, and the court being fully advised in the premises, now finds and determines that the allegations of fact made in the bill of complaint herein are true, and that the defendants and their Eastern connections—said connections being different and competing railroads—filed with the Interstate Commerce Commission, pursuant to a previous agreement between them, a joint tariff relating to citrus fruits, and fixing thereon a through rate of $1.25 per hundred pounds," etc.

Said findings are abundantly supported by the testimony, and I believe there is nothing in the record of a contradictory character.

The joint tariff signed by the representatives of the railroads declares on its face the existence of an agreement as follows: "The joint tariffs and rates herein named are made and entered into upon the express condition." Then follows the routing rule. Certainly it cannot be successfully contended, in the face of this language, that there is no contract as to rates.

But Mr. Norton suggests that this is not a contract, within the meaning of the anti-trust law, because it is not binding upon the parties. I find on the face of the joint tariff a clause favorable to Mr. Norton's suggestion: "This tariff contains," etc., "and is subject to change by each company without the consent of any of the other companies whose names appear thereon." The commerce act itself, however, provides, I think, that, where tariffs have been filed with the Commission, there can be no advance of rates except upon ten days' notice, nor even a reduction except upon three days' notice, so that the joint tariff, it would seem, is obligatory certainly for three, and probably ten days. Does the duration of a contract, whether short or long, determine or in any way affect its validity or binding character?

However, it is unnecessary now to determine whether or not the joint tariff in question violates the anti-trust law, since the other views hereinbefore expressed are fatal to the pending motion, and on them my decision is rested.

Said motion will be denied, and the existing stays at once terminated.

In re McKENNA.

(District Court, N. D. New York. May 16, 1905.)

1. BANKRUPTCY—TRUSTEES—APPOINTMENT—LEGACIES.
Where a bankrupt became the owner of a legacy by the death of his testator prior to the filing of his petition and adjudication, but on the same day, such legacy vested in the bankrupt's trustee for administration in bankruptcy.

2. SAME—LEGAL SERVICES—TRUSTEE AN ATTORNEY.
A trustee of a bankrupt, though an attorney, is not bound to perform legal services, but if he does so he cannot have compensation therefor from the estate.

3. SAME—EMPLOYMENT OF COUNSEL.
Where a bankrupt was left a large legacy on the same day he was adjudged a bankrupt, and claimed that he, and not his trustee, was entitled to receive the same, his trustee was justified in employing an attorney to represent him in litigation involving a contest of the will, and also a contested accounting as the administrator with the will annexed, though the bankrupt was also represented by counsel in such proceedings.

4. SAME—ACTS OF ATTORNEYS.
It was not improper for attorneys of a bankrupt's trustee to make out and present formal proof of the claim of a creditor, where nothing appeared to indicate that such attorneys did anything for the creditor that would in any way prejudice the interests of the bankrupt or his estate.

5. SAME—ATTORNEYS' SERVICES.
Where, on the same day a person was adjudged a bankrupt, he became vested with a legacy of $25,000, and his trustee properly employed attorneys to recover such legacy, who, in connection with an attorney employed by the bankrupt, assisted in successfully defending a will contest, and recovering so much of the legacy as was sufficient to pay the claims against the estate of the bankrupt, etc., after having been engaged for a period of fifty days, an order allowing such attorneys $800 for their services was proper.

Review of decision of referee in bankruptcy making an allowance to the attorney for the trustee on objection by the bankrupt.

Lewis E. Griffith, for the bankrupt.
Peck & Behan, for the trustee.

RAY, District Judge. The facts in this case are somewhat peculiar. Isaac Bradt died at the city of Albany, N. Y., on the 29th day of December, 1902, at 8 o'clock and 45 minutes a. m., leaving a last will and testament, in and by which he left a general legacy of $25,000 to said Edward J. McKenna, of the city of Troy, N. Y. Said Edward J. McKenna, said legatee, filed a voluntary petition in bankruptcy in the Northern District of New York on the same day, December 29, 1902, at 10 o'clock in the forenoon, and on the same day, at 2:30 o'clock p. m., he was duly adjudicated a bankrupt. His petition and schedules were verified December 27, 1902; and the circumstances, sickness of Bradt, very frequent visits of McKenna to him, etc., are such that it is not unreasonable to think that McKenna knew he was a legatee in the will, and was seeking to obtain a discharge in bankruptcy prior to coming into such legacy, that he might enjoy it without impairment. How-

ver this may be, at the first meeting of creditors Andrew P. IcKean was duly chosen and appointed trustee of the estate of such ankrupt, and he still is such trustee. Said trustee was an attorney nd counselor of the Supreme Court, in good standing, learned in he law, and capable of taking care of all legal matters in which the rustee might be interested. A contest was entered against the ill, and this fact, with others, demanded the services of a gentle- nan learned in the law—such services as would justify a nonpro- essional man, trustee in bankruptcy, in employing an attorney. 'he trustee in this matter, instead of undertaking to do this work imself, or seeking to have himself individually appointed attorney or himself as trustee, as has been improperly done in many in- tances, employed the firm of Peck & Behan to act as his attorneys, nd they have so acted since that time. Preparations were made or the contest over the will, but such contest was finally abandoned. 'he executor named in the will having died, an administrator with he will annexed was then appointed. The estate was so adminis- ered that finally, after a contested accounting, the legacy to the oluntary bankrupt, Edward J. McKenna, netted about $20,000. 'he trustee in bankruptcy intervened, as he had the right and as vas his duty, for he then represented the creditors of McKenna, nd demanded the legacy for purposes of administration in the ankruptcy court. There is no question that, on the appointment f Andrew P. McKean as trustee, the title to the legacy vested in im as such, and he was entitled to receive it. The surrogate of he county of Albany, after a contest made by the said bankrupt, o held. The debts of the bankrupt, as proved and established, mounted to about $2,500 only, and the trustee consented that all ut $3,500 of such legacy be paid to said bankrupt. This was done. 'rom the $3,500 paid to the trustee, he has paid all expenses of dministration of the estate, and all debts of the bankrupt ex- sting at the time he filed his petition. Said Peck & Behan have ontinued to act as attorneys for the trustee in all the matters of he estate.

At the final meeting of the creditors of the said Edward J. McKen- a on the 12th day of January, 1905, the said attorneys of the rustee moved for an allowance of $1,200 as compensation for their ervices to and for said trustee, from the estate of the bankrupt in he hands of said trustee. This allowance was contested and op- osed by the bankrupt. The grounds of such objections are that aid trustee required no attorney—was fully competent and able, and t was his duty, to act as his own attorney; that said Peck & Behan cted as attorneys for several persons who had claims against the ankrupt estate, and should not, for that reason, be allowed com- ensation from the estate for services rendered the trustee; and nally that the $1,200 demanded was excessive, exorbitant, op- ressive, and extravagant. Affidavits as to the amount and value f the services rendered the trustee were submitted on both sides. 'he affidavit of Mr. Behan states that he, as attorney for the trustee, xpended $16.25 in necessary disbursements, and 50 days' labor nd time. The opposing affidavits speak more particularly of the

services before the surrogate on the will contest, and somewhat as to the accounting. The bankrupt had Mr. Griffith in his employ all the time, and, inasmuch as the legacy was largely in excess of any sum required to pay all the debts of the bankrupt and all the expenses and commissions, it was at least proper for the trustee to permit this. At least, it would have been exceedingly ungracious, had the attorney for the trustee objected to Mr. Griffith, as attorney for the bankrupt, taking the leading part all through. It is well known that in all well-conducted trials but one counsel on a side is permitted to examine witnesses or argue questions. In this case it would have been highly improper, in view of the attitude of the bankrupt, for the trustee to have intrusted his interests as trustee to the counsel for the bankrupt. It was his duty to look out for and protect the interests of the creditors, and in view of the fact that the bankrupt, with upwards of $20,000, which came to and vested in him the same day he filed his petition in bankruptcy, and before he was adjudicated a bankrupt, took the position that the creditors were entitled to no part of it, and that under the bankrupt act he was entitled to a discharge from all his debts, while retaining the whole legacy, the trustee would have been culpably remiss in the discharge of his duty, had he not employed counsel, and good counsel, in the matter, and it was his duty to have such counsel present at all the hearings before the surrogate and in both proceedings.

It is well settled that a person, being a trustee, cannot perform legal services for himself as trustee, and have compensation therefor from the estate he represents. Nor is he under obligation to perform such legal services because he is the trustee. In many cases the compensation permitted by the bankruptcy act to a trustee in bankruptcy would not pay 10 per cent. of the value of the purely legal services rendered in addition to those legitimately performed by the trustee in the discharge of the usual duties of that office. However, when a trustee performs legal services, he cannot have additional compensation therefor.

This general subject is considered in 1 Perry on Trusts (2d Ed.) § 432, where it is stated:

"The rule that trustees can make no profit out of the estate is carried so far in England that they can receive no compensation for their services. In the United States trustees are entitled to reasonable compensation. But both in England and the United States a trustee can receive no indirect profit from the estate by reason of his connection with it. Thus a trustee cannot be appointed receiver with a salary, nor would he be appointed without compensation, except under peculiar circumstances, for it is his duty to superintend and watch over the receiver. The same reasons do not apply for excluding a dry trustee. If trustees are factors or brokers or commission agents or auctioneers or bankers or attorneys or solicitors, they can make no charges against the trust estate for services rendered by them in their professional capacity to the estate of which they are trustees. They may employ the services of such agents, if necessary, and pay for them from the estate; but, if they undertake to act in such capacities themselves for the estate, they can receive no compensation. This rule is so strict, that if the trustee has a partner, and employs such partner, no charge can be made by the firm; but, if the trustee is excluded from all participation in the compensation, the partner of the trustee may be paid like any other person for similar services. In one case where several trustees were made defendants,

ne of them, being a solicitor, conducted the defense, and was allowed his ull costs; it not appearing that the costs were increased by such conduct. his case is put upon the ground that the services were rendered under the ye of the court, and there could be no danger of collusion; but the case is ot approved in England, and has not been followed. In the United States rustee has been refused compensation as solicitor for professional serves rendered by himself for himself as trustee, on the ground that no man an make a contract with himself."

This doctrine is sustained by the many decisions cited in that ork.

In Collier, as Executor, v. Munn et al., 41 N. Y. 143, it was held, fter due deliberation and consideration, that an executor cannot eceive from the estate any greater compensation than the statute ommissions for his own services, however meritorious or extraordinary they may be. And it was held in that case that one of ne executors of a will, and who was an attorney and counselor at aw, could not be allowed any fees whatever from the estate for rofessionally defending and conducting an action brought against ne estate, although requested by his coexecutors to appear and efend, with a promise of compensation, and although the legatees nd next of kin also united in such request. The opinion in that ase refers to a decision of Chancellor Kent (Green v. Winter, 1 ohns. Ch. 26, 7 Am. Dec. 475), where it was held that a trustee is ot entitled even to commissions on his sales or receipts, or payents, or any compensation for his care or pains in the execution f his trust, but only to an allowance per diem for his services and xpenses of travel. He rejected a charge by way of retainer for is counsel.

In Parker v. Day, 155 N. Y. 383, 49 N. E. 1046, it was held:

"Executor an Attorney at Law—Services of Copartner. Although an executor who is an attorney at law cannot have compensation for professional ervices rendered by him to the estate, and if, having a partner, he employs is partner in business of the estate, no charge can be made by the firm, et, if the executor is excluded from all participation in the compensation, is partner may be paid like any other person for similar services, and the xecutor may, as an individual, employ his partner, as an individual, to do ork for him in matters of the estate, outside and independent of the copartnership, and become personally liable therefor.

"Employment of Attorney by His Copartner—Action for Services. The fact hat the parties were copartners at the time of the employment is not conusive, as matter of law, against the right of an attorney to recover in an ction brought by him individually against an executor individually for ervices in matters of the estate, claimed to have been rendered on the emloyment of the defendant, outside and independent of the partnership."

The court in its opinion cites section 432 of Perry on Trusts with pproval.

The court holds in this case that it was the duty of the trustee in ankruptcy to employ counsel, and that he had the right so to do; hat it was not the duty of the trustee in bankruptcy to perform nese legal services; that, the legal services rendered and the emloyment of the attorneys having been necessary for the proper rotection and preservation of the estate, the referee was justified n fixing the sum that should be paid to the attorneys from the state as compensation for such services. This court is aware of

the rule which has been adopted in some of the state courts that no allowance will be made for legal services until the executor or administrator or other trustee has first paid therefor; that then he may present the bill in his account, and ask reimbursement. This rule always leaves the trustee, executor, or administrator open to have the propriety of his allowance and payment questioned by those interested in the fund. If the court decides that he has paid too much, he must stand the loss, for he has undertaken to decide that matter for himself, and, having conceded the justice of the claim of the attorneys—their claim being a personal one against him—he is without remedy. Without questioning the wisdom or propriety or justice of such a rule in the cases where it has been applied by the state courts, this court is decidedly of the opinion that it ought not to prevail in the bankruptcy court. Here there are meetings of the creditors, where all parties in interest may come before the court. The attorneys who have rendered services for the trustee or for the receiver in bankruptcy may come before the court or referee, as the case may be, and present their claim. If no objection is made by any party, and the court or referee in bankruptcy deems the bill reasonable for the services rendered, it may be allowed, and payment directed from the estate. It is entirely immaterial to those in interest whether the compensation going to attorneys for the trustee be first paid by the trustee personally, from his own funds, or by the trustee, under an order of the court, direct to the parties entitled thereto, from the estate, provided it is allowed by the court after a fair hearing. The practice adopted in this case relieved the trustee from the imputation of having undertaken to decide as to the compensation his attorneys ought to receive from the estate. The course pursued left it entirely to the court or referee in bankruptcy to determine the necessity and the value of the services rendered. This practice has been many times approved in the bankruptcy court, and is approved by this court. In the opinion of this court, neither a trustee nor a receiver in bankruptcy ought to be permitted to pay money of the estate to his attorneys or counsel without the order or authority of the court, and certainly such officers ought not to be required to pay for such services from their own funds. It is always, however, within the power of a receiver or trustee to pay the attorney from his own funds, and then ask reimbursement from the estate by order of the court.

In fixing the value of legal services, courts have many things to consider—the nature and importance of the business transacted; the ability of the parties to pay; the amount of the estate involved; the magnitude of the interests in question; the standing and ability of the attorneys employed; the location of the parties and of the attorneys. These and many other things are proper subjects of consideration. In the case now under consideration it is not disputed that Peck & Behan did 50 days' work as attorneys for the trustee. They reside in the city of Troy. The referee in bankruptcy making the allowance resides in that city, and he knew of the performance of a large part, at least, of these services. He

knows the value of such services in that vicinity. It does not appear that there was any contest or controversy over the claims allowed and paid, represented by Peck & Behan. So far as appears, the presentation of these claims by that firm was a mere formality, except in the making of the proof. This court does not approve of the practice which allows attorneys representing a receiver or trustee to also represent creditors, where there is any contest or contention over the claims of creditors. There is no objection, however, to permitting the attorney for a trustee to make out and present the formal proof of claim of a creditor. Nothing appears in this case to indicate that the attorneys for the trustee did anything for the creditors that would in any way prejudice the interests of the bankrupt or of the bankrupt estate. In view of the interests involved, the size of the estate of the bankrupt, the position taken by the bankrupt with reference to the creditors and the payment of their claims, and the location of the parties in the cities of Albany and Troy, where all the proceedings were had, this court is of the opinion that the allowance of $800 was not improper or excessive.

The order of the referee under review, allowing the sum of $800 to Peck & Behan as attorneys for the trustee, is therefore affirmed.

UNITED STATES v. SCHLIERHOLZ.

(District Court, E. D. Arkansas, W. D. April 22, 1905.)

UNITED STATES OFFICERS—EXTORTION.

Under Const. art. 2, § 2, providing that all officers shall be appointed by the President, by and with the advice of the Senate, or Congress may vest the appointment of such inferior officers as they think proper in the President alone, in the courts, or in the heads of departments, a special agent of the Land Department of the United States, appointed under Appropriation Act June 4, 1897, c. 2, 30 Stat. 32, to meet the expenses of protecting timber on public lands, but providing no fixed salary, tenure of office, or person with power to appoint, was not an officer of the United States, within Rev. St. § 5481 [U. S. Comp. St. 1901, p. 3701], providing that every officer of the United States, guilty of extortion under color of his office, shall be punished, etc.

W. G. Whipple, U. S. Atty.
James Brizzolara, for defendant.

TRIEBER, District Judge. The defendant demurs to an indictment in which he is charged with violation of section 5481, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3701]. The offense is alleged to have been committed by the defendant, who, it is charged in the indictment, "was then and there an officer of the United States, to wit, a special agent of the Land Department of the United States." The only question raised by the demurrer is whether such a special agent of the Land Department of the United States is an officer of the United States, within the meaning of that section. In United States v. Schlierholz (D. C.) 133 Fed. 333, the identical question was before Judge Adams, of the Eastern District of Missouri, and it was by him held that such an official is not an officer of the United

States, within the meaning of the statute, and for this reason the demurrer to the indictment was sustained. Ordinarily this court would follow that decision, unless, in its opinion, it is clearly wrong, not only owing to the high standing of Judge Adams as a jurist, but for the further reason that it is advisable that there should be some uniformity among the federal judges of the same circuit in the construction of statutes which have not been construed by the appellate courts whose decisions are binding on the District Courts. It is true, the decisions of one district judge are not conclusive on any other, but they are persuasive, especially if the matters determined have received careful consideration, and a written opinion, giving the reasons for the conclusion reached, has been prepared. But the attorney for the United States very earnestly contends that in rendering that decision Judge Adams overlooked some decisions of the Supreme Court of the United States and of the Circuit Courts of Appeals, which, in his opinion, control this case, and conclusively establish the fact that a special agent of the Land Office is an officer, within the meaning of the law.

The statute, being highly penal, must be strictly construed. Nothing can be taken by intendment or implication. There can be no constructive offense. Before a man can be punished, his case must be plainly and unmistakably within the statute. At the same time, even penal statutes must be naturally construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other hand, equally refusing, by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope. Sedgwick on Statutory & Constitutional Law (2d Ed.) 282.

In United States v. Harris, 177 U. S. 305, 309, 20 Sup. Ct. 609, 44 L. Ed. 780, it was sought to recover a penalty from receivers of a railroad for an alleged violation of sections 4386–4389, Rev. St. [U. S. Comp. St. 1901, pp. 2995, 2996]. Those sections made it an offense for a railroad company engaged in interstate commerce, carrying cattle and other animals, to confine them in cars, etc., for a longer period than 28 hours, without unloading the same for a rest, water, and feeding for a period of at least 5 consecutive hours. The contention on behalf of the government was that by the words "any company" Congress intended to embrace all common carriers; that the act in question was a humane one, designed to prevent cruelty to animals; and that whoever had charge of the railroad, whether as a receiver or otherwise, ought to see that these wholesome and humane regulations were obeyed, or were subject to the penalty for violating them. But the court refused to adopt this view, saying:

"Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the Legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal stat-

e must be found in the language actually used, interpreted according to its ir and obvious meaning. It is not permitted to courts, in this class of ses, to attribute inadvertence or oversight to the Legislature when enum- ating the classes of persons who are subjected to a penal enactment, nor depart from the settled meaning of words or phrases in order to bring rsons not named or distinctly described within the supposed purpose of the tute."

In Field v. United States, decided only a week ago by the United ates Circuit Court of Appeals for the Eighth Circuit (137 Fed. , the defendant was indicted as an officer of a bankrupt corpo- tion, who had concealed assets of the bankrupt corporation in olation of section 29b (1) of the Bankruptcy Act July 1, 1898, c. 1, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]. That section makes an offense for "a bankrupt" to conceal from his trustee any of the operty belonging to the estate in bankruptcy. On behalf of the fendant it was contended that an officer of a corporation, although is the only one who can prepare the schedules for a bankrupt rporation, is not a bankrupt, and for this reason not within the ovisions of that act. This was sustained by the court. To the me effect, see United States v. Lake (D. C.) 129 Fed. 499.

It therefore becomes necessary to determine what constitutes "an ficer of the United States," within the meaning of the Constitution d laws of the United States.

As shown by Judge Adams in his opinion, section 2, art. 2, of the onstitution, provides that all officers shall be appointed by the resident, by and with the advice of the Senate, with a proviso that ongress may by law vest the appointment of such inferior officers they think proper in the President alone, in the courts, or in the eads of departments. As a proviso must be strictly construed . S. v. Dickson, 15 Pet. 141, 10 L. Ed. 689; Dollar Savings Bank U. S., 19 Wall. 227, 22 L. Ed. 80; Gould v. N. Y. Life Ins. Co. [D.] 132 Fed. 927), it is clear that no one can be deemed an "officer the United States" unless appointed by the President, by and ith the advice and consent of the Senate, or appointed by the Pres- ent alone, or a court of law, or the head of a department; and, the latter, Congress must have vested that power in the person aking it, by some statute, and Congress must also have created e office, unless it is one created by the Constitution itself.

In United States v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747, hief Justice Marshall, sitting as a circuit justice, in speaking of appointment of an agent of fortifications made by the Secretary War—one of the heads of a department—said:

"It is too clear, I think, for controversy, that appointments to office can made by heads of departments in those cases only where Congress has thorized it by law."

This was cited with approbation and followed in Auffmordt v. edden, 137 U. S. 310, 327, 11 Sup. Ct. 103, 34 L. Ed. 674.

On behalf of the government it is insisted that Congress has eated the office of special agent of the Land Office, and author- ed the Secretary of the Interior, who is the head of a department, appoint such officers. That there is no act of Congress expressly eating the office has been determined by the Supreme Court in

Wells v. Nickles, 104 U. S. 444, 26 L. Ed. 825. But it is contended that by the decision of the court in that case it is settled that, by appropriating money for the payment of such agents, Congress has authorized their appointment, and in fact created the office. A careful reading of the decision of that case does not sustain this contention. What the Supreme Court did decide was that, although Congress had not expressly authorized the Secretary of the Interior or other officer of the Land Department to appoint such agents, yet, the Secretary having employed such agents, with certain well-defined powers and duties—among others, to compromise claims in favor of the United States—an appropriation by Congress to pay these agents is a ratification of the acts of the Secretary of the Interior, and any compromise made by such agents, within the scope of their authority, will be binding upon the government. That was a civil action, and for this reason not subject to the strict rules of construction governing criminal proceedings.

Do the appropriation acts create the office of special agent, or authorize the employment of such agents as officers? The appointment under which the defendant acted was made under the appropriation act of June 4, 1897, c. 2, 30 Stat. 32. Referring to that act, we find the following provision:

"For depredations on public timber, protecting public lands and settlement of claims for swamp lands and swamp land indemnity. * * * To meet the expenses of protecting timber on the public lands and for more efficient execution of the law and rules relating to the cutting thereof," etc., "$90,000.00, provided that agents and others employed under this appropriation shall be allowed per diem subject to such rules and regulations as the Secretary of the Interior may prescribe in lieu of subsistence, at a rate not exceeding $3.00 per day each and actual necessary expenses for transportation."

It will be noticed that in this act nothing is said by whom the persons referred to as "agents or other persons employed under this appropriation" shall be employed. All the Secretary of the Interior is authorized to do is to prescribe rules and regulations "in lieu of subsistence, at a rate not exceeding $3.00 per day each and actual necessary expenses." No salary is fixed, no tenure provided, no office mentioned, nor who shall have the power to appoint them. The first act providing for the selection of these agents by the Secretary of the Interior is the appropriation act of July 1, 1898, c. 546, 30 Stat. 618, where it was enacted under the same heading, and for the same purposes as in the previous act, "provided that agents and others employed under this appropriation shall be selected by the Secretary of the Interior," etc. This is the first act which authorizes the Secretary of the Interior to make the selection. This provision is found in every subsequent appropriation act. In every one of them the language used is "that agents and others employed under this appropriation shall be selected by the Secretary of the Interior," etc. Only the most liberal interpretation of these acts can justify a court in holding that the intention of Congress, as expressed in these appropriation acts, was to create new offices, within the meaning of the national Constitution. In none of these acts is there any reference to an "appointment," but the words used

each of these acts are "employed under this appropriation." s alone would sustain the opinion of Judge Adams that a special nt of the Land Office is an employé, and not an officer. If an ent" employed under those acts is an "officer," within the meaning he Constitution, why is not every "other person employed under appropriation" also an officer of the United States within the ning of article 2, § 2, of the Constitution? The object of these priations, as stated by Congress in each of those acts, is "depations on public timber, protecting public lands and settlement laims for swamp lands and swamp land indemnity." The act proceeds, "To meet the expenses of protecting timber on the lic lands," etc. There can be no doubt that this section author- the employment of any persons who, in the judgment of the retary of the Interior, may be required to carry out the objects he appropriation, including surveyors and chain carriers, if a vey of some tract of land is necessary to ascertain the exact ndaries; stenographers for the purpose of reducing to writing dence gathered; guards to protect timber from being cut, or if ed by special agents as having been unlawfully cut; and many er persons, whom it is unnecessary to mention. The very fact the appropriation is so general proves conclusively that neither gress, nor the head of the department who asked for the appro- tion, could state with any degree of certainty what persons it ht be necessary to employ, and what duties such employés ht be called upon to discharge. Congress therefore wisely left entire matter to the discretion of the Secretary of the Interior, ting him only in the one item of expense for subsistence. That persons thus employed are not officers, within the meaning of constitutional provision, has been decided by the Supreme Court everal cases. In United States v. Germaine, 99 U. S. 508, 511, L. Ed. 482, cited by Judge Adams in his opinion, the officer question was a civil surgeon appointed to make periodical exnations of pensioners, and to examine applicants for pensions. statute (section 4777, Rev. St.) expressly authorized the Comsioner of Pensions to "appoint" such examiners, and not merely employ" them, as in the case at bar, but the court held that they e not "officers."

Jnited States v. Hartwell, 6 Wall. 385, 18 L. Ed. 830, so earnestly ed upon by counsel for the United States, is distinguished in the maine Case upon grounds which are peculiarly applicable to the e at bar. The court there say:

> Jnited States v. Hartwell is, as supposed, in conflict with these views. It early stated and relied on in the opinion that Hartwell's appointment was oved by the Assistant Secretary of the Treasury, as acting head of that rtment, and he was therefore an officer of the United States. If we look he nature of defendant's employment, we think it equally clear that he is an officer. In that case the court said the term embraces the ideas of re, duration, emolument, and duties, and that the latter was continuing permanent, not occasional or temporary. In the case before us the du- are not continuing and permanent, and they are occasional and intermit- The surgeon is only to act when called on by the Commissioner of Pens in some special case, as when some pensioner or claimant of a pension ents himself for examination. He may make fifty of these examinations

in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised. No regular appropriation is made to pay his compensation, which is two dollars for every examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the Commissioner. He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. * * * If Congress had passed a law requiring the Commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law, high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute."

In United States v. Mouat, 124 U. S. 303, 307, 8 Sup. Ct. 505, 31 L. Ed. 463, the court, following United States v. Germaine, held that a paymaster's clerk appointed by the paymaster of the navy, with the approval of the Secretary of the Navy, is not an officer of the United States.

In United States v. Smith, 124 U. S. 525, 532, 8 Sup. Ct. 595, 31 L. Ed. 534, clerks of a collector of customs are held not to be officers of the United States, in the sense of section 2, art. 2, of the Constitution.

There is nothing in any of the acts under which defendant was employed fixing the tenure, duration, emolument, and duties of his position. Whether they shall be continuing and permanent, or occasional and intermittent, what his duties shall consist of, what his compensation shall be, are all dependent upon the will of the Secretary of the Interior or the Commissioner of the General Land Office. No regular appropriation to pay his compensation is made, but it is paid out of the general appropriation for the protection of timber and public lands. He is but an agent or person employed by the Secretary, removable at his pleasure, to perform such duties at such times and at such places as may be demanded of him. The Secretary may appoint one or one hundred persons to do the same thing. The compensation may be small or large. He is not required to keep any designated place of business for the public use, but may be and is quite frequently ordered from one section of the country to another.

In Hall v. Wisconsin, 103 U. S. 5, 26 L. Ed. 302, the court was called upon to determine whether a commission to make a geological, mineralogical, and agricultural survey of the state, appointed under an act of the Legislature of a state, were officers, within the meaning of the law; and it was held (reversing the Supreme Court of Wisconsin) that they were not.

In Auffmordt v. Hedden, 137 U. S. 310, 326, 11 Sup. Ct. 103, 34 L. Ed. 674, the question was whether a merchant appraiser, who took an oath of office and was selected in compliance with the statute and the treasury regulations, was an officer, and the court held he was not. Mr. Justice Blatchford, who delivered the opinion of the court, said:

"He is not a 'clerk,' nor an 'agent,' nor a 'person employed' in the customs department, within the meaning of section 6 of the civil service act: nor is he an officer of the United States, required to be appointed by the President or a

urt of law or the head of a department. * * * He has no general functons, nor any employment which has any duration as to time, or which extends er any case further than he is selected to act in this particular case. * * The statute does not use the word 'appoint,' but used the word 'set.' His position is without tenure, duration, continuing emolument, or ntinuous duties, and he acts only occasionally and temporarily. Therefore is not an 'officer,' within the meaning of the clause of the Constitution rerred to."

In United States v. Maurice, supra, Chief Justice Marshall said:

"Although an office is an 'employment,' it does not follow that every employnt is an office. A man may certainly be employed under a contract, express implied, to do an act or perform a service, without becoming an officer."

In re Attorneys' Oaths, 20 Johns. 492, the court defined an office be "An employment on behalf of the government in any station public trust not merely transient, occasional, or incidental."

Judge Cooley in People v. Langdon, 40 Mich. 673, in holding at the chief clerk in the assessor's office of Detroit, appointed nder a law providing, "the assessor is hereby authorized to employ ch clerical assistance as the business of the office may render necsary, and such clerical assistance shall receive such compensation er diem as the common council shall from time to time fix by resotion," is not an officer, gave the following legal definition as to hat constituted "office":

"An office is a special trust or charge created by competent authority. * * The officer is distinguished from the employé in the greater importce, dignity, and independence of his position; in being required to take on ficial oath, and perhaps to give official bond; in the liability of being called account as a public offender for misfeasance or nonfeasance in office; and ually, though not necessarily, in the tenure of his position. In particular ses other distinctions will appear, which are not general."

Further on that eminent jurist says:

"But the duties of the assessor's clerk, such as they are, can be changed at e will of the superior, since no rule of law or well-defined custom forbids it."

In the case at bar the duties of the defendant could be changed any time by his superior officer, as no statute defines them.

The district attorney, in his able brief, relies, among others, on e following authorities: United States v. Hartwell, hereinbefore ferred to; McGregor v. United States (C. C. A.) 134 Fed. 187, here it was held that a clerk in the Post-Office Department is an fficer; United States v. McCrory, 91 Fed. 295, 33 C. C. A. 515, here it was held that a letter carrier was an officer; Williams v. nited States, 168 U. S. 387, 18 Sup. Ct. 92, 42 L. Ed. 509, where it as held that a Chinese inspector is an officer, within the meaning f this section of law. He also cites a large number of decisions in hich the courts have held in civil actions that a receiver of a naonal bank is an officer—among others, Gibson v. Peters, 150 U. S. 42, 14 Sup. Ct. 134, 37 L. Ed. 1104; Ex parte Chetwood, 165 U. S. 57, 17 Sup. Ct. 385, 41 L. Ed. 782; Auten v. U. S. National Bank, 74 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920. Assuming that the ame rule would apply to criminal proceedings as in civil actions, ne national bank receiver cases are easily distinguishable from ne case at bar. The office of a receiver is expressly provided for

by sections 5191, 5234, Rev. St. [pages 3486, 3507, U. S. Comp. St. 1901]. In the first-named section the appointment of the receiver is to be made by the Comptroller, with the concurrence of the Secretary of the Treasury; and, while section 5234 does not contain that provision, the courts have placed their decisions that a receiver is an officer of the United States upon the ground that the Comptroller is the chief officer of a bureau in the Treasury Department, and appointments made by him are to be presumed to be made with the concurrent approval of the Secretary of the Treasury, and for this reason are made by the head of a department, within the meaning of section 2, art. 2, of the Constitution. The leading case on this subject, and which has been cited and followed by the Supreme Court and all other federal courts, is Price v. Abbott (C. C.) 17 Fed. 506, decided by Mr. Justice Gray on circuit. An examination of that case will show that it is based solely upon the grounds above stated. As Congress has never authorized the appointment of a special agent of the General Land Office, those cases are inapplicable, especially in view of the well-recognized rule that criminal statutes must be strictly construed. In the Hartwell Case the statute under which the defendant was indicted provided that "all officers and other persons charged by this act or any other act," etc., and also, "The provisions of this act shall be so construed as to apply to all persons charged with the safe keeping, transfer or disbursement of the public money, whether such persons be indicted as receivers or depositories of the same." Act Aug. 6, 1846, c. 90, 9 Stat. 59. A later act (the general appropriation act of July 23, 1866, c. 208, 14 Stat. 200) authorized the Assistant Treasurer to appoint a specified number of clerks, who were to receive, respectively, the salaries therein prescribed, under which act the indictment was found. The question whether the defendant was an officer, within the meaning of section 2, art. 2, of the Constitution, was neither raised, nor determined by the court. All that was decided was that the defendant was an officer or person charged with the safe-keeping of public moneys, within the meaning of the act of 1846. In the Williams Case, Mr. Justice Harlan, who delivered the opinion of the court, held that a Chinese inspector was an officer, within the meaning of section 5481, Rev. St. [page 3701, U. S. Comp. St. 1901]. The question seems not to have been raised or argued by counsel, but was decided by the court; and, although no reasons are given by the learned justice for the conclusions reached, the court did expressly determine the question. An examination of the provisions of the appropriation acts authorizing the appointment of Chinese inspectors will show that the language there used was quite different from that authorizing the employment of agents to protect the public lands. In the former acts the language used is that the appropriation is "to prevent unlawful entry of Chinese into the United States by the appointment of suitable officers to enforce the laws in relation thereto." Act Aug. 30, 1890, c. 837, 26 Stat. 387; Act March 3, 1891, c. 542, 26 Stat. 968; Act March 12, 1894, c. 37, 28 Stat. 41; Act Aug. 18, 1894, c. 301, 28 Stat. 390. In the case at bar the appropriation is made "to meet the expenses of protect-

mber on public lands," etc., "* * * provided that agents
ficers employed under this appropriation shall be selected by
ecretary of the Interior." In the one case the Secretary of
Treasury is authorized to "appoint suitable officers"; in the
, the Secretary of the Interior is authorized to "employ agents
thers." In the common acceptation, the meaning of the words
intment" and "employment" is quite different. An officer is
ly appointed, while a person employed is spoken of as an "em-
," and but rarely, if ever, as an "officer."

e Century Dictionary defines "appointment" as "the act of ap-
ing, designating, or placing in office. An office held by a per-
ppointed."

ong the definitions given to those words by the courts are the
ving:

pointment is the designation of a person by the person having authority
or to discharge the duties of some office or trust." State v. New Orleans,
Ann. 156, 6 South. 592. "Where the selection of an officer is referred
e functionary, it is called an 'appointment.'" Speed v. Crawford, 60
07.

e definition of "employé," as given by the Century Diction-
:

e who works for an employer; a person working for salary or wages;
d to any one so working, but usually only to clerks, workmen, laborers,
nd but rarely to the higher officers of a corporation or government or
nestic servants."

re Cortland Manufacturing Co. (Sup.) 45 N. Y. Supp. 630, an
oyé is defined to be a person who is employed; one who works
ages or a salary.

Palmer v. Van Santvoord, 153 N. Y. 612, 47 N. E. 915, 38 L. R.
2, the court held:

employé is one who works for an employer; a person working for a
or wage. The word is applied to any one so working, but usually only
ks, workmen, laborers, etc., and but rarely to officers of a government or
ation."

the McGregor Case the statutes under which the indictments
drawn (sections 1781, 1782, Rev. St. [page 1212, U. S. Comp.
901]), include any "officer or agent" of the government (section
, and "other officer or clerk in the employ of the government"
ion 1782).

the McCrory Case, the court expressly holds that letter car-
are officers, because they are appointed by the Postmaster
ral, the head of a department, under authority of an act of
ress.

is review of the cases relied upon by the district attorney clear-
ows that they are not applicable to the case at bar, and that the
urrer to the indictment should be sustained.

D. A. TOMPKINS CO. v. MONTICELLO COTTON OIL CO. et al.

(Circuit Court, S. D. Georgia, W. D. April 21, 1905.)

1. STATUTORY LIENS—CONTRACTS—PERFORMANCE—TIME.

A contract for the construction and setting of mill machinery provided that the seller's work should be considered completed when the mill was set in motion and each machine put on its legitimate work, at which time complete settlement should be made for unpaid balances; that the plant would not be delivered to the purchasers until such settlement was completed; and that the mill should be completed, ready for operation, on a specified date. *Held*, that the time fixed for the completion of the contract was of its essence, and, on the seller's failure to complete the same until long after the time specified, it was not entitled to a statutory lien under Code Ga. 1895, §§ 2501, 2504, giving to contractors for building factories, and furnishers of material and machinery therefor, etc., a special lien on the real estate, "provided the contractors have made a substantial compliance with their contract."

2. SAME—CONTRACTS—CONDITIONAL SALE—EQUITABLE MORTGAGE.

A contract for the purchase of machinery and mill equipment provided that the title to the machinery and equipment should remain in the seller until payment of the price, that failure to execute notes and deliver the same as provided in the contract, or to pay any of the amount specified at maturity, should entitle the seller to take possession of the machinery and other property named, and sell it by private or public sale after 30 days' advertisement, without process of law, and retain any balance unpaid, together with interest, traveling expenses, and attorney's and other fees connected with collection, and pay the buyers any surplus, and collect from them any deficiency. *Held*, that such contract was not a conditional sale, but, at most, an equitable mortgage.

3. SAME—ENFORCEMENT.

Where a contract to purchase mill equipment and machinery constituted a mere equitable mortgage thereon to secure the price, and it appeared that the purchasers were solvent, and that the seller had made default in complying with its contract within the time specified, and that the buyers had suffered considerable damage thereby, such mortgage would not be enforced in equity, except to the extent of the amount due on the contract after deducting the buyers' damages.

4. SAME—ATTORNEY'S FEES—EXPENSES.

Where an equitable mortgage on mill machinery and equipment provided that in case of enforcement the seller should be entitled to retain from the proceeds of a sale of the machinery any balance of the price unpaid, together with interest, traveling expenses, and attorney's and other fees connected with collection, but the buyers had a meritorious defense to a part of the amount claimed, no allowance would be made for attorney's or other fees connected with the collection.

In Equity.

Robert C. Alston and Merrel P. Callaway, for complainant.
John R. L. Smith and Greene F. Johnson, for respondents.

SPEER, District Judge. This cause is under consideration for final decree. All of the evidence has been taken and submitted to the court. The contentions of the parties have been fully argued, and the court has taken time for consideration.

The case is a bill brought in equity to enforce the recovery of the price of certain machinery and equipment used in the manufacture of oil from cotton seed. The cost of the machinery, equipment,

and installation was $19,000. The complainant is a manufacturer and dealer in such machinery, and a contractor for its installation. The defendants were the projectors, and subsequently became the incorporators, of the Monticello Cotton Oil Company. While these persons, as the contract was made with them, were made parties, the principal defendant is the oil company. It appears from the evidence that the machinery was manufactured or furnished by the complainant, and installed in the mill of the defendant company. A dispute arising between the parties, and it being denied by the defendants that there was a substantial compliance on the part of the complainant with its contract to furnish and install the machinery within the time limited, payment of the full amount claimed was denied. The bill was then brought. As originally presented, this had a double aspect. It was alleged that complainant was entitled to a materialman's or contractor's lien, as defined by the law of Georgia. A suitable prayer was made for the enforcement of such lien. It was also alleged that the contract between the parties was a conditional sale, and, since the condition of payment had not been complied with, the bill also presented a prayer for an order directing the recaption or restitution to the complainant of the machinery and equipment sold, delivered, and installed. However the averments and the prayer with relation to this construction of the contract are not merely for recaption. It is alleged that since the machinery has been installed and attached to the realty, or otherwise built into the plant, it is impossible to retake it in its entirety without great loss, and the court is asked to frame such a decree as will enforce the equitable rights of the vendor. While the bill rested in the form thus described, a demurrer was interposed thereto. The principal ground of this was that the court was without equitable jurisdiction. It appearing, however, to the court that the bill, by its averments, made obviously a case for the enforcement of a statutory lien authorized by state law, this demurrer was overruled. Answer and replication having been filed, and the evidence taken, the case was assigned for hearing. On the hearing the complainant amended its bill; alleging, in substance, that the contract relied on must be treated as a chattel mortgage, and accompanied this amendment with a prayer seeking to enforce it as such. This amendment, having been allowed, reopened the case to the usual defenses. An additional demurrer was interposed upon the ground that the contract was in no sense a mortgage, and otherwise objecting to the amended bill for the want of equity, etc. This demurrer, while argued, is, by consent of counsel, to be considered and determined in connection with the whole case.

The questions involved have not been free from difficulty. The contract is set out in a printed and written order. The blank order was furnished by the Tompkins Company, as is usual with them in such transaction. It was completed and signed by the defendant company, or, more accurately, by the projectors, who were afterwards the incorporators. Of the responsibility of these parties, in case liability is established, there is no question. The order is in evidence, and its material stipulation will be presently considered.

Its acceptance by the complainant, along with certain "general conditions," constitutes the contract. These general conditions accompanying the order are also in print and in writing, and, it is conceded, were agreed to by the complainant. They contain the following material stipulations:

"Our work is to be considered completed when the mill is set in motion, and each machine is put on its legitimate work. At this time complete settlement must be made for unpaid balances in cash or by notes, as per order sheet.

"The plant will not be delivered over to purchasers until this settlement is completed as above.

"We guarantee all machinery and equipment to be first-class in material and workmanship, and to work well for the purposes intended, if properly used.

"In case of original defect in any machine or part of machine, we agree to make good the defect by supplying a new machine or new part."

These are the printed covenants. Another, in writing, and that upon which the controversy practically depends, was added. It is this:

"Mill to be completed ready for operation on Sept. 15th, 1902."

The contract thus created by the order, the general conditions, and the acceptance will be found to contain no specification creating in behalf of the complainant the statutory lien relied upon. The law of Georgia authorizing or creating such a lien is found in section 2801 of the Code of 1895. This provides:

"All contractors for building factories, furnishing material for the same, or furnishing machinery for the same; and all machinists and manufacturers of machinery, including corporations engaged in such business, who may furnish or put up in any county of this state any steam mill or other machinery, or who may repair the same; and all contractors to build railroads, shall each have a special lien on such real estate, factories or railroads."

Section 2804 provides:

"To make good the liens specified in section 2801, they must be created and declared in accordance with the following provisions, and on failure of either the lien shall cease, viz.: (1) A substantial compliance by the party claiming the lien with his contract for building, repairing, or improving, or for materials or machinery put up or furnished, as set forth in said section. (2) The recording of his claim of lien within three months after the completion of the work, or within three months after such material or machinery is furnished."

Now it is insisted for the defendants that there was no such substantial compliance with its contract by the complainant as would make good this lien. This contention, in our opinion, is supported by the evidence. It is plain that time was of the essence of this contract. As we have seen, it was expressly contracted in writing that the mill should be completed on the 15th day of September, but this was not done. The machinery was installed imperfectly not until the 6th of November, and even then was operated by the skilled workmen of the complainants until the 8th of December, when the machinery was so sufficiently adjusted that it might be turned over to the defendants. Now the written covenant as to the date of completion was made with a definite purpose. This was to enable the parties who were investing their means in the oilmill to utilize the cotton seed of the current crop year. It indeed ap-

pears from the evidence that there were on the ground a number of competitors of the Tompkins Company, all engaged in the manufacture of such machinery and in the construction of such mills, who competed strenuously for this contract. It also appears that the contract was given by the defendant company to the Tompkins Company because the latter undertook to have the mill completed at the time explicitly named in the written addition above mentioned, as the other bidders could not do. That the complainants failed to comply with this condition is indisputable. That such failure negatived such a substantial compliance as would make the lien good is equally plain. Much is said in the argument and in the briefs of counsel with regard to the amount of damages resulting to the defendant company. It is perhaps not material, in deciding whether or not the lien is good, that the court should make a definitive finding as to damages. It is perhaps sufficient to declare that appreciable damages resulted. The proof is abundant to demonstrate that, relying upon the promise of the complainant as to the date of completion, there were preliminary purchases and storage of large quantities of cotton seed. This resulted in injury and considerable loss. There were other alleged deficiencies in performance, for which damages are claimed, and in view of which it is insisted that there was no substantial compliance with the contract. When the mill was finally completed and tendered, these questions were raised, and the defendants refused to accept the mill until it was agreed in writing that they might do so without prejudice to their claim for injury and damage resulting from the delay. The court has felt obliged, therefore, to consider all the evidence showing want of substantial compliance and the resulting damage, and, when this is precisely ascertained, to direct that the sum thereof shall be subtracted from the total amount which the complainants claim. To determine the lien claimed to be good, it would be incumbent upon the court to hold that the defendants did not suffer any substantial damage because of the complainant's delay. This, in view of the evidence, would be quite unjustifiable. The effort on the part of the complainant to justify its delay by the anthracite coal strike in Pennsylvania does not seem meritorious. There is perhaps a remote possibility that this conflict between capital and labor may have had some effect on this, as upon any similar contract, but the connection is too remote to be judicially appreciable. For these reasons, we hold that the proof does not establish the lien of a manufacturer and contractor, and must deny the prayer to enforce such lien.

The prayer that the contract shall be treated as a conditional sale, in view of all the evidence, must also be denied. It is plain enough that there is on the face of the order an apparent attempt of reservation of title by the complainant. In all such cases, however, the court must look at the entire transaction, and ascertain what was the true intent of the parties. As stated in the very recent work of Isaac on Conditional Sales, par. 13:

"It sometimes becomes difficult to determine whether a particular transaction constitutes a mortgage or a conditional sale. In such cases the question

must be determined by a consideration of the circumstances of the case and the intention of the parties." Citing 1 Jones on Mortgages, § 258.

The learned author continues:

"In doubtful cases the courts are inclined to construe the transaction as a mortgage, rather than a conditional contract of sale, for the reason that an error which converts a conditional contract of sale into a mortgage is less harmful than one which converts a mortgage into a conditional sale. Pioneer Gold Mining Co. v. Baker (C. C.) 23 Fed. 258; Dunbar v. Rawles, 92 Am. Dec. 311."

This view finds strong support in the case of Herryford v. Davis, 102 U. S. 216, 26 L. Ed. 160. There the question was whether the contract constituted a mortgage or conditional sale. "What, then," said Mr. Justice Strong, for the court, "is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provision it contains, disconnected from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." After reciting the provisions of the contract, the learned justice continues:

"In view of these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars should pass at once to the railroad company, in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price, either by paying their notes, or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. This giving the property as a security for the payment of a debt is the very essence of a mortgage, which has no existence in a case of conditional sale."

When we look at the intention of the parties in the case before the court, it is apparent that, notwithstanding the verbal reservation of title in the order, neither anticipated that the reservation should be made effective as such. If, however, the contract be held to constitute originally a conditional sale, with the express right of recaption in the vendor, the court would not now, under all the circumstances of this case, permit the destruction of the mill of the defendant company, when there is no good reason why this should be done. The company and the incorporators who signed the contract are wholly solvent. There is no averment or pretense to the contrary. The complainant will have no difficulty in enforcing any recovery we may decree. The amount justly due is in fair dispute. It would be unconscionable, therefore, to grant to the complainant an order which would justify a demolition and destruction of the defendants' solvent and presumably profitable enterprise. It is the duty of a court of equity, under such circumstances, to secure the rights of the complainant with as little injury as possible to the defendants. This, as it will presently appear, may be accomplished by treating the contract upon which the complainant relies not as a lien or a conditional sale, but as an equitable mortgage, not only upon the machinery sold and furnished, but upon the real estate

to which it has been attached—a mortgage given to secure the amount which may be ascertained as rightly due the complainant. In the ascertainment of this, it is equally the duty of the court to subtract from the claim the sum of the actual damages which the defendants have sustained because of any distinct and substantial breach of contract for which the complainant may be properly liable.

Our conclusion that this contract creates, under all the circumstances, an equitable mortgage, depends upon the following material clauses of the order for the machinery:

"It is understood and agreed that the title to the machinery and equipment named shall remain with and be vested in you until the payment in legal currency of all the above amounts.

"Failure to execute notes and deliver same to you, as provided, or to pay any of the above amounts at maturity, shall entitle you to take possession of the machinery and other property named, and sell it by private or public sale, after thirty days' advertising, and without process of law, and retain and balance that may be unpaid on all notes, together with interest, traveling expenses, attorney's and other fees, connected with collection, and pay us any surplus and collect from us any deficiency."

Here, as stated, the title is apparently reserved. This is done, however, not for the purpose of giving the complainant absolute control over the machinery and equipment in case default in payment shall be made, but merely to secure the amount of its claim. It is true that complainant, on such default, is entitled to take possession of the machinery and other property named. There is, however, no independent and absolute right to hold or dispose of such property. On the contrary, the complainant is expressly obliged to sell it at private or public sale after 30 days' advertising. It is also authorized to retain any balance that may be due on all notes, together with interest, traveling expenses, attorney's fees, and other fees connected with collection. This imports, of course, any balance which may remain after the proceeds of such sale are credited upon the notes. Even more significant is the stipulation that the complainant is obliged to "pay us" (the defendants) any surplus. This is also characteristic of a mortgage rather than of a conditional sale. If, however, there is not enough of the proceeds of the machinery to pay the debt, by the same clause complainant is given the right to collect the deficiency from the defendants. All of these features are characteristic of a mortgage rather than a conditional sale. We conclude, as between the parties to the contract itself, the rights of no third person having intervened, that this is nothing more or less than an equitable mortgage. This view seems fully sustained by the Supreme Court in Chicago Railway Equipment Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349. There the instrument in question was a note. It contained this stipulation:

"On the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13,000 to 13,249 inclusive, and marked on the side thereof with the words

and letters, 'Blue Line, C. & E. I. R. Co.,' and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and the interest are fully paid, all of said notes being equally and ratably secured on said cars."

It was held that the title was retained only by way of security for the payment of the notes, and the agreement for the retention for that purpose was a short form of a chattel mortgage. Said Mr. Justice Harlan, for the court:

"The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid."

This view would seem to meet and to provide for all the equities of the parties. It accords to the complainant a lien as good as another for the amount it is actually entitled to recover. It will afford equal opportunity to the defendants to have the amount claimed diminished by the justly ascertained damages which it has actually sustained for breach of contract. It will preserve the integrity of the cotton oil plant, for which the defendants have already paid the complainant $10,000, and subject it to no such destructive process as the removal of its machinery. Thus no unnecessary injury will result to either party. This construction will, on the one hand, avoid the harsh and drastic enforcement of the alleged lien—a remedy granted in derogation of common right—and, on the other, the great loss to the parties, after their extensive and costly preparation, which would result, should the court be obliged to sustain the motion to dismiss the bill for want of equity. The parties are here with full proofs. There is the proper diversity of citizenship. The jurisdictional amount is also involved. Finding the defense in part, at least, meritorious, the court feels obliged to disallow the claim for attorney's fees, traveling expenses, and other fees connected with collection. Nothing, then, remains to be done, save to ascertain by how much the complainant's demand shall be reduced because of the failure on its part to complete the contract by the time and in the manner it engaged to do. This task will be referred to a master, with direction to compute such damages, and to restrict his attention to the evidence upon which the court has passed. On hearing the report of the master, and such proceedings as may be appropriate thereto, the court will grant a decree to enforce the mortgage for the sum ascertained to be due the complainant, and will at the same time determine how the costs shall be apportioned.

ALT LAKE HARDWARE CO. v. CHAINMAN MINING & ELECTRIC CO.

(Circuit Court, D. Nevada. April 28, 1905.)

No. 756.

MECHANIC'S LIEN—TIME FOR FILING—COMPLETION OF CONTRACT.

Where complainant contracted to furnish machinery and material for a mill, and to install the same, the contract was not completed, so as to start the time for filing a mechanic's lien to running, so long as complainant's employés were engaged in work in the mill which was necessary in order to put the machinery and equipment in the condition required by the contract as originally made or as modified by subsequent agreements.

SAME—EXTRA MATERIALS.

Extra machinery and materials furnished by a contractor for the equipment of a mill, and made necessary by changes in the specifications by the owner, are to be regarded as having been furnished under the original, and not under an independent, contract.

SAME—VALIDITY—ERROR IN STATEMENT.

Mechanic's lien statutes are to be construed so as to effect substantial justice, and a lien will not be held void because the statement filed claimed more than was actually due, where it was the result of mistakes, and without fraud or wrongful intent.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 253.]

SAME—MINING PROPERTY SUBJECT TO LIEN—NEVADA STATUTE.

Under Cutt. Comp. Laws Nev. § 3881 et seq., which gives a lien on a mine for labor or materials used in the construction of any building or superstructure thereon, and on a mill, manufactory, or hoisting works for machinery or labor furnished in its construction, and provides that the lien shall extend to "the land occupied by any building or other superstructure, * * * together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof," a contractor who furnished and installed the machinery and appliances for a mill at a mine is not entitled to a lien therefor on an electric power plant situated some miles from the mine on land not connected therewith, although power is supplied by such plant for the operation of the mill, but the lien therefor will extend to a group of mines constituting the mining property on which the mill is situated, and to reduce the ores from which it was built.

In Equity. Suit to establish and enforce a mechanic's lien. See 128 Fed. 509.

S. Summerfield and Charles C. Dey, for complainant.
Cheney & Massey, for defendant.

HAWLEY, District Judge (orally). This is a suit brought under ıe provisions of the mechanic's lien laws of Nevada (Cutt. Comp. aws, § 3881 et seq.) to forcclose a mechanic's lien upon defendıt's mill and mines situate in White Pine county, Nev. In its aim of lien the complainant states that on March 15, 1901, "this en claimant and said Chainman Mining & Electric Company made ıd entered into a certain contract in writing, wherein and whereby ıis lien claimant agreed and undertook to furnish certain mill maıinery and material, and construct and install the same into a mill ır said Chainman Mining & Electric Company upon the premises

hereinafter described, and said Chainman Mining & Electric Company agreed to pay this lien claimant the sum of $50,097.50 therefor. That said contract specified the various articles of machinery and material to be furnished. * * * That acting under said contract, and pursuant to the terms thereof, and as a continuous part thereof, this claimant furnished said machinery and material to said Chainman Mining & Electric Company, and installed and constructed the same into a mill upon the mine of said company, * * * and during the progress of said work, and as a continuous part of the performance of said contract, furnished and installed in said mill, at said company's instance and request, extra material, machinery, and fixtures, not provided for or mentioned in said contract, of the aggregate value of $3,311.12. * * * Upon which indebtedness it has paid the sum of $41,751.28, leaving due, owing, and unpaid the sum of $11,657.34, with interest thereon at the rate of 8 per cent. per annum from July 31, 1902, after deducting all just credits and offsets. That the first of said material and work was furnished on the 22d day of May, 1901, and the last thereof on July 16, 1902." There are several separate and independent questions presented in the suit, which will be noticed under separate heads.

1. Was the lien of complainant filed within 60 days after the completion of the contract? When was the furnishing of the machinery and its installation in the mill completed? The claim on behalf of complainant is "that the last work was performed and material furnished on July 16, 1902." On behalf of defendant the claim is "that the contract of the complainant was completed in December, 1901, and at a date not later than May, 1902." This point presents some difference in the opinion of the respective parties as to when the contract should be considered as having been completed. The complainant, for the purpose of getting its money due on the contract, wrote several letters to the defendant, that the contract was practically completed in December, 1901. The defendant, for the purpose of delaying the payment of the money due, wrote letters in reply that the mill had not been completed, and that there were many things yet to be done. In a letter of March 14, 1902, complainant says:

"We finished, or practically finished, our contract in the latter part of November of last year, and the mill should have been started up at that time, making our last payment due on or about December 15th, but as we fully realized that you were making changes at that time in your management and were laboring under disadvantages, we did not push for a settlement, or even demand that you start up the mill and test the machinery to find if it was perfect, but left it open, waiting the arrival of Mr. Dunham."

Under date of March 19, 1902, complainant writes Mr. Dunham, "Mr. Weller writes us that you are about ready to start up the mill;" and in a letter to Mr. Dunham April 2, 1902, complainant says:

"Our Mr. Forbes calls my attention to a clause in one of your recent letters in which you refer to the contract payments not being due on account of the mill not having started. You possibly overlooked the fact that as soon as the machinery has been put in motion, that the mill is presumed to have started,

whether you put ore into it or not. Mr. Weller informs us that he has had every piece of machinery in the mill in operation. That being the case, the mill has started, and you must so consider it."

On the other hand, defendant, through its superintendent, Dunham, on May 28, 1902, wrote to complainant, "Your work has not all been completed by a good deal, and there are a number of things for you yet to complete;" and on June 12, 1902:

"We do not see how your contract for machinery and installation is finished until the tanks are made tight, the silver plates set, pumps and shafting installed in a workmanlike manner, one full set of screens furnished for each Chillian mill, turn-tables made over or new ones, so that the cars will run on them, the tailing cars should be put in line and made over so that it will not require three men and a horse to move them, the turn-tables are too small for the cars, and a car will not run on them until the guard-rail is cut off; we lack one set of screens to start the Chillian mills, the screens you sent are too small, and the set that came with the mills are broken. Mr. Weller is and has been working for you on the above incompleted work. Mr. Weller is installing one of the solution pumps now, up to today it would not run, neither pump is bolted down yet. The line shaft is not in line, and many details yet to be finished by you before we can possibly start the machinery to give the mill a test."

These letters—and there were many others of like import—establish the fact that the principal part of the contract in relation to the installation of the machinery was performed prior to January 1, 1902. But there were several other matters which the defendant claimed had to be done by complainant before the contract could be fully completed. The court must, therefore, look elsewhere to find other facts tending more clearly and directly to show just what was done. The allegation of the complaint is that the last work was performed and materials furnished on July 16, 1902. The answer avers:

"This defendant is informed and believes, and upon such information and belief alleges the facts to be, that said contract was completed on or before the 1st day of December, 1901."

As bearing on the actual belief and claim of the defendant, it is proper to notice the fact that in defendant's cross-bill it is averred:

"That by reason of the neglect and failure of said Salt Lake Hardware Company to complete said contract and said mill within the time specified in said contract, as hereinbefore alleged, your orator was unable during said time, for a period of eight months after said contract and said mill should have been completed, to operate its said mill," etc.

It further appears that in December, 1901, defendant changed its general manager and other officers theretofore employed by it, and the new officers made alterations in the plans and specifications hitherto adopted, which delayed the work on the mill. But, in addition to this, without further giving the details of the testimony, it affirmatively appears without any contradiction that Mr. Weller was working continuously for the complainant from June 3, 1902, up to July 16, 1902, lining up, boxing, calking tanks, setting pulleys, and doing sundry work arising in starting new machinery. It is, however, claimed that this work done by Weller was upon additional contracts made by the parties, and no part of the original contract. We will have occasion hereafter to show the agreement

made by the parties for the payment of extra work. Whether the work done by Weller at the dates last stated was necessary work under the contract or extra work seems immaterial. It was such work, as was stated by defendant's superintendent, necessary to be done in order to complete the contract. The work was done at defendant's request, and the right of lien attaches when the last work is done.

In New England Engineering Co. v. Oakwood St. Ry. Co. (C. C.) 75 Fed. 162, 168, an objection of a similar nature was made, which was overruled. The court said:

"The bill charges that the complainant, at the request of the defendant, operated the machinery after it had been started for a month, and also furnished during that month extra materials and extra labor, so that the last item for labor and materials furnished bears the date of the 29th of July, while the sworn and itemized statement of account was filed with the recorder on the 13th of August. It is very clear from these averments of the bill that the work under contract and that added by stipulation thereto were not completed until the 29th of July. The engine was started on the 1st or 2d of July, and from that time the complainant claims interest in accordance with the terms of the contract, which provides for the second $10,000 cash and the delivery of the notes when the machinery is started. I think it may be very doubtful whether the contract does not mean the starting of the machinery by the street railway company; but, whether this be true or not, it is certain that the work was not done and the materials were not furnished, all of them, within the meaning of the statute, until the 29th of July."

It was held in Perkins v. Boyd (Colo. App.) 65 Pac. 350, that where an agreement to furnish certain material and perform certain work is subsequently extended by other agreements, the time within which to file a mechanic's lien therefor commences to run from the date of the last work done under any of such agreements.

In Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 215, 50 Pac. 744, the court, in discussing a similar question, said:

"The acts of plaintiffs in performing labor and furnishing materials all tended to the accomplishment of one purpose, viz., the construction of a smelting plant, and were practically continuous. All of the items in the account related to one transaction, and it was therefore a continuous account, the right to initiate a lien for which accrued from the date of the last item."

In McIntyre v. Trautner, 63 Cal. 429, the court said:

"As appears by plaintiff's testimony, * * * defendant, about the middle of February, objected that 'the job was not satisfactory, and that he would not accept'; * * * that 'the pipes leaked'; and requested plaintiff 'to go and put them into proper shape.' The leaking was stopped and the work perfected April 25, 1878. The lien was filed May 24, 1878. Defendant cannot be heard to say that the additional work done at his request to complete the contract was not a continuation of the previous work, and done under the same contract. The notice of lien was filed in time."

See, also, Skyrme v. Occidental M. & M. Co., 8 Nev. 219, 237; Watts-Campbell Co. v. Yuengling, 125 N. Y. 1, 25 N. E. 1060.

From all the facts and circumstances in this case it is clear to my mind that the lien was filed within 60 days after the last work was performed, and was in time. Salt Lake Hardware Co. v. Chainman M. & E. Co. (C. C.) 128 Fed. 509.

2. There is some controversy as to the claim in the lien for extras, $3,311.12. The record shows that when the original contract

s executed it was understood between the parties that, owing the haste in making up the specifications, there would doubtless some extras, which Mr. Richmond, on behalf of complainant, ally agreed with the agent of defendant should not exceed 00. At the time of the first payment by defendant on the con- ct the agreement as to the extras not exceeding $2,500 was put writing. In relation to the account for extras, it is alleged in complaint:

That after the making of said contract the said defendant caused sundry ges from time to time to be made in said specifications, including changes removal of certain of the machinery and appliances furnished after the e had been placed in position in said mill by your orator according to the d specifications. That in making such changes and alterations your r furnished to said defendant, at its special instance and request, cer- extra material not included in said original specifications, consisting of s, bolts, shafts, pulleys, journals, pipes, nails, and other sundry appli- es and material required in the erection, equipment, and installation of d machinery in connection with the said changes and alterations required said defendant. That said extra material so furnished and used in and t the construction and equipment of said mill for the said defendant were l are of the reasonable value of $3,311.12."

The defendant answered:

"This defendant admits that it caused sundry changes to be made in the cifications, as alleged in the bill of complaint herein, and admits that the plainant in making such changes and alterations furnished to defendant ra material, as in said bill of complaint alleged; but denies that the extra terial so furnished or used in and about the equipment of said mill for d defendant were or are of the reasonable value of $3,311.12, but, on the trary, this defendant alleges that said extra material so furnished by d complainant made necessary by any change or changes in the specifica- ns and used in or about the construction and equipment of said mill does exceed the reasonable value or sum of $500."

Under these allegations in the pleadings there is but one question t can properly be raised as to the extras, namely, as to the value reof. The agreement that the extras should not exceed $2,500 uld not be a limitation upon any extras except such as were in- ded at the time such agreement was made.

In Salt Lake City v. Smith, 104 Fed. 457, 466, 43 C. C. A. 637, court said:

"The dry words and broad stipulations of contracts must be read and in- preted in the light of reason and of the subject contemplated by the parties. stipulation common to many corporation contracts that contractors may be uired to perform extra work at the price named in the agreement or fixed an engineer is limited by the subject-matter of the contract to such pro- tionally small amounts of extra work as may become necessary to the ple tion of the undertaking contemplated by the parties when the con- act was made."

There were no false terms and conditions stated in the lien, or y fatal variance between the statements as therein made and the ofs given at the trial. There is no evidence that the recorded im covers machinery and materials not properly included in the ntract. The extras allowed were used by reason of alterations d changes made in the work under the contract, and this fact ows that no segregation is required to be made. The extras must

be considered as having been furnished under the terms of the contract by the express agreement of the parties thereto. The testimony, carefully considered, does not show that the extras constituted an independent contract. It is true that the right to enforce a mechanic's lien depends upon a compliance with the requirements of the statute. Technical accuracy, however, is not required. The courts hold that a substantial compliance is all that is essential.

In Springer Land Ass'n v. Ford, 168 U. S. 513, 524, 18 Sup. Ct. 170, 174, 42 L. Ed. 562, the court said:

"Although mechanics' liens are the creation of the statute, the legislation, being remedial, should be so construed as to effectuate its object. Davis v. Alvord, 94 U. S. 545, 24 L. Ed. 283; Mining Co. v. Cullins, 104 U. S. 176, 26 L. Ed. 704. Substantial compliance, in good faith, with the requirements of the particular law, is sufficient, and the test of such compliance is to be found in the statute itself."

In Skyrme v. Occidental Mill & Mining Co., 8 Nev. 219, 239, the court said:

"The statute in regard to mechanics' liens was intended by the Legislature as a protection to materialmen, contractors, and laborers, and lien claimants are required substantially to comply with its provisions in order to obtain the security which it affords. As was said in Putnam v. Ross, 46 Mo. 338: 'The whole course of legislation on the subject shows that it has been the intention of the Legislature to avoid unfriendly strictness and mere technicality. The spirit and purpose of the law is to do substantial justice to all parties who may be affected by its provisions.'"

The only variance between the lien as filed and the proof offered at the trial is shown by the record as follows:

Contract price		$50,097 50
Extras		3,311 12
Total		$53,408 62
Credits		41,751 28
Balance		$11,657 34

The proofs show:

Contract price		$50,097 50
Payments thereon:		
May 1, 1901	$16,698 60	
May 25, 1901	16,669 17	
July 6, 1901	8,495 84	
		41,863 61
Balance due on contract		$ 8,233 89
Extras furnished	$3,311 12	
Less material not used	861 23	
		2,449 89
Balance		$10,683 78

It will thus be seen that the amount claimed in the lien exceeds the amount proved by $973.56. This was fully explained at the trial. There was a clerical mistake in the aggregate credit, given in the lien at $41,758.28. The proof at the trial showed that this credit should have been $41,863.61, an error of $112.33. A clerical

mistake also is shown to have occurred in the item for extras by a failure to deduct therefrom the sum of $861.23, being the value of certain materials which were included in the contract, but not used. If mechanics' liens are to be construed so as to effect substantial justice, it cannot sensibly be claimed that a lien should be held void because it claimed a greater sum than was actually due, when, as here, it is evident that it occurred without any fraud or wrongful intent.

3. It is argued by defendant's counsel that two checks of $5,000 each, given by defendant on December 6, 1901, to Mr. Richmond, the manager of the machinery department of complainant, should have been credited as a payment on the contract. No such claim is made in the answer. It was shown by the testimony that the checks were paid to Mr. Richmond under a pressing demand for money, on an open account for machinery and materials purchased by defendant from complainant. This account has nothing whatever to do with the contract or the extras hereinbefore mentioned. In fact, there was never any controversy whatever between the parties as to the amount due on the contract. There was some confusion as to certain statements rendered by the complainant, which included the extras. The item of $3,423, referred to, included the sum of $2,449.89 extras, "and the excess of that amount was the unpaid amount of the open account." The whole matter as to the discrepancies is fully explained in the testimony. On June 25, 1902, complainant wrote to defendant:

"It came to the writer's attention that our bill for extras furnished during the construction of the mill had never been charged to the proper account. We are therefore charging your ledger account today with the amount of our bill for extras amounting to $2,449.89, and this amount will in the future appear on statements rendered you."

Thereafter, on August 19, 1902, complainant sent a statement to defendant, showing the total amount due on contract, extras, and open account $11,657.34, and on the 23d received a letter in reply, stating, "The directors appreciate the fact that this debt should be paid promptly." On November 5, 1902, counsel for complainant wrote a letter to the secretary of defendant, stating the amount due to be $11,657.34. On January 6, 1903, the secretary of defendant replied, stating:

"No one regrets more than our board that this small balance of so large and pleasant transaction with your clients should so linger, but, owing to the unfortunate management of last summer, it has thus lingered, and with a little more leniency on their part they will get all of their debt and interest without any trouble."

Other letters of like import were written by the respective parties. The defendant always admitted the debt to be due. The amount was never questioned in the correspondence. The difference between the amount due under the lien and the amount claimed by the letters arises from the fact that there was still money due on the "open account," which cuts no figure in this suit, except an open and frank admission that the debt proven under the lien claimed is justly due.

4. Counsel for defendant does not rely upon the "offsets" claimed in the answer, which are, in fact, possessed of no merit whatever, and will not be discussed.

5. Upon what property can the lien of complainant be enforced? This is the most important question involved in this suit. It is, in many respects, different from any other case to which the attention of the court has been called. In some of its features it may be said to be exceedingly close and uncertain. The answer must be given upon the facts, considered with reference to the express provisions of the statute.

(1) The claim of lien states:

"That all the above-mentioned work and labor was performed and all the above-mentioned material and machinery was used and installed and built and constructed into a mill upon the mine of said Chainman Mining and Electric Company, which mine is described as follows, to wit: 'Chainman Consolidated Lode Mining Claim,' designated by the Surveyor General as 'Lot No. 65,' consisting of the 'Chainman,' 'Chainman Gore,' 'Turkey,' and 'V' claims, especially the 'Chainman' and 'Chainman Gore' mines, upon which said mill and reduction work are constructed, and the Chainman mine mill site; also the electric plant house of said Chainman Mining and Electric Co., situated on lots 6 and 7 of Bk. '4' in Ely, Nevada, Lode Mining Claims, and the Chainman mill site—all being and situate in Robinson mining district, White Pine county, Nevada; together with mill, buildings, water rights, and machinery situate thereon and thereto pertaining, all being and constituting one single and indivisible mine, owned and worked as such by means of common shafts, tunnels, and excavations, and also by means of the mill, machinery, and other appliances, structures, and devices thereon and thereto pertaining."

The complaint copies the description as given in the lien. At the trial it was shown that the defendant, in addition to the consolidated group mentioned in the lien, owned an undivided one-half interest in a contiguous claim called the "Joanna," claimed to be a part of the "Chainman mine." It was also proven that the electric plant described in the lien and bill of complaint was situate in the town of Ely, about 2½ miles distant from the mine, and was run by water, known as the "Georgetown Water Right," owned by the Chainman Mining Company; that this electrical plant furnished the only motive power that the Chainman Company had for running the mill; that this power was not sufficient for operating the mill at its full capacity, there being only 78 horse power in the water right, and it took 90 horse power to operate the mill. The power was transmitted from the power plant to the mill by copper wire and pole line owned by the Chainman Company. It was also shown that the power for the mine hoisting works was steam, which was believed to be sufficient to operate the mill, but that the mill was not equipped for operating by steam power. It is claimed by complainant that the electric power and steam power were both necessary and required in the operation of the mine and mill. The complainant furnished no machinery or materials under its contract or list of extras for the electric light plant. What was furnished was on the open account between the parties, and for which they are not entitled to any lien. Mr. Richmond, in his testimony, said:

"At the time we commenced the installation of this machinery the Chainman Mining & Electric Company owned a power plant situated in the town of

Ely, which was equipped with a Risdon impact water wheel, which drove by belt connections a Westinghouse alternating current generator. The connection between the ditch, the water ditch, and the bars (?) was in very bad condition, and the efficiency of the Risdon water wheel was very low. I received an order from the Chainman Company to supply them with a new pipe line to supply this plant with water, and also with a new water wheel of the Pelton water wheel manufacture, which increased the efficiency of the plant so that they were able to utilize a certain amount of the power of this plant to drive a certain percentage of their machinery in their mill. * * * Q. Did any part of the material that you had contracted to furnish go into the electric light plant, two miles from the Chainman mine? A. Not in my original contract. My original contract only contained the electric motors which were to be used in conjunction with the electric power house. Q. Where were these electric motors installed? A. In the mill. * * * Q. Now, please tell the court what material, not included in your original contract, was furnished to the defendant company and installed by the complainant at * * * the defendant's electric light plant? A. I do not think that any of the materials that we furnished them for their electric power plant was installed by our men. I think they installed the material themselves. We furnished, however, a pipe line, and the water wheel which furnished the power to operate the generator. Q. You didn't have a contract to install that material, did you? A. No, sir; that was not in the contract. That was an open order. * * * The question of electric machinery was absolutely left out of my calculations until after I met with the directors of this company in the East, at which time they requested me to include in my contract the electric machinery they would require, so as not to have accounts with so many different people, and also as I had special freight rates into Ely, and I could take that machinery in probably cheaper than they could themselves."

It is shown by the deposition of Mr. Weller that all the work done on the power plant was for the Chainman Company, under the direction of Mr. Dunham, the general manager.

(2) The provisions of the mechanic's lien law (Cutt. Comp. Laws, § 3881 et seq.) having application to the question under consideration read as follows:

"Sec. 3881. Every person performing labor upon, or furnishing material * * * in the construction of any building or other superstructure, * * * and all persons who shall furnish any timber or other material * * * to be used in or about any such mine, * * * shall have a lien upon such mine for the amount and value of the work or labor so performed, or material furnished."

"Sec. 3883. The land occupied by any building or other superstructure, * * * together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, or structure to be constructed, altered, or repaired."

"Sec. 3899. All foundrymen and boilermakers, and all persons performing labor, or furnishing machinery, or boilers, or castings, or other materials for the construction, or repairing, or carrying on of any mill, manufactory, or hoisting works, shall have a lien on such mill, manufactory, or hoisting works, for such work or labor done on such machinery, or boiler, or castings, or other material furnished by each respectively; and all the provisions of this act respecting the mode of filing, recording, securing, and enforcing the liens of contractors, sub-contractors, journeymen, laborers, and others, and the word 'superstructure', wherever it occurs in this act, shall be applicable to the provisions of this section of this act."

The property mentioned in the lien as the "Chainman mill site" should not be included in the decree. It is shown that it was

not upon any part of the Chainman mine, and has no connection whatever with the mill upon which the lien is claimed. The interest in the Joanna mine should also be excluded, because it was not mentioned in the description of property claimed to be subject to the lien. I am also of opinion that under the facts and the law the electric power plant, as described in the lien, should not be included in the decree.

This brings us directly to the question whether or not the lien can be enforced upon the entire group of mines described in the lien. The contention of defendant that, if complainant is entitled to a lien upon any ground, the same shall be limited to sufficient space around the mill as may be required for the convenient use and occupation of the same, namely, space for "dumps, tailings, supplies," etc., falls far short of giving the security which the lien laws contemplate should be given, and cannot be entertained. It is the duty of the court to consider the object and purpose of the parties in installing the machinery, constructing the mill and improvements on the property, in order to reach a proper interpretation of the law. The decisions cited by the respective counsel were based upon facts somewhat dissimilar from the case at bar. Some are founded upon the provisions of lien laws that are different in one state from another, etc.; others are dependent upon the rule established in various states as to whether the law should be construed strictly or liberally. But an examination of the cases will shed some light upon the general principles which are applicable to the question under discussion. The mechanic's lien law should be so construed as to protect lien claimants of whatever kind, whether contractors, machinists, materialmen, or laborers, in securing their claim. This at least should be one of the objects which courts should keep constantly in view. It is to secure this end that courts have held that the lien laws should be liberally construed with a view to effect their object and promote justice. In line with this principle, in Phillips v. Salmon River M. & D. Co. (Idaho) 72 Pac. 886, the Supreme Court of Idaho held, in a foreclosure of a laborer's lien upon a group of placer claims, that:

"Said three mining claims were being worked as one mine, and we think, under the evidence, appellant is entitled to a lien upon all of them, and the court erred in refusing to enter a decree foreclosing said claim of lien."

In Thompson v. Wise Boy M. & M. Co. (Idaho) 74 Pac. 958, 960, where a laborer at work as an amalgamator in a mill situate upon a quartz mine was held to be entitled to a lien on the mine, the court, in its opinion, said:

"If it be true that the mill was 'affixed to the mine, and was a part of the realty.' * * * then work in the mill was as much work in the mine as operating a hoist would be work in the mine. * * * The milling of the ore extracted from the mine is as valuable to the mine owner as the extraction of the ore; and where it is milled upon the mine, and in a mill belonging to the mine, we see no more reason for denying the man a lien who works in the mill than for denying such lien to the man who operates the hoist or runs the cars. * * * And we are very strongly inclined to the belief that the Legislature had the one in mind as much as the other when they enacted this law."

In Keystone M. Co. v. Gallagher, 5 Colo. 23, 28, the court said:

"Blodgett's claim is for furnishing the material for and building a house or shop contiguous to the mine, and built for the use of the mine under the direction of the mining superintendent. The house was owned by the owners of the mine, and was a part of the mining property, and we see no error in the decree in favor of Blodgett and for the sale of the house, together with the mine, for the purpose of enforcing the lien."

In Williams v. Mountaineer G. M. Co., 102 Cal. 134, 142, 34 Pac. 702, 36 Pac. 388, it was held, under the lien law of California, that a claim of lien for materials furnished for the construction of a mill, tramway, boarding house, and reduction works upon a mining claim should be against the mining claim, and not against the specific structure upon the mine. In the course of the opinion, the court said:

"The mill is not a mere appurtenance for the mine. It is upon the mining claim, and, like the tunnels, tramways, and roads, is a part of the mine."

In Gould v. Wise, 18 Nev. 253, 264, 3 Pac. 30, 35, the court said:

"The last point made is that there was no testimony showing how much of the land upon which the reduction works stood was necessary for its convenient use and occupation. When the reduction works were leased, the land determined by the court as subject to the lien was embraced within the demised premises. And when the defendant acquired the property he purchased this land and the reduction works. This testimony showing that the land and reduction works had been leased together and sold together, tends to prove that the property subjected to the liens has been treated as a unit, and used for a common purpose."

In Springer Land Ass'n v. Ford, supra, the court had under consideration the construction of the lien law of Arizona, which gave a lien for labor performed or materials furnished in the construction of ditches, not only on the ditch and the land through which it was constructed, but on so much of the land about the same as might be required for its use, "to be determined by the court on rendering judgment." The suit was brought to foreclose a mechanic's lien upon an irrigating ditch and reservoir system, the land covered thereby, the right of way therefor, and the particular lands intended to be irrigated. The lower court rendered a decree allowing the lien on the ditch and reservoirs, together with the right of way, and also on 22,000 acres of land appurtenant to the ditch and to be irrigated thereby. The decree was affirmed. The Supreme Court, in the course of its opinion, said:

"The truth is that what area of land is subject to lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall, or a fence would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same. This ditch was to expend its waters on this tract, and could not be used or operated without it. Each was dependent on the other, and both were bound together in the accomplishment of a common purpose. The lien must apply to the entire tract, or be confined to the right of way through which it took its course, and to narrow it down to the latter would be to disregard the very terms of the statute."

In view of the principles announced in these cases, and of all the facts established by the testimony, that the mill in question was erected upon the mining ground owned by the defendant; that

the object in view was the erection and construction of the mill for the purpose of working the ores that were to be extracted from the group of mines described in the lien; that the success and usefulness of the mill and of the mine were virtually dependent upon each other, and to that extent, at least, they were bound together for a common purpose—my conclusion is that the entire group of mines as mentioned in the lien and complaint should be held subject to the lien.

Let a decree be entered in favor of complainant in accordance with the views expressed herein.

In re J. H. ALISON LUMBER CO.

(District Court, S. D. Georgia, W. D. April 29, 1905.)

1. BANKRUPTCY—LIEN.
   Where mortgaged property of an insolvent corporation was disposed of during a receivership prior to the institution of proceedings in bankruptcy, but neither the receiver nor the trustee in bankruptcy received any part of the proceeds, the mortgagee has no claim on the fund in the hands of the trustee on account of the mortgage.

2. SAME—PRIORITY OF CLAIMS—RECEIVER OF STATE COURT.
   A receiver appointed by a state court for an insolvent corporation in proceedings instituted shortly prior to bankruptcy proceedings is not entitled to priority in the bankruptcy court on account of his services rendered prior to the bankruptcy proceedings, or of expenses or advances made to the estate which did not contribute to the fund in the hands of the trustee.

3. SAME—COSTS—REQUIRING PAYMENT FROM SECURED CREDITORS.
   Secured creditors of a bankrupt who make use of the bankruptcy court and officers to realize on their security may be required to contribute their proportion to the costs of the proceedings and for the preservation of the property during their pendency, where there is not sufficient unincumbered estate, but they cannot be required by the court to pay any part of the expenses of a prior receivership in a state court.

In Bankruptcy. On petition of J. E. Mercer, receiver appointed by state court, for compensation, etc. Petitions of attorneys for fees and petition of Victoria McArthur, administratrix.

Minter Wimberly, for receiver.
George S. Jones, for petitioner McArthur.
Black & Jackson, D. B. Jay, L. Kennedy, and Haygood, Cheney & Stewart, pro se.
F. S. Harrell, for V. S. Wooley.
Hal Lawson, for Bowen Banking Co.
D. B. Jay and L. Kennedy, for trustee.

SPEER, District Judge. The enactment by Congress of a uniform system of bankruptcy has been repeatedly held to suspend the operation of state bankruptcy or insolvency laws. Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; In re Smith (D. C.) 2 Am. Bankr. R. 9, 92 Fed. 135; In re Macon Sash & Door Company (D. C.) 7 Am. Bankr. R. 66, 112 Fed. 323, modified on appeal as Carling v. Seymour Lumber Co., 8 Am. Bankr. R. 29, 113 Fed.

480, 51 C. C. A. 1; Davis v. Bohle, 1 Am. Bankr. R. 412, 92 Fed. 425, 34 C. C. A. 372; Parmenter Mfg. Co. v. Hamilton, 1 Am. Bankr. R. 49, 31 N. E. 329, 30 Am. St. Rep. 238; In re Bruss-Ritter Co., 1 Am. Bankr. R. 58, (D. C.) 90 Fed. 651. The embarrassments which attend the parties in this cause are the direct outgrowths of a disregard of that settled doctrine. In November, 1903, the J. H. Alison Lumber Company, of Fitzgerald, became insolvent. It subsequently appeared that it was also bankrupt. A petition in behalf of creditors under the state insolvency law was filed in the state superior court of the Oconee circuit against that company. After consideration of the case made by the bill, that honorable court appointed Mr. J. E. Mercer as receiver of the assets of the insolvent company. By the decree of his appointment he was ordered to continue the business of the company as a going concern. This he did until March 30, 1904, when bankruptcy proceedings were instituted. Mr. Mercer, however, remained in possession of the assets of the bankrupt concern until a trustee was appointed and qualified, when he turned over to that officer the assets in his hands as receiver. He also submitted to the court appointing him a report of his services as receiver. In this he also gave an account of his receipts and disbursements. This report was approved by the judge of the superior court, who recommended to this court that Mr. Mercer's compensation as receiver of the state court be fixed at the sum of $1,000. Thereafter the receiver applied to this court for the approval of his accounts and for compensation for his services. This application was referred to a special master, with instructions to report as to the accuracy and propriety of the accounts, and approximately the sum which should be allowed as compensation for the services performed. Victoria McArthur, administratrix, also filed a petition in this court, asking that the receiver be required to pay to her as a part of his expenses of operation the value of certain timber used by him. Upon the proceeds of this timber she claimed a lien. Her petition was referred to the master. The usual applications for fees of the attorneys in bankruptcy were also referred. After taking and hearing the evidence fully, the special master filed his report. From this it appears that the accounts of Mr. Mercer as receiver of the state court were correct, and that he presented vouchers for all of his expenditures made in the operation of the business of the lumber company. It appeared that from his own means Mercer had advanced $3,461.37 more than had been received by him from the operation of his trust, and the master therefore found that the insolvent company was indebted to him in that sum. The master also found that $750 would be reasonable compensation for the services of Mr. Mercer as receiver in the state court and as custodian of the assets during the interval between the date of filing of the petition in bankruptcy and the qualification of the trustee. The master having heard evidence as to the character and value of their services also reported the amounts which should be allowed the attorneys as fees. The claim of Mrs. McArthur against the bankrupt estate was disallowed. On the coming in of the master's re-

port the court was advised that most of the machinery and property of the bankrupt had been withdrawn from the possession of the trustee. This had been done under orders granted by the referee in favor of creditors holding contracts for retention of title. It further appeared that much other property had been sold by the trustee, and the proceeds held to satisfy the lien of certain mortgages on practically all the assets. In addition to this, it appeared that a considerable amount of property was burned immediately after the trustee took charge. This was mainly lumber, drykilns, and the like, on which it was at the time impossible to obtain insurance. The loss it seems, however, fell principally upon individual creditors who had retained title, or who had mortgages on the property destroyed. In view of these facts it was discovered that there was not a sufficient fund in the hands of the trustee arising from the proceeds of unincumbered property to pay the costs, expenses of administration, attorney's fees, the compensation of the receiver in the state court, and the sum of $3,451.37 advanced by him from his personal means in conducting the losing operation of keeping that receivership a going concern as ordered by the state court. Certain pressing and obviously proper claims received an allowance on account by order of the court. A reference was then made to the referee having jurisdiction to report:

"First. As to what priority, if any, shall be allowed to the various claimants herein named, including Mrs. Victoria McArthur, should her claim be finally allowed by the court. Second. What proportionate part of the expenses and costs of administration should be taxed against these or other creditors or claimants, including those who have heretofore been paid in full or on account of the fund in court or allowed to withdraw property from the hands of the trustee."

The referee, having heard the parties, has made his report, exceptions thereto have been filed, and the matter is now for final decision.

It will be recalled that the special master disallowed the claim of Mrs. McArthur, administratrix. In this finding the referee concurred. This claim is based upon the facts following: Mrs. McArthur held title to certain timber. The Alison Lumber Company had notice of her claim. She had sold the land and timber to Swift and Grantham for $350, and had given them a bond for title. Swift and Grantham executed and delivered to Mrs. McArthur their promissory note for the purchase price, secured by a mortgage on all the logs and lumber cut from said land, and gave to Mrs. McArthur an order on the Alison Lumber Company to pay her $1 per thousand feet of lumber manufactured from logs coming from said land, to be credited on said note. The logs from the timber of Mrs. McArthur were furnished to the Alison Lumber Company by Swift and Grantham under this arrangement. This was the status at the time the receiver appointed by the state court took charge of the lumber company's mill. The facts were brought to the attention of the state court, and the receiver was by that court directed to segregate the lumber cut from Mrs.

McArthur's timber, and hold it subject to the order of the court to be made upon her petition for payment. Certain lumber was pointed out to the receiver as having been produced from the logs and timber in question. It also appeared that at the time Mercer was appointed receiver of the lumber company its mill was being operated by one Frank Crapp, who had agreed to pay the lumber company $1,000 a month as rental. The receiver continued the arrangement with Crapp for one month. Crapp cut up and disposed of Mrs. McArthur's lumber, but omitted to pay the receiver anything therefor. This was done while the property was entirely in the control of the state court, and three months before bankruptcy proceedings were instituted. Since none of the proceeds of the operation by Crapp went into the hands of the receiver, and nothing from this source was turned over by him to the trustee, it follows that the proceeds of Mrs. McArthur's lumber form no part whatever of the bankruptcy assets. As stated the lumber was sawed up by Crapp, who had agreed to pay the receiver $1,000 rent for the mill, but who never paid a dollar. This was done before bankruptcy. Whatever may be the equities to which Mrs. McArthur is entitled against Crapp, or against Mercer as receiver of the state court, or against Swift and Grantham, her claim obviously has no relation to the bankruptcy fund in the hands of the trustee, or to any fund which may accrue in its behalf.

Another question arises upon a petition of Mercer, receiver, presented to the referee after the reference above mentioned to that officer was made. In this Mercer recited the fact of his appointment as receiver of the state court: that he operated the sawmill of the bankrupt company; that, there being no fund in hand, he bought timber with his own money and that of his niece, for whom he was guardian, to the extent of $1,850, with which to operate the mill; that from this timber there was cut and turned over to the trustee logs that sold for $250; that from the same timber he himself manufactured lumber of the value of $5,801.85 at a cost of $3,783, which left a profit of $2,018.85. He alleged also that a part of this was used in the preservation of the estate, and also that the trustee sold timber turned over to him cut from said timber of the value of $800, and that the remainder of the timber was sold by the trustee for $1,385.25. He further alleged that he spent large sums of money in addition to the above for the protection of the estate; that the timber leases were his individual property, and that his title never passed to the bankrupt. He prayed that the money in the hands of the trustee arising from the sale of the lumber, timber, and logs be declared to be his property to the amount of $1,850, and that he be declared to have a lien upon the other funds in the hands of the trustee arising from the sale of timber and lumber. This he claims under the lien laws of Georgia. Upon this petition the finding of the referee is as follows:

"The trustee has in his hands $1,385.25 from the sale of the timber left standing and $252 from the sale of logs from this timber, and as much as 90 per cent. of certain lumber turned over by Mercer to the trustee, which the trustee sold for the sum of ——— dollars. There was also sold by the trus-

tee some rice meal for $61.25, which had been turned over by the receiver to him; and that the bankrupt estate is better off by the sum of these four amounts, to wit, ——— dollars, from the purchase and operations of the receiver so far as this timber is concerned, considered apart from his other transactions."

It is not a little embarrassing to the court that the referee on these important matters has thought proper to make his findings in blank. We are enabled, however, to gather from all of the figures and from the testimony of Mr. Mercer that the lumber turned over by him to the trustee was of the value of $800. Ninety per cent. of this sum—adopting the figure of the referee—is $720. The total of the four amounts found in Mr. Mercer's favor by the referee, had he appropriately written his figures in the blanks, will be $2,418.50. The referee further finds that for the remainder of Mr. Mercer's advances, expenses, and compensation as receiver he is not entitled to any lien or priority, but has only an unsecured claim against the estate, standing upon the same footing as any other unsecured creditor. While this is a hardship on Mercer, we are constrained to approve this finding. It is apparent from this record that no creditors other than those having liens or priorities can beneficially participate in the distribution of the assets. Creditors having claims to the extent of $13,000 have been allowed by the referee to withdraw from the estate machinery, timber, and other property furnished by them on contracts reserving title in the vendor. This was done in the following manner: Such creditors filed before the referee petitions setting up conditional sales, the amount due them, and praying that the trustee be authorized to "sell" to them such property in settlement of their claims. Attached to said petitions is a petition of the trustee representing that it is to the best interest of the estate to accept such offer, and praying that he be authorized to make the sale. This is followed by an order of the referee directing the sale to the claimants for the amount due them. It is also significant that six of the seven creditors who in this manner apparently received full settlement of their claims were represented by the same attorneys who also appear of record as the attorneys for the trustee and for the petitioning creditors. No attention seems to have been accorded the rule of court on this subject adopted May 30, 1901, as follows:

"It is ordered that in no case shall trustees, receivers or custodians appointed in bankruptcy cases employ attorneys to represent them without first obtaining an order of the court authorizing such employment. Ordered further that in no case shall such trustees, receivers or custodians employ or continue as their attorneys a member or members of the bar employed in the same cause by the bankrupt or a creditor unless previously so authorized by order of the District Judge."

These so-called "sales" or orders allowing vendors to retake property furnished by them were, it also appears, made ex parte, and without complying with section 58–4, which requires "creditors shall have at least ten days' notice by mail of all proposed sales of property." Bankr. Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]. Another creditor—V. S. Wooley—held a valid specific mortgage on certain timber and other property of

the bankrupt. This was given to secure a loan of $3,750 with interest at 8 per cent. from June 14, 1902. This property was sold by the trustee for $5,060. It follows that the lien of the creditor attached to this fund, and must, unless otherwise ordered, in its entirety be paid therefrom. Since this property brought more than the principal and interest of the mortgage, it is presumable that a sufficiency to discharge the debt of Wooley is in the designated depository as required by law. There is no doubt at all as to the validity or priority of Wooley's claim and mortgage on the property conveyed to secure it.

It is quite impossible to compel secured creditors to pay any part of the compensation of the receiver earned in the state court, or any portion of his advances there which did not evidentially appear to contribute to the fund in the hands of the trustee in bankruptcy. The expenses and costs of the bankruptcy court stand upon a superior footing, and, if there is not sufficient money arising from the sale of unpledged property to pay them, it seems that the secured creditors should contribute ratably to that purpose. They have appeared in the bankruptcy court, selected it as their forum, availed themselves of the services of its officers, and utilized its process to collect their claims. We have no doubt of their duty to contribute to pay all such costs and expenses. As stated in Isaac on Conditional Sales in Bankruptcy, § 117:

"Where actual and necessary expenses have been incurred to the estate in the preservation of property sought to be reclaimed, the court may tax the claimant the whole or any part of such expense. Bankr. Act, § 64b (1)."

And section 118:

"It has been held that, where the property is sold by consent of the claimant, the referee and trustee are entitled to commissions on the purchase price in full, even when the claimant is the purchaser. In re Sanford Furniture Co., 11 Am. Bankr. R. 414."

Among the claims of this character is that of J. E. Mercer in preserving the assets of the bankrupt after the petition had been filed and before a trustee had been elected. For these services the court will allow him $300, and will approve the finding of the special master fixing $750 as compensation for his entire services. This will leave $450 for his services in the state court. This he may possibly recover from the plaintiffs in the original suit in the state court who secured his appointment on the inoperative insolvency proceeding. This may also be true of the balance of his advances and expenses as such receiver, for which priority here has been denied him. The disastrous result of the receivership in the state court, and the calamity which fell upon the property from a fire after the trustee was appointed, all of which most unfortunately reduced the assets of the bankrupt, will not only defeat the claim of unsecured creditors, but will largely reduce the compensation of attorneys. These fees will be fixed as follows: Black & Jackson, $250; Kennedy & Jay, $250; Haygood, Cheney & Stewart, $100. These sums have already been paid on account, and by this finding the account is closed. The fee of the attorney for the trustee has

not been fixed. This, if allowed, will, of course, constitute a part of the expenses in bankruptcy. This attorney is yet attempting to collect funds of the estate, and his compensation may, perhaps, be adjusted with large regard to his success. The receiver and custodian, J. E. Mercer, has already been paid $1,000 on account. This, of course, must be credited on the amount of $2,418.50 for timber actually furnished by him to his trust and allowed him by the referee as above recited. V. S. Wooley has also been paid $1,000 on account of his claim. It follows that the balance of his claim of $3,750, with interest from June 14, 1902, at 8 per cent. must be paid in full. This, however, like payments made or satisfied by the delivery of property for or bought by other secured creditors, is subject to the ratable deduction to be apportioned on the value each received, to pay the costs and expenses of protecting, collecting, and administering the property pledged to secure their claims, unless it should turn out that there is in the general fund a sufficient sum for that purpose. This is in accordance with the finding of the referee as follows:

"Each of the parties who have withdrawn property should contribute to this fund, whatever it may be, according to the amount collected on their claims, as shown by the settlements made by them with the trustee. These parties are the Bowen Banking Co., Berlin Machine Works, Mrs. Ella Mae McCarty, Soule Steam Feed Works, Continental Gin Co., Schofield Sons Company, and V. S. Wooley."

The court has reason to believe from information received from the trustee that the latter will probably receive a considerable sum from the settlement of certain litigation now pending. It may be therefore that it will not be necessary to require the creditors above mentioned to contribute to the expenses of the bankruptcy court.

KRONTHAL WATERS, Limited, v. BECKER.

(Circuit Court, E. D. Pennsylvania. April 8, 1905.)

No. 11.

1. UNFAIR COMPETITION—DISTINCTIVE DRESSING—TRANSFER OF RIGHT BY SALE OF BUSINESS AND GOOD WILL.

Although the name under which an article is sold may be one which cannot be appropriated as a technical trade-mark, yet where it has been used for many years in connection with a style of package and labels which together constitute a distinctive dressing for the article, by which it has become well known to the trade and to consumers, the right to the exclusive use of such dressing is one which passes with the sale of the assets and good will of the business, and in which the purchaser is entitled to protection against a fraudulent imitation.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 98.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper, 30 C. C. A. 376.]

2. SAME—IMITATION OF DRESSING.

Complainant and its predecessors in ownership have for many years bottled and sold the waters of a well-known mineral spring in Germany

under the name "Blue Label" using therefor a uniform and distinctive dressing consisting of a green bottle having thereon a blue neck label of peculiar shape bearing the words "Blue Label," and a body label containing an elliptical blue panel with white lettering surrounded by a white field with blue lettering. Said water became widely known throughout the United States under the name of "Blue Label Mineral Water." Defendant commenced the bottling and sale of a different water, using bottles of the same shape, size, and color, having thereon neck and body labels of the same shape, size, style, and colors, but having different words thereon. The resemblance between the two as a whole being such as would be noticeable to a person of ordinary intelligence and observation, and the differences, such as were calculated and evidently intended to deceive ordinary purchasers. Held that such simulation of complainant's dressing, aside from any question of trade-mark or copyright of labels, constituted unfair competition, against which complainant was entitled to protection by injunction.

In Equity. Suit for unfair competition in trade. On demurrer to bill and motion for preliminary injunction.

Howson & Howson, for complainant.

James H. Wolfe, Walter C. Pusey, and Joshua Pusey, for respondent.

HOLLAND, District Judge. A bill in equity is filed and a motion for a preliminary injunction made to restrain unfair competition in trade alleged to be carried on by the defendant in the use of a bottle and dressing for a mineral water so closely resembling that of the complainant that the imitation is a fraud not only upon complainant, but upon the public. A demurrer was filed to the bill, which was argued together with the motion for a preliminary injunction, and both questions will therefore be disposed of in this opinion.

The facts necessary to a complete understanding of both questions are as follows:

(1) Long prior to 1868, Ernst von Eckardstein, a subject of Germany, was the owner of a natural mineral spring, known by the name of "Wilhelms Quelle," located at Kronthal, Prussia; was engaged in bottling mineral water from this spring, and selling it to the public as blue label mineral water, in bottles of a certain shape, green in color, upon which there has been uniformly arranged upon the neck of each a label with the words "Blue Label" in white upon a blue back ground. There is also affixed to each bottle a body label, with a certain characteristic arrangement of colors, type, and panels, and particularly an elliptically shaped blue center panel, on which are written words and sentences in white; and this panel is surrounded by a field of white, containing sentences and words in blue letters. This dressing of complainant's blue label mineral water has been used for a great number of years. On October 10, 1898, Ernst von Eckardstein transferred "all the good will of the business so carried on by him * * * together with the trade-marks and labels used therein," etc., to the Kronthal Company, Limited, and this company, on the 10th day of November, 1898, conveyed and assigned unto the complainant company "all and singular the property and assets * * * and the good will

of the business of the Kronthal Company, Limited," and the complainant company has bottled and sold this mineral water in bottles and dressing of the same kind since that time, with the exception that the body label has been made somewhat larger.

(2) Defendant, in the year 1904, began the use of bottles of the same shape, size, and color; neck and body labels of the same color, excepting the blue is of a slightly deeper shade; same style panel; and same color and arrangement of letters, with, however, the use of different words. The resemblance between the complainant's and defendant's bottle of mineral water when prepared for sale is very striking, and much more conspicuous than the differences.

(3) The bill recites that in the year 1889 the body label of the complainant was registered in the United States Patent Office as a label for use in connection with the bottling and sale of its mineral water, and on or about the 21th day of August, 1895, the name "Blue Label" was registered in the United States Patent Office as a trade-mark for this mineral water, both of which have been used continuously since their adoption and registration as neck and body labels. So that by reason of the constant use by the complainant and its predecessors of this dressing in connection with the sale of this mineral water, it has become known to the trade and consumer throughout the United States as "Blue Label Mineral Water."

The bill avers, with other facts, by way of inducement, that the defendant's dressing is an infringement of complainant's trademark and registered label, but the injury of which plaintiff complains is unfair competition, which is set forth in the bill as follows:

"Said mineral water is by reason of your orator's and its predecessor's extensive and constant use in their advertisements and as a trade-mark upon the bottles of the name 'Blue Label' known throughout the United States to dealers, wholesale and retail, and to consumers, by said name 'Blue Label,' or as 'Blue Label Mineral Water.' The words 'Blue Label' mean to the trade and to the public generally the mineral water bottled and sold by your orator. Furthermore your orator shows unto your honors that by reason of the continuous, uniform, and uninterrupted use by your orator and its predecessors without change during the past fifteen years both in the United States and abroad of their distinctive style of package or dress, to wit, the aforesaid quart bottle green in color, and of the shape shown by exhibit 'Complainant's Bottle and Labels,' having thereon the characteristic neck label and body label heretofore described and also shown in said exhibit, said distinctive package has become known to the trade and consumer both in the United States and abroad as your orator's, and indicates to the trade and consumer mineral water issued by the aforesaid spring Wilhelms Quelle, and bottled and placed upon the market by your orator and its predecessors. The general appearance of the package aforesaid, as shown by exhibit 'Complainant's Bottle and Labels,' is a badge long recognized by the trade and consumers, pointing to your orator as the origin of its said mineral water product. Your orator shows unto your honors that the simulation by defendant of your orator's labels and distinctive style of package was and is intended and calculated to deceive purchasers into the belief that defendant's goods are the goods of your orator, and to enable defendant to pass off his goods as and for your orator's; and your orator is informed and believes, and therefore charges, that many persons have thus been deceived and induced to purchase the defendant's goods under the belief that they were getting the well-known prod-

ts of your orator. Your orator further shows unto your honors that it has thin the present year come to the knowledge of your orator that said de- ıdant is selling his aforesaid mineral water under the name 'Blue Label'; at is to say when purchasers ask defendant or his agents for Blue Label neral water, thereby meaning the product of your orator, defendant and his ents are accustomed to hand said purchaser the aforesaid defendant's prod- t, with the intent and result of deceiving said purchasers into the belief that ey are getting your orator's product."

The prayer of the bill is for a provisional or preliminary injunc- on to restrain the defendant from putting up in bottles of a general rm, shape, and color of complainant's bottles, and marked with bels of the form, device, and in the manner complained of, or in y other form or device which shall be a colorable imitation of mplainant's bottled mineral water, and from simulating any of mplainant's trade-marks or labels, and from passing off in any anner whatever, or attempting to pass off, mineral water or other verage not bottled by complainant as complainant's product. ther relief asked for in the bill will not be considered, as counsel r the complainant has agreed that it would be more appropriate consider the other matters of relief upon final hearing.

The demurrer to the bill is: (1) That complainant has failed show title to the alleged trade-marks and labels. (2) That the ll seeks an injunction for an infringement of trade-mark, and also a certain alleged registered label, and that the two cannot prop- ly be joined, as the first cause of action is cognizable under the w covering trade-marks, and the second named under the statutes vering copyrights. (3) That the bill does not set forth that the mplainant complied with certain prerequisites prescribed by the nited States statutes prior to registration of labels.

1. Where a trade-mark is applied to a commercial article to in- cate its origin at a particular manufactory or place of production, its ownership or origin with a particular manufacturer or dealer, ıd not to indicate that such article is produced by the peculiar ill of any particular individual, the trade-mark is transferable, ıd will pass with the manufactory or place of production or with e business in which it is used, to a successor to the original pro- ietor. Trade-marks of this character constitute a part of the sets of an individual, firm, or corporation, and pass under a sale the "assets and good will" of the business, whether specially entioned or not. Laughman's Appeal, 128 Pa. 1, 18 Atl. 415, 5 R. A. 599; Morgan v. Rogers (C. C.) 19 Fed. 596; Paul on rade-Marks, § 116. But it is contended that "Blue Label" can- ot be appropriated as a trade-mark, and therefore cannot be as- gned; but without regard to the question as to whether "Blue abel," technically speaking, can be a trade-mark, the complain- nt's purchase and use of this neck and body label in combination, rming a well-known bottle dressing for this mineral water, in- cating, as alleged, that it is a blue label mineral water bottled om Wilhelms Quelle, a well known spring in Germany, gives it hatever rights the complainant's predecessors had in and to the se of the alleged trade-mark and label under the assignment to it the "assets and good will," so as to enable it to restrain the de-

fendant from fraudulently imitating this dressing on an entirely different kind of mineral water for the purpose of deceiving the consumer. A manufacturer or vendor may have no trade-mark, and yet may, by usage for a great number of years, of a particular form, color, and general appearance of labels and manner of arranging the general dressing of an article so as to cause them to be known by the public from their general appearance, acquire such a right in the indicia thus adopted and used as to enable him to assign it with the article of merchandise upon which it has been used, and the assignee may restrain others from fraudulently imitating such dressing for the purpose of deceiving the public and enabling another's goods to be palmed off on the public as his.

2 and 3. The second and third grounds of demurrer are overruled for the reason that the suit is for the purpose of restraining unfair competition by a fraudulent imitation of the bottles and dressing of the complainant, and not for the purpose of restraining an infringement of a trade-mark or a registered label, although the bill claims a registered trade-mark and a registered label. In order to sustain a bill for unfair competition, it is not necessary to establish an ownership in a trade-mark, or the proper registration of the label. "Irrespective of the technical question of trade-mark, the defendant has no right to dress his bottles up in such manner as to deceive an intended purchaser, and induce him to believe he is buying those of the complainant." This is the charge made in this bill for which the restraining order is asked, and, if the facts establish this allegation, plaintiff is entitled to be protected. Coates v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 1 L. R. A. 616; Putman Nail Co. v. Bennett (C. C.) 43 Fed. 800. The question on the motion for a preliminary injunction is whether, taking the defendant's bottle as dressed up for sale, with the neck and body labels as a whole, it so far copies or resembles the bottle and dressing of the complainant that a person of ordinary intelligence would be misled into buying the one supposing that he was buying the other. And in such case it has been said that "one must be guided very largely by the judgment one forms from the use of one's own eyesight." Elaborate descriptions of the points of resemblance or those of difference are, taken by themselves alone, always unsatisfactory. The eye, at a glance, takes in the whole of one exhibit and the whole of another, and the comparison thus made of the two is the surest and the only satisfactory way of satisfying the judgment as to the existence of the alleged deceptive imitation. Lorillard Co. v. Peper, 86 Fed. 956, 30 C. C. A. 496. With an exhibit of a bottle both of the complainant and defendant before me, dressed up in the style used by both, ready for sale, I can, of course, easily distinguish one from the other; but the resemblance between the two is so close that the consumer, without close attention, could easily be deceived into accepting the mineral water of the defendant when he intended to purchase that of the complainant. The bottles are of the same shape, size, and color; the neck labels are the same in size and color, placed upon the bottle at the same place and same angle; the body labels are the

same in color, each containing an elliptically shaped panel of blue, with words and sentences of white letters; the white field in both body labels surrounding the blue panel contains words and sentences of blue letters, similarly arranged, and same style and similar shape. The differences are found in the use of different words and sentences on the labels, and the blue of the defendant's dressing is of a slightly deeper shade. The plaintiff has written on the neck label the words "Blue Label," and the defendant has "Kosmos Springs." These words appear in the body label of defendant at the same place and in the same shape as the words "Wilhelms Quelle" occupied in the complainant's body label. It might be that a consumer who has been accustomed to purchase the Blue Label mineral water in quantity, bottled at the spring known as Wilhelms Quelle in Germany, would detect the difference upon comparison; but in the sale of these waters the purchaser would not likely have both products together, and the great similarity of the two would make him an easy victim to the imposition. Of course, the complainant can have no exclusive use of the blue colors, the shape of the bottle, nor the coloring words or letters upon the body label. These no doubt may all be used fairly by the defendant; but when he arranges his dressing in the use of colors, letters, words, and labels in such a combination as to so closely resemble that of the complainant as to be calculated to deceive an ordinarily careful and intelligent person, he should be restrained. Coates v. Merrick Thread Co., supra; Scheuer v. Miller, 74 Fed. 225, 20 C. C. A. 161; Wellman Co. & Dwire Tobacco Works v. Ware (C. C.) 46 Fed. 289; Carroll v. Ertheiler (C. C.) 1 Fed. 688; Bernheimer v. Ross (C. C.) 73 Fed. 203; Enoch Morgan Sons & Co. v. Whittin-Coburn Co. (C. C.) 118 Fed. 661; McLean v. Fleming, 96 U. S. 254, 24 L. Ed. 828; Von Mumm v. Wittemann (C. C.) 85 Fed. 966. The following remarks, from a case recently decided are very appropriate in connection with the facts in this case:

"Inspection of the labels must carry conviction to any unbiased and unprejudiced mind that the later label was prepared by some one who had seen the earlier one, and that it was designed not to differentiate the goods to which it was affixed, but to simulate a resemblance to complainant's goods sufficiently strong to mislead the consumer, although containing variations sufficient to argue about should the designer be brought into court. This is the usual artifice of the unfair trader." Collinsplatt v. Finlayson (C. C.) 88 Fed. 693.

In another recent case the same court says:

"There are as usual a number of minor differences between the form and the dress of the two packages, which are expatiated upon in the affidavits and the brief; but no one can look at both packages without perceiving that there are strong resemblances, which could easily have been avoided had there been an honest effort to give defendants' goods a distinctive dress." National Biscuit Co. v. Baker (C. C.) 95 Fed. 135.

The demurrer is overruled, and a preliminary injunction awarded. Let a decree be drawn in accordance with this opinion.

FRANKLIN SUGAR REFINING CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. April 14, 1905.)

No. 104.

CUSTOMS DUTIES — BOUNTIES — COUNTERVAILING DUTY — SUGAR — DUTIABLE WEIGHT.

Held, that the purpose of the provision in section 5, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], authorizing the imposition on imported merchandise of an "additional duty equal to the net amount of the bounty" paid by the exporting country, was to compel the importer to pay the total or net amount of the bounty allowed on the merchandise, and that it is the duty of the collector of customs to adopt such a basis of assessment as will accomplish this object. *Held*, also, that, as the bounty is paid on the basis of the quantity exported, it is proper to assess the additional duty on the same basis, and that as to sugar, a commodity that nearly always decreases while being imported, the additional duty should be assessed with reference to the invoice weight, or weight at time of exportation, and not the weight on arrival, subject to deduction for difference in weight due to any cause warranting an allowance.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,072, T. D. 23,503, which affirmed the assessment of duty by the collector of customs at the port of Philadelphia on merchandise imported by the Franklin Sugar Refining Company.

John G. Johnson, for importer.

Wm. M. Stewart, Jr., and J. Whitaker Thompson, for the United States.

HOLLAND, District Judge. The collector in this case levied a countervailing duty upon the cargo of sugar imported into the port at Philadelphia, per steamship Pilgrim, equal to the net amount of bounty paid by the exporting country, according to the invoice weight, which was 235,042 pounds greater than the landed weight. This ruling of the collector was sustained by a majority of the Board of General Appraisers in an opinion filed, which is as follows:

"The protestant imported from Hamburg, Germany, a cargo of sugar, the product of that country. According to the invoice, the total net weight of the sugar shipped was 4,328,000 kilos, or 9,541,509 pounds, being contained in 43,280 bags of 100 kilos each. Upon arrival of the vessel at the port of Philadelphia, it appeared that 23 bags had not been loaded onto the vessel, and that the 43,257 bags of sugar shipped had been reduced in weight from 9,536,438 to 9,301,396 pounds, which was the weight returned by the United States weigher.

"Regular duty was assessed on the merchandise at the rate provided by law according to polariscopic test, and in the computation of these duties the landed weight of the sugar, as returned by the United States weigher, was taken. As to this action, no controversy has arisen. Additional duty was levied on the cargo under section 5 of the act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), as sugar upon which a bounty had been paid by a foreign country; and this additional duty was assessed, not on the landed weight, but on the total weight given in the in-

e, diminished by the weight of the 23 bags shown to have been short ped, to wit, 9,541,509, less 5,073, or 9,536,436 pounds. As to this action, importer protests, claiming that the additional duty should be assessed he basis of 9,301,396 pounds, the landed weight.

This precise question was considered by us in G. A. 4,637 on a protest of same importing company, and decided adversely to the importer. No al was taken from that decision, but the importer desires a reconsidera- of the question by the board.

The language of section 5, under which the assessment of additional duty made, is as follows:

'Sec. 5. That whenever any country, dependency, or colony shall pay or ow, directly or indirectly, any bounty or grant upon the exportation of article or merchandise from such country, dependency, or colony, and article or merchandise is dutiable under the provisions of this act, then the importation of any such article or merchandise into the United es, whether the same shall be imported directly from the country of pro- ion or otherwise, and whether such article or merchandise is imported he same condition as when exported from the country of production or has changed in condition by remanufacture or otherwise, there shall be ed and paid, in all such cases, in addition to the duties otherwise imposed his act, an additional duty equal to the net amount of such bounty or nt, however the same be paid or bestowed. The net amount of all such ties or grants shall be from time to time ascertained, determined, and ared by the Secretary of the Treasury, who shall make all needful regula- s for the identification of such articles and merchandise and for the as- ment and collection of such additional duties.'

The importer, in his protest, claims that the net amount of bounty on man sugars of the kind here involved, as proclaimed by the Secretary he Treasury, is 2.40 marks per 100 kilos. Department Circular No. 86, ed June 20, 1899 (T. D. 21,274), superseded T. D. 18,217, fixing the amount ounty at 2.50 marks per 100 kilos, and proclaimed the rate of 2.40 marks 100 kilos, but, as this regulation was issued after the importation of the ar here in controversy, the rate of 2.50 marks per 100 kilos must be taken. Counsel for the government contends that the use of the words 'net amount ny bounty or grant which may have been bestowed' indicates that it was the intention of Congress to assess the additional duty as a rate, but it was intended to collect an amount equal to the amount of the benefit ived on exportation. The importer contends, by way of opposition, that words 'net amount,' as found in the collocation quoted, mean exactly the e as the same words when used in the next sentence of section 5, that net amount of all such bounties or grants shall be from time to time rtained, determined and declared by the Secretary of the Treasury,' and es the point that, inasmuch as the Secretary has declared that the net unt equals 2.40 marks per 100 kilos, the 'net amount' must be taken to n a rate.

We think there can be no question that 'net amount' is used in both parts this section as meaning precisely the same thing, but whether these ds mean 'rate' or not seems to us immaterial. The change from the law 894, which provided a constant specific rate for the additional duty, was uestionably for the purpose of making the additional duty in all in ces, as nearly as could be, equal to the amount paid by the foreign gov- ment, which amount would presumably differ from time to time. Con- s, therefore, directed the Secretary to ascertain this amount from time ime, to the end that the amount of duty collected should always equal the nty paid, however the latter might vary. It is, of course, fair to assume Congress knew that the practical operation of section 5 would be to blish a rate which should be greater or less from time to time, inasmuch any other method of ascertaining and declaring the amount of bounty ld be impracticable; but it should be noted that the Secretary was not nd down or limited to the declaration of a rate. Congress intended that importer should be compelled to refund what he had received from the nty-paying government, and it was left to the Secretary of the Treasury ascertain and declare in whatever manner he chose, either by the declara-

tion of a rate or otherwise, just what this amount was. The extra duty, in short, was to be collected upon the merchandise upon which and for which the bounty was granted, and was to equal the net amount of that bounty. This much is perfectly clear from the language used, and it makes no difference, therefore, whether the words 'net amount' mean 'rate,' or whether they do not. If it appear that a cargo of sugar upon which a bounty has been paid has been imported into this country, an additional duty equal to that bounty must be collected on that cargo. Two conditions only must exist: (1) The merchandise must be imported, and (2) a bounty must have been paid on that merchandise. It therefore becomes pertinent to inquire:

"(1) What 'article or merchandise' was the product of Germany, and was imported into this country?

"(2) What was the net amount of the bounty paid upon such articles or merchandise so imported?

"Having ascertained what merchandise was imported, and what bounty was paid on the merchandise so imported, the amount of duties to be assessed becomes at once apparent.

"No evidence is in the case as to what caused the decrease in the weight of the sugar, or to show that this decrease was due to other than natural causes. It is not disputed, however, that a cargo of 9,536,438 pounds was shipped from Germany, and that it was the product of that country; nor is it disputed that the cargo—that is to say, the merchandise here in question—arrived within the customs district of Philadelphia. True, it did not arrive in the condition in which it was loaded on board the vessel, and, if it were here only a question of regular duties, there could be no question that duty would have to be assessed on the merchandise in the condition in which it was imported and on the weight as imported. So far as the regular duties are concerned, this in fact is what was done, and properly. The long line of authorities following the well-known cases of Marriott v. Brune, 9 How. 619 [13 L. Ed. 282], and Austin v. Peaslee, 2 Fed. Cas. 235, have settled this point beyond cavil.

"But section 5 provides that the additional duty shall be assessed 'whether such article or merchandise is imported in the same condition as when exported from the country of production, or has been changed in condition by remanufacture or otherwise,' and the long line of authorities relating to the assessment of duty on merchandise in the condition as imported have no application. Here there is a radical difference between the rule governing the assessment of regular duties and that governing articles falling within the provisions of section 5. In the one case, if the article has undergone change through remanufacture or otherwise, duty must be assessed, not on the article as it was before it was changed, but on the article as it is in the condition in which it is imported. In the other case, the law goes back of the change, and assesses an additional duty equal to the bounty paid, not on the article in its imported condition, but on the article in its original state, whatever change may have occurred in its condition after the payment of bounty and before importation here. That duty is not regulated nor made dependent upon any attribute or quality of the imported article. It is regulated by one fact only, namely, the amount of bounty paid on the original article, and its accrual is dependent on one condition only, namely, that the article on which the bounty was paid is imported. Its condition on arrival is absolutely immaterial. The purpose of section 5 is to take from the importer the benefit received on his cargo, which, when paid him, practically amounts to a reduction of our dutiable rates; and any theory by which he can import his goods and pay less additional duty than the net amount on the bounty received by him would operate to defeat the section.

"Undoubtedly the importer may, if he can, prove by competent evidence that the whole or a part of the merchandise shipped was not imported into this country, and if he proves that fact, one of the conditions precedent to the collection of additional duty not having occurred, he is relieved from the payment of the additional duties. As to the 23 missing bags, that proof appears, and consequently no additional duty on those bags has been exacted, even though it may be a fact that the importer was paid a bounty thereon.

balance of the shipment, however, did arrive, and it avails the importer ing, merely to show that its weight on arrival was less than when ped, for this could result, and must be assumed in this case to have lted, from a change in its condition while on the vessel. As to this mer- ndise, therefore, all the conditions of section 5 are fulfilled, and the addi- al duty must attach. The change in condition was sufficient to enable cargo to enter at a less amount of regular duty than would be assessed he merchandise in the condition in which it was shipped, but that change d not operate to lessen the amount of the additional duty, which, by the guage of section 5, is independent of change of condition. Whether its ght became less, or whether the cargo became otherwise changed in con- on by reason of remanufacture or otherwise after exportation and before ortation, does not matter; so long as the cargo shipped was imported into country, it must pay an additional duty, and that additional duty must qual in amount to the amount of the bounty paid on that merchandise.

As was said in G. A. 4.637: 'In the case before us, the sugar has changed ondition by evaporation or drainage, but all of the merchandise exported which bounty was paid has been imported.'

The point has been made that the words 'changed in condition by remanu- ure or otherwise' mean only changed in condition by remanufacture, or some process similar to remanufacture. But any artificial process is a ess of manufacture, and surely the words 'or otherwise' cannot be con- red to mean only processes similar to manufacture, for that construction ld be meaningless. The words unquestionably mean changed in condi- from any cause, and as 'remanufacture' would cover all artificial pro- es, so 'or otherwise' will cover such changes as occur from natural causes, as those here under discussion.

As showing what may constitute a changed condition, the case of Knight chell, 24 How. 532, [16 L. Ed. 760], is in point. In that case, the United es Supreme Court held that barrels shipped empty to Cuba and brought filled with molasses were not in the same condition as when exported, were not entitled to free entry.

It therefore appears that a certain quantity of sugar, to wit, 9,536,438 nds, the product of a bounty-paying country, was shipped from that coun- and was imported into this country, and we come to our second question, ely: What was the net amount of the bounty paid upon that cargo of ar? The protest states that the rate of bounty assessed was 2.712 marks 100 kilos on certain of the sugar, and 2.563 marks per 100 kilos on the ance. These figures are evidently obtained by dividing the amount of additional duty collected by the weight returned by the United States gher; but an inspection of the entry shows that the additional duty was essed, not as a duty by weight of the sugar imported—for the duty on this chandise was exacted only on the landed weight, and as to that there is complaint—but was assessed as an amount equal to the net amount of the nty paid on that sugar; that is to say, as a payment to this government of um of money received as a bounty or grant from the government of the ntry where the sugar was produced. The Secretary of the Treasury ing, in accordance with section 5, ascertained and declared the net amount bounty paid by Germany equaled 2.50 marks for each 100 kilos, the liqui- ng officer, by an arithmetical process, arrived at the total amount of nty ascertained and declared by the Secretary of the Treasury to have n paid on the cargo imported, and duty was accordingly assessed on the go to an amount equal to that net amount of the bounty paid thereon. therefore find that the amount of additional duty assessed on the mer- ndise here in question was equal to the net amount of the bounty paid Germany on that merchandise, and hold that the assessment of additional y to that amount was correct.

If the importer's contention be correct that the extra duty must be as- ed only on the landed weight, without requirement of proof as to whether not the deficiency occurred through other than a change in its condition, n he might, if he chose, have taken his cargo from Hamburg to Liver- l, and, after having had the same remanufactured, producing a change in dition which would cause a loss in weight, import the same into this

country thus manufactured, and be compelled only to refund so much of the bounty received on the original exportation as should agree with the exact landed weight. Surely this would not be permissible under the law. It would be a nullification of the present tariff provision, and would result in assessing duties according to the provision of the act of 1894, which was repealed, and for which a different method was provided by section 5 of the present act. It follows that, if it be proper to assess the additional duty on the foreign weight when it is shown that the loss of weight is due to remanufacture, then it must be equally proper to assess the additional duty on the foreign weight when the loss in weight is due to natural causes, and thus the argument that the extra duty can be assessed only on the same basis as the main duty falls to the ground.

"It is therefore clear that a mere shortage in weight is not prima facie evidence that the loss was due to other causes than a mere change in condition, and, unless the importer can show that the diminished weight is due to other causes, he must pay over the net amount of the bounty paid to him by the government of the country of which the goods were a product. As section 5 provides that the additional duty must be paid regardless of change in condition, the collector, in assessing the duty here complained of, must be presumed to have found that the decreased weight was due to change in condition, and the burden of proof was on the importer to show that it was not. This the importer has not done.

"In determining how much of this amount of bounty should be handed over to this government, Congress has declared that it shall be based on the amount of merchandise exported, and upon which the bounty was paid. This was essential in the case of sugar, where it is conceded that, though less in weight, it is still the same article exported. If two vessels should leave two different ports with exactly the same quantity of sugar, in the one case the sugar being the product of a bounty paying country, and in the other the sugar being the product of a nonbounty paying country, and the cargo of each vessel should decrease in weight through natural causes, the owner of the first cargo would, if this protest be well founded, pay only his duty and his extra duty on the landed weight, while the owner of the second cargo would pay the same regular duty. But the first owner would have received more in bounty than he would pay as additional duty, and he would therefore have an advantage over the second owner to the extent of the amount of bounty paid on the difference in weight between the exported cargo and the imported cargo. This was the very object sought to be avoided by section 5 in declaring that a change in the condition of the merchandise should not operate to lessen the amount of the additional duty, and the construction sought to be placed upon the section by the importer would operate to defeat its apparent object.

"For the reasons above set forth, we overrule the protest, and affirm the decision of the collector."

The purpose that Congress had in view when it authorized the assessment of "an additional duty equal to the net amount of bounty" paid by the exporting country was to compel the importer to pay the total or net amount of the bounty to the government upon the importation, and it is the duty of the collector, in assessing this countervailing duty, to adopt such a basis of assessment as will accomplish the object at which the legislation was aimed, to wit, to compel the importer to pay to the government the net amount of bounty he received from the exporting country. Section 5 authorizes the Secretary of the Treasury to "make all needful regulations * * * for the assessment and collection of such additional duties." It was ascertained that the bounty paid by Germany on this class of sugar is 2.50 per kilogram, and the Secretary fixed this amount to be assessed as an additional duty upon sugars imported from that country; but the collector, in order to carry out the ob-

ject and intention of Congress, as expressed in section 5 of the act of 1897, in levying this additional duty of 2.50 per kilogram, must necessarily levy it upon the weight or basis upon which it was paid, in order that he may collect from the importer the amount of money that he (the importer) received from the exporting country. This purpose is easily accomplished by adopting, as the collector did, the invoice weight. It is manifest that no other basis of assessment could be adopted that would accomplish the object of this legislation, as sugar nearly always decreases while being imported, and other changes may occur, so that the weight upon landing would scarcely ever be an accurate basis of assessment, which would result in the collection of as much duty as the importer was paid in the shape of a bounty.

The cases cited to sustain the proposition that duties should be assessed only upon the merchandise in the condition in which it is landed are not at all in point, as these decisions had reference to the assessment of either an ad valorem or specific duty which was to be levied upon the value or the amount of the merchandise arriving at our ports. But the duty to be levied in the case at bar was to accomplish a different purpose, to wit, to take from the importer the net amount of money he received from the exporting country. The language of section 5 of the act of 1897 is broad enough to authorize the adoption of such a basis of calculation as will accomplish that purpose, which can be done with certainty when the invoice weight is taken, as in this case. This does not prevent the collector from allowing a deduction from that weight, if the evidence and the facts in any particular importation warrant it. The finding, however, in this case is that the difference in weight was not the result of any cause which entitled them to an allowance.

The ruling of the Board of General Appraisers is affirmed.

PLUMMER v. MYERS.

(District Court, E. D. Pennsylvania. May 13, 1905.)

No. 2.

1. BANKRUPTCY—RECOVERY OF PREFERENCES—DEFENSES.

Where a creditor of an insolvent who had sold him goods on credit through an agent took back certain of said goods as a credit immediately before the debtor's bankruptcy, and with reasonable cause to believe and know that he was insolvent, and that a preference was intended, it is no defense to an action by the debtor's trustee to recover the value of such goods as a preference that the creditor's agent, by a collateral agreement with him, had guarantied payment of part of the indebtedness, and that the credit was applied on such part.

2. SAME.

Where the statement of claim in an action by a trustee in bankruptcy to recover an unlawful preference, under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], alleges that the preference was received by defendant through an agent who had reasonable cause to believe and know that the debtor was insolvent, and that it

was thereby intended to give a preference, an averment in the affidavit of defense that defendant had no personal knowledge of the actual insolvency of the debtor states no defense.

At Law. On motion for judgment for want of sufficient affidavit of defense.

Theodore W. Reath, for plaintiff.
Hepburn, Carr & Krauss, for defendant.

J. B. McPHERSON, District Judge. This is a suit by a trustee in bankruptcy to recover a preference from a creditor. The statement of claim is as follows:

"The plaintiff, Charles E. Plummer, of Petersburg, state of Virginia, trustee in bankruptcy of John L. Mulcaha, of Petersburg, Virginia, sues to recover of the defendant, Angelo Myers, doing business at 311 North Third St., Philadelphia, in the state of Pennsylvania, the sum of two hundred dollars and ninety-five cents ($200.95), with interest thereon, being the value of a preference given said defendant by John L. Mulcaha, the above-named bankrupt, under the following circumstances, viz.:

"On the first day of April, 1904, the said John L. Mulcaha, doing a liquor business at Petersburg, in the state of Virginia, was by the District Court of the United States in and for the Eastern District of Virginia adjudged a bankrupt, and this plaintiff was duly chosen as trustee, and was qualified to act as such by the said District Court on the 21st day of April, 1904, and entered upon the performance of his duties on that date, and is still acting as such trustee.

"On or about the 28th day of March, 1904, said John L. Mulcaha, being largely indebted to the defendant and other creditors, and well knowing at the time that he was insolvent and unable to pay his creditors in full, and with the intent to prefer the defendant, Angelo Myers, as a creditor, and in violation of an act of Congress in such cases made and provided, did allow to be withdrawn from his stock of liquors by an agent of the defendant whisky to the value of two hundred dollars and ninety-five cents ($200.95); and said consignment and shipment of whisky, together with its delivery to said Angelo Myers as above described, enabled the said Angelo Myers to obtain a greater percentage of his debt than any other of such creditors of the same class.

"Plaintiff avers that the said Angelo Myers, or his agent acting therein at that time, had reasonable cause to believe and to know that said John L. Mulcaha was insolvent, and that said delivery of whisky to him, the said Angelo Myers, was for the purpose of preferring him as a creditor of said bankrupt.

"Plaintiff further says the sum of two hundred dollars and ninety-five cents ($200.95), the value of the whisky shipped to the said Angelo Myers in the manner hereinbefore described, is justly due and owing to him as such trustee in bankruptcy of the said John L. Mulcaha and interest thereon, for all of which he brings this action and asks judgment."

To this statement the defendant has filed the following affidavit of defense:

"Angelo Myers, being duly sworn according to law, doth depose and say that he is the defendant in the above case, and that he has a just and true defense to the whole of the plaintiff's claim of the following nature and character, to wit:

"That defendant is a wholesale liquor dealer in the city of Philadelphia, and has been such for upwards of thirty years last past; that all of the transactions which he had with the bankrupt John L. Mulcaha, of Petersburg, Va., were had by and through the agency of one Simon Reichman, a liquor salesman living in the city of Philadelphia, Pa. Defendant avers that the said Simon Reichman did sell certain whiskies to John L. Mulcaha, which were shipped by the defendant to John L. Mulcaha, amounting in the aggre-

to the sum of one thousand one hundred dollars ($1,100). Defendant
er avers that the said Reichman, before the goods were shipped, en-
into an agreement or guaranty with the defendant to the effect that
he said Reichman, would guarantee the payment of half of the bill
oods so shipped to the said Mulcaha by the defendant, holding
lf, Reichman, responsible to the defendant, Angelo Myers, for the pay-
thereof in the event of the failure of the said Mulcaha to pay his bill.
dant avers that he did thereafter receive back from the said Reichman
time during the latter part of the month of March or early part of
, 1904, certain whiskies, of the value of about two hundred dollars
), which whiskies were received back from the said Reichman as a credit
count of his guaranty of the account of the said John L. Mulcaha.
nent further avers that he had no personal knowledge of the actual
ency of the said John L. Mulcaha; that he is advised and believes
the return of said whisky of the value of two hundred dollars ($200)
e said Simon Reichman as a credit on his, the said Simon Reichman's
nty, in no wise constituted a preferential payment in bankruptcy. All
hich facts deponent avers and expects to be able to prove on the trial
e above case."

my opinion, the motion for judgment must prevail. The de-
ant admits that he sold all the whisky to the bankrupt on credit,
the fact that Reichman had made a collateral agreement, where-
ie agreed to guarantee the payment of one-half the account,
e no change in the title to the goods, and gave Reichman no in-
st therein. So far as appears, the bankrupt knew nothing of the
anty—which seems to have been a secret agreement between
hman and the defendant—and there is no averment that he was
bted to Reichman individually, or was even attempting to trans-
he whisky in controversy for Reichman's private benefit. On
contrary, it is clear that Reichman obtained it from the bankrupt
he defendant's benefit, and that this object has been fully car-
out by delivery.

ie remaining question is whether the defendant is to be charged
knowledge that the transfer of the whisky was intended to
him a preference. The answer is to be found in section 60,
)," Bankr. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St.
, p. 3445]:

a bankrupt shall have given a preference, and the person receiving it,
be benefited thereby, or his agent acting therein, shall have had reason-
cause to believe that it was intended thereby to give a preference, it
be voidable by the trustee, and he may recover the property or its
from such person."

his being the law, it only remains to say that no attempt is
e by the affidavit of defense to deny the averments of the state-
t on this point. The statement declares:

laintiff avers that the said Angelo Myers, or his agent acting therein,
at time had reasonable cause to believe and to know that John L. Mul-
was insolvent, and that said delivery of whisky to him, the said Angelo
s, was for the purpose of preferring him as a creditor of said bankrupt."

o this distinct and positive averment the affidavit of defense
ely sets up that "deponent further avers that he had no person-
nowledge of the actual insolvency of the said John L. Mulcaha,"
ing whatever being said about Reichman's knowledge or belief.
iously, therefore, the defendant's averment is incomplete.

It is therefore ordered that the plaintiff have judgment for want of a sufficient affidavit of defense, the amount to be liquidated by the clerk.

PAIGE et al. v. TOWN OF ROCHESTER.

(Circuit Court, D. Vermont. May 11, 1905.)

1. RAILROADS—TOWN AID—SUBSCRIPTIONS—FEDERAL COURTS—JURISDICTION.
Where, under the terms of a town vote granting aid to a railroad company, no cause of action ever accrued to the railroad corporation, but did accrue to its receiver or the assignee of his successor who furnished funds to complete the road under an assignment of the subscription, the fact that the corporation could not have maintained an action in the federal courts to recover such subscription because it was of the same citizenship as the town did not deprive such assignee of the right to sue in the federal courts, under Rev. St. U. S. § 629, providing that federal courts shall not have cognizance of any suit to recover a chose in action in favor of an assignee, unless a suit might have been prosecuted in such court if no assignment had been made.

2. SAME.
Where an assignee of a chose in action is entitled to sue thereon alone in the federal courts, he and his assignees may sue there together as if no assignment had been made.

3. SAME—RECEIVERS—SUCCESSORS.
Where the receiver of a railroad corporation completed the road, and thereby became entitled to a town subscription, the receiver's successor was not an assignee, within Rev. St. U. S. § 629, providing that no suit shall be brought in the federal courts to recover a chose in action in favor of an assignee unless the suit might have been prosecuted in such court had no assignment been made.

4. SAME—SUBSCRIPTIONS—CONSIDERATION.
A town railroad aid subscription, in consideration of contributions of others to the railroad as a public work beneficial to the inhabitants of the town and the public, was based on a sufficient consideration.

5. SAME—CONTRACTS—EXECUTION.
Where a town railroad aid subscription provided that the selectmen of the town were authorized for and on its behalf to contract with the railroad company, which contract should embody the terms and conditions of the "foregoing vote," the making of the contract was merely authorized, and was not required to entitle the railroad's receiver to the benefit of the subscription on compliance with the terms of the vote.

6. SAME—PARTIES.
Where a railroad contractor to whom a right to a subsidy had been assigned by the railroad's receiver assigned the same to plaintiff to secure funds with which to complete the road, and had no interest in any of the property, the mere fact that he had a right to redeem did not make him a necessary party to an action to recover such subsidy, the receiver, who was a party, being entitled to redeem from him.

In Equity.

Eleazer L. Waterman, for plaintiff.
William B. C. Stickney, for defendant.

WHEELER, District Judge. According to the bill, the White River Valley Electric Railroad Company was chartered to build a railroad from Rochester to Bethel, was organized, and solicited

oscriptions and aid for building its road. The defendant town, rsuant to the laws of the state, voted to aid the project as follows:

(1) Whereas, the General Assembly of the state of Vermont, at its ses- held in the year 1896, passed an act (Laws 1896, p. 311, No. 204) incor- ating the White River Valley Railroad Company, giving the said com- y authority to build and operate a railroad in and through the Towns of hel, Stockbridge, Pittsfield, and Rochester, all in Vermont.

And whereas, the granters named in said act of incorporation and their ociates propose to build a standard gauge railroad extending from said hester to the Central Vermont Railroad of said Bethel, running along bank of the White River through the White River Valley so called, pro- d the towns to be benefited by building such railroad shall aid in its con- uction and equipment:

Now, therefore, be it resolved that the town of Rochester aid in the con- uction and equipment of said White River Valley Railroad in the sum thirty-five thousand ($35,000) dollars; the payment of said sum to be le to the said White River Valley Railroad within thirty days after said road is in operation and ready for business; said payment, however, e subject to the following conditions:

First. That said railroad shall be of the standard gauge, thoroughly and stantially built and equipped.

Second. That said railroad shall extend from the village of Rochester, rmont, to the Central Vermont Railroad, at Bethel, Vermont.

Third. Said railroad shall be properly equipped for the transportation of sengers, baggage, mail, and express, and also for the transportation of ght in bulk or by the car load to and from the town of Rochester.

Fourth. That said railroad shall be in operation on or before the 30th of December, 1900.

If the above-named conditions are not complied with, the aid hereinbefore ed shall not be granted.

(2) Resolved, that the selectmen of the town of Rochester for the time- ng are authorized for and in behalf of the town to make a contract with said White River Valley Railroad Company, which contract shall embody terms and conditions of the foregoing vote."

Subscriptions were made and aid was voted sufficient, with this, apparently warrant commencement of work. The road was ilt part way, the corporation failed, and a receiver of it was ap- inted by this court with authority to complete the road, which s done in considerable part by the assignment of this subsidy to ontractor, who assigned it to the plaintiff Williams, to secure him funds furnished by him for the prosecution of the work, of which e defendant was notified; and an interest in it has since been as- ned to the plaintiffs Jose and Stiles, of which the defendant has o been notified. The bill is brought for the recovery of the osidy, and is demurred to for lack of jurisdiction and want of uity.

The statutes of the United States have always provided that no strict or Circuit Court should "have cognizance of any suit to cover the contents of any promissory note or other chose in ac- n in favor of an assignee unless a suit might have been prosecut- in such court to recover the said contents if no assignment had en made," with some exceptions not here material. 1 Stat. 78, c. § 11; Rev. St. § 629; 25 Stat. 434, c. 866, § 1. The argument in position to the jurisdiction is that the assignment of the receiver s that of the railroad corporation, which could not have main- ned a suit against the defendant in this court, because it is a cor-

poration and a citizen of the same state as the defendant. This would be true, and fatal to the jurisdiction, if the cause of action had accrued to the railroad corporation; but none would accrue, under the terms of the vote, until the road should be in operation. Concord v. Portsmouth Savings Bank, 92 U. S. 625, 23 L. Ed. 628. Before then the right to the subsidy was merely one to obtain it by building and equipping the road according to the terms of the vote. Williams as assignee had furnished the money by which this was accomplished, and the right to the subsidy accrued to him, for the benefit of himself, or the receiver, if he should redeem Williams' assignment, which has not been done. Williams' cause of action does not depend upon the assignment of a chose in action to him, but upon the assignment of a right to him by which by performance he acquired a chose in action to himself. The case in this respect is somewhat like De Sobry v. Nicholson, 3 Wall. 420, 18 L. Ed. 263, where Nicholson, with others, one of whom could not sue in the federal court, had contracted to build a mill for De Sobry at a certain price, and acquired their right before the mill was completed, and it was held that he could sue for the price in the federal court. As Williams could sue here alone, he and his assignees, Jose and Stiles, can sue together, as if no assignment had been made. If Paige, receiver, is a necessary party, he is not an assignee, but a successor of his predecessor, Sawyer, and is not within the statute. If it was necessary that Sawyer, receiver, and Williams should have been citizens of another state when the chose in action accrued, the record in the receivership case shows them to have been residents, and probably citizens, of Massachusetts, at that time which, while it would not help out this case in that respect, would afford ground for allowing an amendment according to that fact; but the jurisdiction seems to appear from the allegations of the bill without that.

The argument of want of equity appears to rest chiefly upon the want of consideration, want of execution of a contract by the selectmen pursuant to the second vote, and want of acceptance. The consideration does not consist of anything that was to pass from the railroad corporation to the town as such, but in the contributions of others to the railroad as a public work beneficial to the inhabitants of the town and the public, which the law of the state made sufficient. The making of a contract was merely authorized, and not required, and was not to vary in any way, but merely to embody, the terms and conditions of the vote. That would not be an acceptance, but the building of the road according to the terms of the vote would be. Concord v. Portsmouth Savings Bank, 92 U. S. 625, 23 L. Ed. 628; Gale v. Jamaica, 39 Vt. 610.

It is suggested that the contractor who was an assignee between the receiver and Williams is a necessary party because of his right to redeem the subsidy; but he had no interest in any of the property, and the mere right to redeem a thing wholly in action which the receiver, who is a party, had a right to redeem from him, would be lost.

Demurrer overruled, defendant to answer over by June 15th.

THE TRANSFER NO. 10.

(District Court, S. D. New York. November 10, 1904.)

COLLISION—STEAM VESSELS MEETING IN EAST RIVER—NAVIGATING ON WRONG SIDE OF CHANNEL.

Vessel *held* in fault for collision occurring while such vessel was navigating the East river below Corlear's Hook on the left-hand side of the channel and near the Manhattan shore, such navigation being in violation of the narrow-channel rule requiring vessels to keep to the right, and of the East river statute requiring vessels using the East river to navigate as nearly in the center thereof as possible.

SAME—VIOLATION OF RULES—CUSTOM.

Violation of statutory rules of navigation cannot be justified upon the ground that it is customary for vessels to violate them under certain tidal conditions.

SAME.

The question in a collision case is not what the colliding vessels do when they get down close to each other, but what maneuver they should have adopted under the rules when far enough apart to maneuver deliberately and safely.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 15, 16.]

SAME.

When a vessel deliberately places herself in a position where she is not free to maneuver, and remains therein until a collision happens, her inability to maneuver immediately before contact is no excuse, her embarrassment being brought about by her own negligence.

In Admiralty. Suit for collision.

Henry W. Taft (Joseph H. Choate, Jr., of counsel), for claimant.
John F. Foley (Howard S. Harrington, of counsel), for libelant.

HOLT, District Judge (orally). This seems to be a pretty clear se. In the first place, the Mary J. was on the right side of the er, and both these transports were on the wrong side of the er. The state statute requires that steamers going up and down e East river shall keep near the middle of the stream, and the rbor rules require that in going through narrow channels each ssel shall keep at the right-hand side of the middle of the chan-. These rules in this case made it the duty of these transports be on the right-hand side of the center of the stream, and, in int of fact, admittedly they were on the left. The fact that it y be the custom to do this when there is an ebb tide, and that nay be easier to go up on the New York side than on the other e, and that they thereby can go a little faster, does not alter the t that any vessel that goes up in that way violates the law and es the risk, and, if there is any collision, is presumably in fault. But aside from that, after these transports turned the Hook they uld look straight up the river, and had no difficulty in seeing. d the question in this case, as in all collision cases, is not what e colliding vessels do when they get down close to each other, t what was the maneuver which they adopted, and what was the neuver which it was their duty to adopt under the rules of the ad, when they were still far enough apart to adopt those ma-

neuvers deliberately and safely. The evidence satisfies me in this case that when these two vessels saw each other they were end on, or nearly so. The rule does not permit two vessels to pass starboard to starboard if they are not exactly end on; the rule is "end on, or nearly so." The general rule is to pass to the right. That is the foundation of all the rules of the road. It is only in exceptional cases where you pass to the left. The cases where you are entitled to pass starboard to starboard are when two vessels are approaching each other on lines each of which is so far to starboard of the other as to justify the exception to the general rule. I think in this case the vessels were about end on, and in any event the Mary J. was not on a course sufficiently to the left of the other's course to justify her in sounding two whistles and endeavoring to pass starboard to starboard. But whether she was or not, she, in fact, sounded one whistle, and, if the transports believed that it would be dangerous to acquiesce in that whistle, they should have sounded alarms. That is the rule. If they were not going to acquiesce in her course, they should have sounded alarms, and the duty was just as strongly on No. 10, in my opinion, as on No. 15, for admittedly the Mary J. could not pass between them, and if she sounded one whistle, it was certain she was going to try to pass No. 10 port to port, and there was more danger that she would come into collision with No. 10 than with No. 15. The Mary J. sounded one whistle, and there was no reply. That was a violation of the rules. Then she sounded one, and then No. 15 sounded one, acquiescing in the arrangement, and then, when the two boats were right on each other, the No. 10 sounded alarm whistles and backed.

It has been said that No. 10 could not pass to starboard because No. 15 was overlapping her. But that is a situation which No. 10 should not have got into. If No. 15 was faster, and could pass her, No. 10 should have slowed up and fallen back until she would have been able to maneuver in both directions. A vessel that is coming on and meeting others should not have another hanging on her side so she cannot go in either direction. But the evidence here shows that, when they first saw the Mary J., it was the duty of both the transports to go on the other side of the river. What they did was that, although they saw two tugs coming down on the New York side of the river on a strong ebb tide, so that the tugs could not do anything but go ahead, and could not stop and back, the transports, nevertheless, undertook to go up on the New York side and meet them.

I think the transfer No. 10 was clearly at fault and that the Mary J. was not at fault, and that there should be a decree for the libelant, with a reference to ascertain the damage.

In re UNITED BUTTON CO.

(District Court, D. Delaware. September 17, 1904.)

BANKRUPTCY—FEDERAL COURTS—JURISDICTION.

Where a bankrupt corporation had its domicile in one judicial district, and its principal place of business in another, the courts of bankruptcy of both districts had concurrent jurisdiction of involuntary bankruptcy proceedings against it.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 20.]

SAME — GENERAL BANKRUPTCY ORDERS — CONSTRUCTION — "INDIVIDUAL"—CORPORATIONS.

General Bankruptcy Order 6 (89 Fed. v, 32 C. C. A. ix) provides that, in case two or more petitions shall be filed against the same "individual" in different districts, the first hearing shall be had in the district in which the debtor has his domicile, etc. *Held*, that the word "individual," as so used, was equivalent to "person," and as such included a corporation.

SAME—PARTIES IN INTEREST.

Bankr. Act July 1, 1898, c. 541, § 32, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], provides that in the event petitions are filed against the same person in different courts of bankruptcy, each having jurisdiction, the cases shall be transferred to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of "parties in interest"; and General Order 6 (89 Fed. v, 32 C. C. A. ix) provides that the court retaining jurisdiction, in case several petitions are filed in different courts, if satisfied that it is for the greatest convenience of "parties in interest" that another of said courts should proceed with the cases, shall order them to be transferred to that court. *Held*, that the term "parties in interest" was not limited to unsecured creditors of the bankrupt, but included all persons whose pecuniary interests were directly affected by the bankruptcy proceedings.

SAME—CONVENIENCE.

Proximity of the place of business of a bankrupt to the court entertaining proceedings in bankruptcy and proximity of a majority of the bankrupt's creditors in number or amount of claims, though persuasive, is not conclusive in determining the court which shall assume final jurisdiction of the proceedings commenced in several districts in courts having concurrent jurisdiction.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 22.]

SAME—EVIDENCE.

On an application to transfer a bankruptcy proceeding to a court of another district, facts *held* insufficient to establish that such transfer would be for the greatest convenience of parties in interest.

Application for transfer of proceedings instituted in district of ne bankrupt's domicile to the district where it was principally ngaged in business, etc. The opinion states the case.

See 132 Fed. 378.

Bowers & Sands, Latson & Bonyrige, Philbin, Beekman & Men-en, Sherman & Sterling, and Thomas F. Bayard, for the motion.

Benjamin Nields and James, Schell & Elkus, opposed.

BRADFORD, District Judge. This is an application for the re-noval of the Security Trust and Safe Deposit Company, as receiver n bankruptcy of the United Button Company, adjudged bankrupt y this court, and for the transfer of the proceedings in bankruptcy

to the District court for the Southern District of New York and the relinquishment by this court of all jurisdiction of the case. The bankrupt is a manufacturing corporation organized under the laws of Delaware, and since its incorporation, in 1902, and until the institution of bankruptcy proceedings as hereinafter stated, was engaged in the manufacture and sale of buttons. It was the owner of three manufacturing plants situated in Massachusetts, at Boston, Easthampton and Springfield. It did not manufacture outside of Massachusetts. As created and existing under the laws of Delaware, that State was its domicile. The bankrupt had and maintained business offices in the city of New York, where it contracted principally, if not wholly, for the manufacture and sale of buttons. In that city it also had its warerooms, where a large amount of its manufactured produce was kept. In Chicago it had a branch office, where samples of its buttons were kept; but orders received in that city were forwarded to the New York office, where they were filled. The manufacturing plants of the bankrupt were operated under orders or directions from the New York office. A petition in involuntary bankruptcy was filed in this court August 4, 1904, against the bankrupt, and it was duly adjudged bankrupt August 10th, 1904. On the latter day, the Security Trust and Safe Deposit Company, a corporation of Delaware, was appointed receiver of the property and effects of the bankrupt and duly qualified on the next following day. An involuntary petition was also filed August 6, 1904, against the bankrupt in the District Court for the Southern District of New York, and on the same day that court made an order appointing Peter Alexander receiver, purporting to confer on him power to continue the business of the bankrupt in its several branches. Alexander forthwith gave bond as required and on the day the order was made for his appointment took actual possession of the assets of the bankrupt located in the city of New York. The District Court for the District of Massachusetts made an order August 8, 1904, ancillary in its purpose or nature, purporting to give full force and effect throughout Massachusetts to the appointment of Alexander as receiver of the bankrupt. On the next following day, Alexander, acting ostensibly as receiver, took possession of the several manufacturing plants of the bankrupt. An order ancillary in its purpose or nature was made August 12, 1904, by the District Court for the Northern Division of the Northern District of Illinois of the same character as the order made by the District Court in Massachusetts, and on the same day Alexander, acting ostensibly as receiver, took possession of all the assets of the bankrupt within the territorial jurisdiction of the District Court in Illinois, granting the order. A petition in involuntary bankruptcy was also filed August 13, 1904, in the District Court for the District of Massachusetts, against the bankrupt, and two days thereafter an application was made to that court for the appointment of a receiver in bankruptcy. It appears, however, that the court of Massachusetts did not make such appointment, and further, that the proceedings in Massachusetts have since been dismissed. The Security Trust and Safe Deposit Company, as

eceiver appointed by this court, applied August 17, 1904, to the Dis-ict Court for the Southern District of New York for an order aying all proceedings in that court against the bankrupt and di-ecting Alexander to deliver all its assets within that jurisdiction o it, the Delaware receiver, and seeking its own appointment or ecognition as ancillary receiver throughout the southern district of ew York. Judge Thomas granted, August 30, 1904, the above pplication of the Delaware receiver, saying, among other things, his opinion (12 Am. Bankr. Rep. 767, 132 Fed. 378):

"The District Court of Delaware first took jurisdiction; it adjudicated the rporation bankrupt; it is the court within the district of the domicile. hese facts severally vest it with exclusive jurisdiction to proceed with the dministration. * * * These views lead to the conclusion that the pro-edings in this court should be stayed, and that the corporation appointed ceiver in the Delaware district should be appointed ancillary receiver in is district, and that the receiver heretofore appointed in those proceedings ould transfer to such other receiver all property of the bankrupt within his ntrol, upon payment of all expenses of administration in this district, so r as it has proceeded."

Accordingly, the same judge, September 1, 1904, ordered that all roceedings under the involuntary petition filed in the southern istrict of New York against the bankrupt be stayed; that the etitioning creditors in that petition be restrained from taking ny further proceedings under it; that the Delaware receiver be ppointed ancillary receiver of the assets of the bankrupt in the outhern district of New York with authority to take into its pos-ession and custody all the property of the bankrupt situated in hat district, "subject to the payment of all indebtedness incurred roperly by the receiver, Alexander, accordingly as this court shall etermine and allow"; that Alexander forthwith surrender and turn ver to the Delaware receiver all the assets of the bankrupt then in is possession or under his control, "subject to the audit and allow-nce by this court of his accounts, but said Alexander, receiver, shall etain from the moneys in his hands the sum of ten thousand dollars $10,000) as a fund to meet legal expenses, the balance thereafter o be paid to the ancillary receiver"; and that Alexander should orthwith "prepare and file his accounts as receiver herein, setting orth all expenses of administration in the southern district of New ork so far as it has proceeded, and upon the allowance of such ac-ount by this court the same shall be a lien on all property delivered o the ancillary receiver pursuant to this order." On the same day udge Holt, in the District Court for the Southern District of New ork, on the application of the petitioning creditors in the bank-uptcy proceedings in that district, ordered that the Delaware re-eiver show cause September 14, 1904, why all proceedings under nd by virtue of the order of that court made by Judge Thomas hould not be stayed pending the presentation to and determination y this court of an application for an order removing the Security rust and Safe Deposit Company as receiver, and staying all pro-eedings by virtue of its appointment and relinquishing the juris-iction of this court in the premises to the District Court for the outhern District of New York. The foregoing proceedings re-

sulted in the filing, September 7, 1904, of the present application or petition.

Courts of bankruptcy in the United States are authorized within their territorial limits to "adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or a greater portion thereof," and in certain other cases not germane to the matter in hand. Where for the required period one has had his domicile in one judicial district, his residence in another, and his principal place of business in a third, the courts of bankruptcy for the three districts respectively have concurrent jurisdiction over the institution of proceedings in bankruptcy against him, by reason of his domicile, residence and principal place of business. So concurrent jurisdiction exists if, for such period, his domicile or residence has been in one district and his principal place of business in another. The word "persons," as used in the Bankruptcy Act, includes corporations except where otherwise specified. Section 2 (19) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]) empowers the several courts of bankruptcy to "transfer cases to other courts of bankruptcy," but does not prescribe the conditions or circumstances under or upon which such transfer may be made. Section 32 (30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]) provides:

"In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy, each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest."

The natural import of this provision is that where a court relinquishes jurisdiction of a petition in involuntary bankruptcy, under the circumstances stated, the case shall be transferred to and be consolidated with the other petition or petitions by such one of the courts having concurrent jurisdiction as can proceed with the case "for the greatest convenience of parties in interest." General Order 6 (89 Fed. v, 32 C. C. A. ix) in bankruptcy is as follows:

"In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the inserting of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions, and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court

taining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the , order them to be transferred to that court."

he word "individual," as used in the above general order, has held by Judge Thomas, in a branch of the pending litigation, ectly, as I think, to be equivalent to "person," and as such to ude a corporation. The effects of the general order in connection the provisions of the Bankruptcy Act is, among other things, nake it the duty of the court retaining jurisdiction of the case eason of the domicile of the alleged bankrupt, "if satisfied that for the greatest convenience of parties in interest," that another rt having concurrent jurisdiction should proceed with the case, rder it to be transferred to such other court. Assuming that bankrupt had its principal place of business, not in Massachu-s, where its product was manufactured, but in the city of New k, this application turns on the question whether the petition, avits and exhibits, and the argument of counsel, have satisfied court that the transfer of the case to the District Court for the thern District of New York would be "for the greatest con-ence of parties in interest." Unquestionable jurisdiction of the , owing to the domicile of the bankrupt, existing here, the bur-of satisfying this court that the greatest convenience of the par-in interest requires a removal of the case to New York, rests n those seeking such removal. It is not going far to say that general principles of policy a court having taken cognizance of se within its undoubted jurisdiction should not abandon to other unals the performance of the duty it has assumed unless it has r warrant for so doing. The Bankruptcy Act does not define escribe "greatest convenience" or "parties in interest," as those ases are used in section 32 and general order 6. Both expres-s are elastic and largely indefinite. It is manifestly too narrow nstruction of the phrase "parties in interest" to restrict it merely nsecured creditors in bankruptcy. The bankrupt is not only lit-ly but substantially a party in interest. A creditor holding rity which is sought to be set aside by the trustee in bank-cy is also a party in interest. And it probably may be stated n accuracy that all persons whose pecuniary interests are directly cted by proceedings in bankruptcy are, within the true meaning ection 32 and general order 6, parties in interest. What may or the greatest convenience of parties in interest does not neces-ly depend upon only one factor or circumstance entering into situation. Proximity of the place of business of the bankrupt to court entertaining proceedings in bankruptcy, though a circum-ce sometimes entitled to weight is by no means conclusive, and same may be said with respect to proximity to the place of man-cture. Proximity of a majority of the creditors of the bankrupt umber or in the amount of their claims is a circumstance which uld also be duly weighed. And the same may be said with at t equal force of a majority of the debtors of the bankrupt in nber or in amount. Nor is the element of expedition or of nomy in the administration of the estate in bankruptcy to be lost

sight of. Taking into consideration all the circumstances disclosed by the petition, affidavits and exhibits, this court is not satisfied that the transfer of the case in hand to the District Court for the Southern District of New York would be for the greatest convenience of the parties in interest. I do not think that the petitioners have adduced the preponderance of evidence required of them as those on whom the onus of proof rests to justify a removal. It satisfactorily appears by the affidavits and exhibits that of the total number of 85 unsecured creditors represented in support of and opposition to the petition for removal 31, having unsecured claims aggregating between $91,000 and $92,000, are in favor of removal, and the remaining 54, having unsecured claims amounting in the aggregate to between $92,000 and $95,000, are opposed to removal. There is no satisfactory or reliable evidence of the desire of the remaining unsecured creditors of the bankrupt with respect to the removal or retention of the case. There are some loose statements on the subject, but not of a character to impress the court. Of the 31 unsecured creditors in favor of removal it appears that 8 reside in New York and the remainder in Massachusetts. Of the 54 unsecured creditors opposing the removal, 20 reside in Massachusetts, 1 in Pennsylvania, and no residence is given to the remaining 33. There is no evidence whatever as to the residence of the debtors of the bankrupt, save the statement that the bankrupt has accounts receivable throughout the United States. What is the center of population represented by the debtors of the bankrupt is wholly problematical. It appears that the bankrupt issued bonds secured by mortgage on the property to the amount of about $100,000. In the application for removal it is stated on information and belief that the above mentioned mortgage has been declared by counsel to be void, "and as your petitioners are informed and verily believe, the validity of the said instrument, and the rights of the various parties in interest thereunder, will be submitted for adjudication in appropriate litigation now contemplated for that purpose." Of the $100,000 face value of bonds, $209,500 are held by creditors of the bankrupt opposing removal. Of the $209,500 face value, $86,000 are held in Delaware, $47,500 in New York, $73,000 in Massachusetts and Rhode Island, and $3,000 in New Jersey. It does not appear from the evidence that more than from $45,500 to $50,000 of the mortgage bonds of the bankrupt are held by the creditors in favor of removal, of which a large majority are held, not in absolute ownership, but merely as collateral security. Those in favor of removal and holding the above mentioned $45,500 or $50,000 of bonds reside in New York. It is not shown where or by whom the remaining outstanding mortgage bonds of the bankrupt are held. Much stress was laid by counsel for the petitioning creditors upon the fact that the principal place of business of the bankrupt was located in New York City. Assuming this to be the case, notwithstanding a decision in New York which tends to the contrary, I am unable to perceive that the fact has much materiality or relevancy, as orders and directions may be sent to the manufacturing plants in Massachusetts from the

ver in Wilmington, as well as from one in New York or Chi- It was stated in open court, and not denied, that objection been taken to the bankruptcy proceedings in New York on the nd of the want of jurisdiction. Whatever question of jurisdic- may possibly be raised in New York, there can be none here e domicile of the bankrupt. Whether the alleged want of ju- ction can be established or not, the question raising it may lead nsiderable delay, which would be avoided by a retention by court of the case. It was strongly urged by the counsel for the loners that the fact that a majority in number and amount of reditors and claims are opposed to the removal of the case to York should not of itself be considered by this court conclu- on the question of the greatest convenience of parties in inter- ut that the court should form its own judgment on that ques- This undoubtedly is true; but the fact of the expressed pref- e of a majority of the creditors of the bankrupt that the case ld be retained by this court is strong evidentiary value. It t to be assumed that large numbers of intelligent persons who, reditors or other parties in interest, are keenly alive to their pecuniary welfare, would oppose the removal sought, unless fied under all the circumstances of the case that it is for their enience and benefit that the case should be retained. The ele- s here entering into the determination of the convenience or nvenience are so numerous and complex that strong evidence quired to justify a removal. Such proof has not been adduced. he whole I am far from being satisfied that a case for removal been made out. It must, therefore, be denied.

STONE, Collector of Customs, v. SHALLUS.

(Circuit Court, D. Maryland. March 27, 1905.)

oms Duties—Nonimportation—Rotten Fruit in Packages.

There is not such a difference between fruit imported in bulk and that mported in packages as that section 23, Customs Administrative Act une 10, 1890, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1930], relating o the abandonment of damaged merchandise, should apply in the latter ase, though not in the former. The rule that fruit separable from the hole quantity, which by decay has lost all value, should be considered s not imported, and that duty should be assessed only on the quantity rriving in good condition, applies to fruit imported in packages as well s in bulk, and without regard to whether the entire package is landed n a worthless state.

n Application for Review of a Decision of the Board of United es General Appraisers.

ese proceedings were brought by William F. Stone, collector of customs e port of Baltimore, and relate to merchandise imported by Frank H. us. The merchandise consisted of oranges in barrels, in regard to which oard of General Appraisers sustained the importer's contention that an ance should have been made for certain portions that had decayed on oyage of importation. The grounds of appeal appear from the letter of

instructions from the Secretary of the Treasury to the collector, which reads in part as follows:

"You report that the rotten oranges were not 10 per cent. of the invoice, and that no abandonment was filed. You therefore call attention to the case of Lawder v. Stone, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178, recently decided in the Supreme Court of the United States, which covered certain pineapples imported in bulk, and in which it was held that such of the pineapples as had decayed and become entirely worthless on the voyage of importation should be treated as a nonimportation, and not subject to the provisions for abandonment under section 23 of the act of June 10, 1890, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1930], which rule is clearly applicable to oranges imported in boxes and barrels when the entire package is landed in a rotten or totally worthless condition, following Shaw v. Dix (C. C.) 72 Fed. 166, dated August 29, 1903. You state that neither of the above conditions existed in the present cases, the fruit in question not being imported in bulk, but in packages, invoiced at a fixed price per package, all of which arrived and were delivered to the importer, none of the packages being entirely worthless, but many containing some rotten and worthless oranges, which the importers were granted the privilege of removing from the packages for the purpose of abandoning the same under section 23 of the act of June 10, 1890, under department's instructions of December 12, 1890 (T. D. 21,831). In reply to your request for instructions as to whether the decision of the Board of United States General Appraisers on these protests should be accepted as a final determination of this question, I have to advise you that, inasmuch as the decision of the board appears to be contrary to the principle laid down in Shaw v. Dix and Lawder v. Stone, referred to, you are hereby directed to file an application for review under section 15 of the act of June 10, 1890, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1930], of the decision of the Board of United States General Appraisers."

John C. Rose, U. S. Atty.

Hatch, Keener & Clute (J. Stuart Tompkins, of counsel), for importer.

MORRIS, District Judge. There arrived from Jamaica November 20, 1900, on the steamship Buccaneer, at the port of Baltimore, consigned to appellee, 1,034 barrels of oranges. Some of the fruit had rotted on the voyage, and the decayed fruit was injuring the sound fruit. The importer requested, and was granted, permission by the collector to sort over, in the presence of a United States customs inspector, a portion of the importation. Under this permission there were opened 215 barrels, and the contents culled over. From the 215 barrels there was taken out and thrown away all the decayed oranges. The decayed oranges so thrown away had filled 63 barrels, which was less than 10 per cent. of the whole importation. The 63 barrels were worthless slush, which had ceased to be merchandise of any kind, and the importer claimed that under the decision of the Supreme Court in Lawder v. Stone, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178, the 63 barrels of slush constituted a shortage not dutiable because not merchandise arriving in this country. The collector did not agree with this contention, and assessed the duty at one cent per pound on the weight of the whole importation of 1,034 barrels, less the proper tare for the weight of the barrels. The collector treated it as a case of damage to the importation within the provisions of section 23, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1930], and because the abandoned portion did not amount

10 per cent. of the total invoice refused to make any allowance r damage. The importer duly protested, and after a hearing the oard of United States General Appraisers at New York sustained e protest, and relieved the importer from payment of duties on the 3 barrels of decayed slush which had no pecuniary value, treating as a shortage. From the decision of the Board of Appraisers sus- ining the protest of the importer the collector has taken this peal.

The question to be determined resolves itself into the question hether or not there is such a difference between fruit imported bulk and fruit imported in barrels or boxes as makes section 23 the customs administrative act of June 10, 1890, applicable in the ne case and not in the other. Section 23 reads as follows:

"Sec. 23. That no allowance for damage to goods, wares and merchandise nported into the United States shall hereafter be made in the estimation and quidation of duties thereon; but the importer thereof may, within ten days ter entry, abandon to the United States all or any portion of goods, wares nd merchandise included in any invoice, and be relieved from the payment the duties on the portion so abandoned; provided, that the portion so bandoned shall amount to ten per centum or over of the total value or quan- ty of the invoice; and the property so abandoned shall be sold by public auc- on, or otherwise disposed of for the account and credit of the United States nder such regulations as the Secretary of the Treasury may prescribe."

Before the passage of the above-mentioned act of 1890, the law ad been for a great many years as embodied in section 2927 of the evised Statutes, to the effect that as to articles damaged during the oyage the appraisers should ascertain the percentage of damage, nd it should be deducted from the original quantity or value in omputing the customs duty. This was changed by the before- entioned act of 1890, but section 2921 of the Revised Statutes [U. Comp. St. 1901, p. 1929] remains in force, providing that if, on pening any package, a deficiency of any article should be found on xamination by the appraisers, it should be certified on the invoice, nd be allowed in estimating the duties. As was pointed out by Mr. ustice White, speaking for the Supreme Court in Lawder v. Stone, xcept in some few specific cases ingrafted by Congress on the eneral allowances for damage, duties have not been exacted on oods which do not actually reach the port of importation, and goods eparable from the whole quantity, which by decay have lost all alue, have been considered a shortage, duty being assessed only n the quantity that did arrive. With regard to fruit which arrives n such condition that some is decayed and worthless and the rest ound, the practice of separating the good from the bad and repack- ng the good under customs supervision would appear to be re- ognized by the customs authorities and by the Treasury Depart- ent. Treasury Decision, Dec. 12, 1899, T. D. 21,831. If by this uthorized repacking a quantity which is absolutely worthless de- ayed matter is separated from the rest of the importation, it is ifficult to see any reason why the ruling in Lawder v. Stone should ot be applied, and the worthless stuff treated as not having arrived s imported goods, wares, or merchandise. The portion thrown way is not damaged goods, but worthless slush, and the portion

which remains is not damaged fruit, but sound undamaged fruit. In respect to oranges the duty imposed is at one cent per pound, so that in this case the duty was not dependent upon the sound or the damaged value of the importation, but upon how much the oranges imported weighed. In such a case the ruling that the slush was not to be considered oranges, and was not to be weighed as such, would seem to be reasonable, just as was held with regard to the loss in weight of sugar by drainage in the case of Marriott v. Brune, 9 How. 619, 13 L. Ed. 282.

The question is not without difficulty, but with the presumption of correctness which attends the decisions of the Board of General Appraisers I cannot say that their decision should be reversed, and it is therefore sustained.

UNITED STATES v. FRANKLIN SUGAR REFINING CO.

(Circuit Court, E. D. Pennsylvania. April 14, 1905.)

No. 22.

1. CUSTOMS DUTIES—PROTEST—TIMELINESS—TENTATIVE LIQUIDATION.
   Where, under instructions of the Secretary of the Treasury, and upon due notice to the importers, an entry of imported merchandise was tentatively liquidated, while the final liquidation was held in abeyance over a year, pending the possibility of a change of rates, *held*, that the final liquidation was the liquidation within 10 days after which the importers might legally file a protest, under section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

2. SAME—PROTEST AGAINST TENTATIVE LIQUIDATION.
   Where an importer filed a protest against a tentative liquidation of an entry, this action does not preclude him from filing another protest against the final liquidation subsequently, regardless of whether, at the time of making the first protest, he regarded the first liquidation as final, and not tentative.

On Application for Review of a Decision of the Board of United States General Appraisers. G. A. 5,294, T. D. 21,266.

These proceedings relate to a decision of the Board of General Appraisers, which reversed the assessment of duty by the collector of customs at the port of Philadelphia on merchandise imported by Franklin Sugar Refining Company.

Wm. M. Stewart, Jr., and J. Whitaker Thompson, for the United States.

John G. Johnson, for importer.

HOLLAND, District Judge. The defendant in this case imported two cargoes of raw sugar from France, one per S. S. Vimeira and the other per S. S. Wildercroft, in April, 1897. The sugar was assessed with a duty under paragraph 182½, Tariff Act Aug. 28, 1894, c. 349, § 1, Schedule E, 28 Stat. 509, and there was imposed upon the same both the regular duty therein provided for sugar of the class imported and an additional duty of one-tenth of one cent per pound as further provided for in said section when imported sugars "are the product of any country which at the time the same are

exported therefrom pays directly or indirectly a bounty on the export thereof." Upon the arrival at Philadelphia of both of these vessels the entries were liquidated by the collector at this port. For the Wildcroft the liquidation took place on June 13, 1897. On July 7, 1897, a certain correction was made in this liquidation by the collector, and was stamped upon its face, "Subject to change of rates if required by law," in accordance with a circular issued by the Secretary of the Treasury on April 5, 1897, requiring the liquidation of sugar upon which the exporting country paid a bounty to be so stamped, and the circular instructed the customs officers to delay until further orders final liquidation of entries that arrived after the 1st day of April, 1897, and expressly exempted any entries of merchandise which was purchased and directed by the owner to be shipped for import into the United States by any person prior to April 1, 1897. Against this liquidation the importers filed a protest July 16, 1897, making as their only claim the refusal of the collector to allow a cash discount in estimating the dutiable value of the cargo. There was no protest made against the countervailing duty of one-tenth of one cent per pound at this time.

France, the country from which this sugar was imported, passed an act allowing exporters of sugar a certain bounty, which went into effect April 7, 1897, after these two cargoes of sugar had been shipped, and no protest was entered by the defendant against the assessment of one-tenth of one cent per pound in the tentative liquidation made by the collector on June 13, 1897, although it had not received any bounty upon either cargo of sugar, but subsequent to the first protest filed on July 16, 1897, to the tentative liquidation by the collector, the Board of General Appraisers filed an opinion on October 30, 1897, in which they held that no bounty was payable on sugar exported from France prior to April 7, 1897, and therefore the United States was not entitled to assess an additional duty of one-tenth of one cent per pound on such sugar.

The order of the Secretary of the Treasury of July 5, 1897, requiring the tentative liquidation to be stamped "Subject to change of rates if required by law," had been revoked, as the reasons for continuing the order no longer existed, and on July 28, 1898, a final liquidation was made by the collector of the duty upon the Wildcroft's cargo. On July 30, 1898—within 10 days' thereafter—the defendant company filed a protest against this final liquidation on the ground that the additional duty of one-tenth of one cent per pound was charged on the cargo contrary to law. A similar protest was filed for the same reason to the final liquidation made in regard to the cargo of the Vimeira. The government contends that as to the Wildcroft the liquidation made July 7, 1897, by the collector was the final liquidation, against which all objections should have been raised by protest within 10 days, under section 14, Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], and that all questions not then raised could not subsequently be raised or considered upon the liquidation which took place July 28, 1898. The defendant claims, however, that the latter assessment was the final liquidation, against which a protest could be made for

any claim whatsoever, and on appeal the Board of General Appraisers so held.

I am of the opinion that the board is clearly right in so holding, and that the first liquidation must be regarded as tentative. It was stamped "Subject to change of rates if required by law," and this notice could mean nothing else than that the government did not consider this assessment final. The final decision of the collector as to "rates and amount of duties chargeable upon imported merchandise," against which the importer is required to file his protest, under section 14, "within ten days" after such decision, must necessarily be a final decision, and he is not permitted to give this notice "before" such ascertainment and liquidation of duties. The importer is thus notified by section 14 of the act of June 10, 1890, that he cannot enter his protest before such "rates and amount of duties" are ascertained and liquidated by the final decision of the collector. It will be disregarded if entered too soon. In re Bailey (C. C.) 112 Fed. 413. Prior to the passage of the act of 1890 a protest could be filed any time after entry and duties estimated thereon. The final liquidation was regarded as only fixing the limit beyond which notice shall not be given. Davies v. Miller, 130 U. S. 284, 9 Sup. Ct. 560, 32 L. Ed. 932. In order to avoid the inconveniences of this practice, the act was passed by inserting the words "but not before" in section 14. So that the legislation on this subject shows it has been the constant aim of the government to confine the time of protest to "within ten days from final liquidation," and to prevent it from being filed either "before" such "final ascertainment" or after the expiration of the 10 days. When the government liquidated the entry of the Wildcroft and placed a notice upon that liquidation that it was "subject to change of rates if required by law," they gave notice that it was not a final decision of the collector. It is urged, however, that the importer must have regarded this as a final, and not a tentative liquidation, because he filed a protest on July 16, 1897. It may be that the importer so regarded this liquidation at that time; but, even if this be true, the government should not be permitted to escape the effect of its own act in notifying importers that these liquidations were not final. The government must be bound by its intention in this regard, and not be permitted to take advantage of a misconstruction put upon its acts by an importer in the first instance, and to say to him that, because he acted in a way to indicate that he regarded the first liquidation as final, therefore he must be held to that, notwithstanding the fact that it was not so intended or acted upon by the government, and notwithstanding the further fact that the importer before the expiration of 10 days from the "final adjustment" took a different view of the question as to the time within which he was required to file his notice, and assumed, as the government intended, that the first assessment was only tentative, as the notice stamped thereon indicated: that the liquidation of July 28, 1898, was final, and fixed the time within which a valid protest could be entered. It is not the case of a reliquidation pursuant to a decision of the Board of General Appraisers, where the protestant is bound by the

inal ground of protest, as in Stern v. the United States (C. C.) ed. 607. It is a case where, by reason of instructions of the etary of the Treasury, a tentative liquidation was made, and ce of that fact served upon the importer, who at the final adjust- t raised such questions as suggested themselves to him, and he ld be heard. The government, by its notice, created an un- l situation as to the final liquidation of these entries, and any t for which it is responsible should be resolved in favor of de- ant. A similar technical objection taken by the government overruled in the case of Robertson v. Downing, 127 U. S. 607, p. Ct. 1328, 32 L. Ed. 269.

ne ruling of the Board of General Appraisers in both cases is af- ed.

In re LEAKEN.

(Circuit Court, S. D. Georgia, Eastern Division. May 10, 1905.)

ABEAS CORPUS—UNITED STATES OFFICERS.

Rev. St. §§ 753, 761 [U. S. Comp. St. 1901, pp. 592, 594], provide that the vrit of habeas corpus shall in no case extend to a prisoner in jail, unless ne is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge hereof, in which case the court or judge shall proceed in a summary way o determine the facts of the case, and dispose of the party as law and ustice require. *Held*, that such sections confer jurisdiction on federal courts o release on habeas corpus an officer of the United States held in cus- ody for an act done or omitted under authority vested in him by the aws of the United States, though there was no act of Congress covering he particular case.

ME—ASSISTANT DISTRICT ATTORNEYS.

Assistant district attorneys appointed by a United States district udge, as authorized by Act Cong. May 28, 1896, c. 252, § 8, 29 Stat. 181 U. S. Comp. St. 1901, p. 613], are officers of the United States courts for heir respective districts.

ME—STATE COURTS—CONTEMPT.

Where petitioner, in his official capacity as assistant United States listrict attorney, procured the production of state court records before federal grand jury under an ordinary subpœna duces tecum, and there- fter held possession of such records as such attorney, he was not sub- ect to punishment for contempt of the state court for failure to return uch records on demand.

sborne Lawrence, for petitioner.
C. Wright, Sol. Gen., for respondent.

ARDEE, Circuit Judge. The evidence adduced on the hearing vs that the material facts in the case are substantially as set n in the relator's petition, as follows:

our petitioner, William R. Leaken, respectfully represents and shows is honorable court that he is a citizen of the United States, and a resi- of the state of Georgia, in the Eastern Division for the Southern District eorgia; that he was at all times hereinafter named up to and before the day of March, 1905, an assistant district attorney for the United States g jurisdiction in the Southern District of Georgia. Your petitioner fur- shows that at the November, 1904, term of the District Court of the ed States for the Southern District of Georgia, your petitioner, as assist- istrict attorney aforesaid, at the request of the grand jury impaneled for

said term of court, sued out precipe for subpœna duces tecum for certain witnesses, to wit, Judge Frank Tarver and the clerk of the county court of Effingham county, requiring them under the laws of the United States to appear before said grand jury and produce certain books, papers and other documents. Your petitioner further shows that in compliance with said precipe, a copy of said precipe being hereto attached and made a part of this petition, marked 'Exhibit A,' subpœnas duces tecum were issued by the clerk of said District Court of the United States for the Southern District of Georgia directing to said Judge Frank Tarver and said clerk of the county court of Effingham county requiring them to produce said records and documents before the said grand jury, a copy of said subpœnas duces tecum, together with copies of subpœna tickets showing acknowledgments of service and attendance under said subpœnas duces tecum upon the part of said Tarver and said clerk, being hereto attached and made a part of this petition, and marked 'Exhibit A.' Petitioner further shows that in compliance with the terms of said subpœnas the said Tarver and the said clerk of the county court of Effingham county appeared before the grand jury of said District Court, and produced before said grand jury the records of the county court of Effingham county, the same consisting of the judge's docket and minutes of said court, and that the said records were examined and used as evidence before the said grand jury, and said books were left by the said judge and clerk in the possession of the grand jury of said District Court of the United States for the Southern District of Georgia. Petitioner further shows that on the 17th day of December, 1904, Mr. C. F. Berry, said clerk, came to petitioner, and at Savannah, Ga., and orally requested petitioner to deliver to him said records, and your petitioner at that time declined to deliver said books to the said clerk, except upon a proper order of the county court of Effingham county. Petitioner further shows that on December 19, 1904, A. C. Wright, Esq., solicitor of the county court of Effingham county, wrote to your petitioner as an individual, and not as an official, making a personal request upon petitioner for a return of said records. In reply to this letter your petitioner, on the 21st of December, 1904, stated to said A. C. Wright, Esq., in writing, that petitioner had told the clerk of the county court that upon proper demand made the United States District Court would act, and that, if the said Wright would amend his letter by making it official, petitioner would return the records and books as soon as he could have a copy made of such portion as petitioner desired; this letter being signed as an assistant United States attorney. Petitioner further shows that on December 26, 1904, said A. C. Wright, Esq., in a letter signed by himself as solicitor of the county court of Effingham county, but addressed to your petitioner again individually, requesting the return of said record without delay, to which letter your petitioner on January 4, 1905, replied in writing, stating that the books were at the disposal of the proper officer upon the proper receipt. Petitioner further shows that on January 9, 1905, said A. C. Wright, Esq., wrote your petitioner a letter, addressing petitioner individually, emphasizing the fact that he addressed petitioner individually, and not officially, and threatening to submit the matter to the county court of Effingham county. Petitioner further shows that on the 14th day of January, 1905, the county court of Effingham county, Frank R. Tarver, judge of said court presiding, issued a rule nisi against your petitioner directing petitioner to show cause before him at Springfield, Effingham county, Ga., on the third Monday in February, 1905, why petitioner should not be dealt with for contempt for having in his possession and retaining in Chatham county, and as an individual, the above-named dockets and minutes; a copy of which said rule was handed to petitioner by a bailiff of said county court of Effingham county, who handed the same to petitioner in Chatham county, Ga., in which said county the said bailiff had no jurisdiction or authority to act. Petitioner further shows that at the time designated for the return of said rule your petitioner, through D. H. Clark, his attorney at law, presented to said county court of Effingham county a traverse to the return of said bailiff, which said traverse the said Frank R. Tarver struck on the ground that your petitioner did not appear before him personally. Petitioner further shows that after the overruling of said traverse your petitioner presented to said court his written demurrer hereinafter set out, the several grounds of demurrer therein expressed. After argument heard upon said demurrer the court overruled the same, and each

ery ground thereof, and passed a written order to that effect, which order is hereinafter shown. Petitioner further shows that after the ing of said demurrer his said attorney presented to the court a plea to sdiction of said county court of Effingham county, a copy of said plea ereinafter set out and made a part of said petition, which said plea erruled and stricken by the court, which entered a written order to that a copy of said order being hereinafter set out with said correspond- d proceedings in said county court of Effingham county, marked 'Ex- ' Petitioner further shows that thereafter petitioner, through his at- presented an answer to said rule to said court, and that upon the trial issue thereby made the court heard evidence upon the same, a aphic report of said evidence being hereinafter set out, and marked t C,' and made a part of this petition. Petitioner further shows that earing evidence the court rendered judgment charging your petitioner contempt of court, and passed a written order to that effect, a copy written order and judgment being hereinafter set out and made a part said Exhibit B. Petitioner shows that thereafter, to wit, on the 28th March, 1905, the said county court of Effingham county issued an at- nt against your petitioner directing the bailiff of the county court of am county or other lawful officers to arrest your petitioner, and con- n in the jail of Effingham couty for ten (10) days, a copy of said at- nt being hereinafter set out, and marked 'Exhibit D.' Petitioner fur- ows that said attachment was delivered to John Schwartz, Esq., sheriff ham county, and on the 13th day of April, 1905, and that said sheriff, nder and by virtue of said process, has arrested your petitioner, and y and unlawfully detains petitioner, and threatens to imprison him in l county jail of Effingham county."

er this state of facts it is evident that the relator is held in y under a proceeding in, and on a warrant from, the county of Effingham county, for and on account of duties devolving t not performed by, him as assistant United States attorney. estionably, as such attorney, he sued out the subpœna duces to bring to the United States court the records of the county of Effingham county, and on production of the records laid before the grand jury; and if, after having been used by the jury, the said records were left in the custody of the relator, because the relator was assistant United States attorney. private citizen he could neither have sued out the subpœna tecum, acted before the grand jury, or afterwards assumed y of the records. Being in possession of the records, if it e duty of the relator to return them to their normal and law- stodian, such duty devolved on him solely because he was the nt district attorney of the United States having charge of the dings before the United States court wherein the records had used. The judgment against him is for contempt of the y court of Effingham county in not on demand returning the cords. It seems clear then that the relator is in custody by rea- the judgment and warrant of the county court of Effingham y for the nonperformance, or omission, of a duty devolving him as an officer of the United States. Under sections 753 61 of the Revised Statutes of the United States [U. S. Comp. 01, pp. 592, 594], the Circuit Court of the United States has ction to release on habeas corpus any person held in custody y person or party for an act done or omitted in pursuance of ws of the United States. In re Neagle, 135 U. S. 1–99, 10 Ct. 658, 34 L. Ed. 55, is full authority for the proposition that

it is not necessary that there shall be an act of Congress passed to cover the particular case, but it is sufficient if the party in custody has acted under authority vested in him as an officer of the United States. Assistant district attorneys are appointed under authority of Act May 28, 1896, c. 252, § 8, 29 Stat. 181 [U. S. Comp. St. 1901, p. 613], and they are officers of the United States courts for their respective districts. Officers of the United States courts cannot be punished by any state court for acts within their duties as officers of the United States court. In re Turner, 3 Woods, 603, Fed. Cas. No. 14,246; In re Thomas (C. C.) 82 Fed. 304; s. c., 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699; In re Waite (D. C.) 81 Fed. 359; s. c., 88 Fed. 102, 31 C. C. A. 403.

So far as the law of the case is concerned, I understand that the learned solicitor general, who appeared for the respondent, admits the propositions above stated, and that in this case the petitioner is entitled to be discharged if it appears that he held the records in question in an official, and not an individual, capacity. While not actually disputing the facts recited in the petition, he contends that there was no authority to compel the production of the records of Effingham county before the United States grand jury, and because thereof all the persons who participated in such production were acting in a private capacity, at least to the extent that when the records came into the hands of the relator, as there is no law to hold or retain the same, he must have held them in his private capacity. The answer to this argument is found in In re Turner, supra, where, under circumstances very similar to those in the present case, it was said:

"But it is not important to inquire how the ballot boxes, ballots, and papers came into the custody and control of the Circuit Court of the United States. The fact is they did come into such control, and that by the ordinary process of the court, and, being there by means of such process, they cannot be wrested from it in the manner attempted."

It may be that the issuance of a subpœna duces tecum by the United States court directed to the county judge of Effingham county for the production before the grand jury of the United States of the records of the county court of Effingham county was improvident, and the compliance therewith ill advised, but the fact remains that the subpœna was obeyed, and the records were produced and were left in the custody of the United States court, and thereafter whatever duty the relator owed to take care of said records or to return them to their lawful custodian was a duty incumbent upon him as an officer of the court. The records might have been left with the marshal, the clerk, or even with the judge, as officers of the court.

Other grounds are urged in the petition and in argument for the release of the petitioner on this writ, such as the lack of jurisdiction of the county court of Effingham county to hold the relator for an alleged contempt committed in Chatham county, but I think the real case is disposed of in the view taken above.

A judgment will be entered making the writ of habeas corpus absolute, and discharging the relator from custody.

LITTLETON et al. v. FISCHER.

(Circuit Court, S. D. New York. March 15, 1905.)

GHT—INFRINGEMENT—PRELIMINARY INJUNCTION.

Preliminary injunction will not issue against the publication of defendant's arrangement of a musical composition, though it is practically reproduction of complainants' copyrighted arrangement thereof; complainants having also published uncopyrighted editions of the composition, the character and extent of the dedication to the public through which cannot be determined on the affidavits and inspection of the respective scores, so that it is impossible to decide the extent of any trespass by defendant on the rights secured to complainants by the copyright, and not appearing that defendant is unable to respond in damages.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 78.]

Motion for Preliminary Injunction.

ton & Lewis, for the motion.

atzek & Stroock, opposed.

WNSEND, Circuit Judge. It appears from the affidavits exhibits that one Edward German, a musical composer, was irst and original author of a musical composition entitled ris Dance," and that he made an arrangement thereof for the , which he assigned to the plaintiffs, and which they duly ighted and published. The defendant employed another mu- , R. Klugescheid, to make an independent arrangement of musical composition for the violin and piano, and has pub- l the same. While the latter arrangement necessarily differs the former by virtue of its adaptation to two instruments, is so constructed that with slight variations in the left-hand npaniment, such as would occur to and be readily made by musician without altering the violin score, it might be played e piano, and, when so played, would be practically a reproduc- of the complainants' copyrighted arrangement.

there were no other questions involved, the right to an injunc- would seem to be clear. But it appears that other editions of musical composition have also been published by complainants, for a military band and for an orchestra; that said editions not protected by copyright, and that copies of each of said edi- have been sold without any imprint of copyright thereon; hat said Klugescheid made his arrangement of said composi- from said source. An inspection of said uncopyrighted pub- ons shows that they contain scores for various instruments, ding one for the violin, and that said scores, and especially for the violin, present the theme and harmony and melody of musical composition so fully that apparently it was only neces- to add thereto the mere mechanical accessories of an accom- ment to produce such an arrangement as that of complainant defendant.

e character and extent of the dedication to the public through ncopyrighted publication cannot be determined upon the af- its and inspection of the respective scores, and consequently

it is impossible to decide to what extent, if at all, the defendant has trespassed upon the rights secured to complainants by the copyrighted arrangement. For this reason, and because it does not appear that defendant is unable to respond in damages in case it shall finally appear that he has violated complainants' rights, it is thought that the extraordinary relief of a preliminary injunction should not be granted, but that the questions at issue should be postponed for final hearing.

The motion is denied.

UNITED STATES v. PERTH AMBOY SHIPBUILDING & ENGINEERING CO. et al.

(Circuit Court, D. New Jersey. May 15, 1905.)

1. BOND—CONSTRUCTION—PERFORMANCE OF CONTRACT.

In an action at law against the obligors of a bond conditioned for the full and faithful performance of a contract therein referred to, the contract itself, as set forth in the declaration, provided for the construction and equipment of two steamers within a fixed period according to certain plans and specifications, and, upon failure so to do, the other party to the contract, the United States, might complete the same by contract. The declaration alleged that said steamers were not completed within said period, that the contractor had abandoned the contract, and that thereupon the United States had advertised for other and new bids to construct and complete said steamers; that a new contract for the purpose was thereupon made, and that they were in fact completed thereunder. The declaration was demurred to for the reason, among others, that the new contract was for the construction and completion of said steamers, whereas under the original contract it should have been for their completion only.

Held that, as used, the words "construction and completion" were substantially the same in meaning.

2. SAME.

Held, further, that the word "constructed," as used, did not imply, as was claimed, other or different steamers than those originally contracted for.

3. SAME—PLEADING.

And it appearing that the original contractor had failed to complete said contract within the period fixed therefor, and had in fact abandoned the same, it was—

Held, further, that it was unnecessary to state in the declaration the exact date of abandonment, it appearing that the new contract was awarded after such abandonment.

(Syllabus by the Court.)

On Contract. On demurrers to declaration.

John B. Vreeland and Theodore B. Booraem, for plaintiff.

Frank P. McDermott, for defendant, U. S. Fidelity & Guaranty Co.

Adrian Lyon, for defendant Perth Amboy Shipbuilding & Engineering Co.

CROSS, District Judge. This is an action on contract brought by the United States of America against the Perth Amboy Shipbuilding & Engineering Company and the United States Fidelity &

ranty Company, of Baltimore, Md., and the questions considered upon separate demurrers filed by the defendants to the plain- declaration. The action is founded upon a joint and several l given by the defendants to the plaintiff, dated January 27, , in the penal sum of $30,000, with the following condition:

hereas the above-bounden Perth Amboy Shipbuilding and Engineering as on the twenty fourth day of January, 1903, entered into a contract the United States, represented by Colonel D. D. Wheeler, Assistant er Master General U. S. Army for constructing and equipping two (2) lard Steel Screw Steamers for harbor service: Now, therefore, if the -bounden Perth Amboy Shipbuilding and Engineering Co., shall and in all respects, duly and fully observe and perform all and singular the ants, conditions, and agreements in and by the said contract agreed and anted by said Perth Amboy Shipbuilding and Engineering Co., to be ved and performed according to the true intent and meaning of the said act, and as well during any period of extension of said contract that may anted on the part of the United States as during the original term of ame, and shall promptly make full payments to all persons supplying or or materials in the prosecution of the work provided for in said con- then the above obligation shall be void and of no effect; otherwise main in full force and virtue."

ne contract referred to in said bond is dated January 24, 1903, as stated in the declaration, was between Col. D. D. Wheeler, tant quartermaster general of the United States army, for and half of the United States of America, and said Perth Amboy building & Engineering Company; and said company did by covenant and agree that it would furnish all the material labor necessary to, and would construct and completely equip, steel screw steamers for harbor service of the quartermaster rtment, in strict accordance with the requirements of the ifications and drawings thereto attached and made a part there- and that the said Perth Amboy Shipbuilding & Engineering pany would complete the construction and equipment of the steamers therein referred to, and deliver them to the said plain- s follows: One steamer to be completed and delivered in 120 king days, and the other in 130 working days, from the date id contract; and that, in case the said Perth Amboy Shipbuild- & Engineering Company failed to complete in all respects and er the two steamers within the time therein specified, the loss lting to the United States from the said failure was thereby at the rate of $50 per day per steamer for each and every day r or both of said steamers remained undelivered beyond the od therein specified; and it was thereby stipulated that the tiff might withhold such amount, as liquidated damages there- entioned, from any money due and payable to said Perth Am- Shipbuilding & Engineering Company by the plaintiff for the k done under said contract.

ne declaration further alleges that, for the consideration of the ful performance of the stipulation of said agreement, the Perth Amboy Shipbuilding & Engineering Company should aid for the complete construction and equipment of said steam- he total sum of $105,000, and that, in case of the failure of the Perth Amboy Shipbuilding & Engineering Company to comply

with the stipulations of said contract, then the plaintiff should have the power to complete the said work at the expense of the said Perth Amboy Shipbuilding & Engineering Company in such manner as the said United States should deem best for the interest of the public service, either by day's labor and open market purchase of the necessary materials, or by contract, or both, and any excess of cost resulting from such failure should be charged to the said Perth Amboy Shipbuilding & Engineering Company.

The breach assigned to the condition of the bond is as follows:

"Said plaintiff says that the said Perth Amboy Shipbuilding & Engineering Company did not duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by said contract agreed and covenanted by the said Perth Amboy Shipbuilding & Engineering Company to be observed and performed, according to the true intent and meaning of the said contract, but failed and neglected to construct and completely equip said two steel screw steamers in accordance with the requirements of the specifications and drawings attached to said contract within the period mentioned therein; but, on the contrary, failed and neglected to complete the same within the time aforesaid, and in fact abandoned said work of construction; that thereupon the United States of America, on the 1st day of December, 1903, having duly advertised for and received other and new bids for the construction and completion of said steamers, entered into a certain other contract, bearing date the day and year last aforesaid, with the Pussey & Jones Company, a corporation existing under the laws of Delaware, they being the lowest bidders therefor, for the construction and completion thereof at a cost of seventy-six thousand nine hundred dollars for each steamer, in all, the sum of one hundred and fifty-three thousand eight hundred dollars, whereupon the said Pussey & Jones Company entered upon the performance of their said contract, and duly completed the construction of the said steamers, and delivered the same to the said plaintiff, and received in payment therefor the said sum of one hundred and fifty-three thousand eight hundred dollars, the price named in the last-mentioned contract."

Then follows an allegation that by means of the premises the plaintiff sustained damage to the amount of $48,800, being the amount in which the plaintiff was damnified by reason of the Perth Amboy Shipbuilding & Engineering Company failing to fully perform the conditions in the said bond, and whereby the same became forfeited, and an action accrued to the plaintiff to demand and have of the defendants the aforesaid sum of $30,000, which the said defendants had not, nor had either of them, paid.

The principal grounds of demurrer assigned, briefly stated, are that the declaration does not set forth with sufficient certainty that the contract entered into with the Pussey & Jones Company was a contract for the completion of the steamers agreed to be constructed by the defendant; that it does not set forth that the plaintiff completed the work of constructing said steamers agreed to be constructed by the defendant; that it sets forth that the contract with the Pussey & Jones Company was for the construction of other and new steamers, and not for the completion of the steamers agreed to be constructed by the defendant; that it does not set forth that the bids received, or the said contract entered into with the Pussey & Jones Company, were for steamers identical in all respects with those agreed to be constructed by said defendant; and that the date of the abandonment of the contract by the Perth Amboy Ship-

ng & Engineering Company is not stated in the declaration. e reasons were substantially assigned by both defendants. r reasons were assigned, but they were not urged upon the ent.

assigning a breach of the condition of the bond, the declara- ers forth that the shipbuilding company failed and neglected ontract and completely equip said two steel screw steamers, ordance with the requirements of the specifications and draw- attached to the said contract, within the period mentioned n, but, on the contrary, failed and neglected to complete the within the time aforesaid, and in fact abandoned said work struction; that thereupon the plaintiff, on December 1, 1903, g duly advertised for and received other and new bids for the ruction and completion of said steamers, entered into a certain contract, of the day and year last aforesaid, for the construc- and completion thereof; and that the new contractor entered the performance of said contract, duly completed the construc- of the said steamers, delivered the same to the plaintiff, and aid the contract price. As we understand the defendants' ar- nt, it is that the United States, in advertising for and receiving and new bids for the "construction and completion" of said ers, departed from the original contract; or, in other words, y the addition of the word "construction" the plaintiff provid- the building of new and different steamers than the ones re- l to in the original contract. We fail, however, to see any in this objection. There can be no doubt whatever that the "said steamers," for which the new bids and the new con- were made, relate back to "said two steel screw steamers" ously referred to, and which were the steamers provided for e shipbuilding company's contract. This must be so, since is no other antecedent to which the words "said steamers," ed in connection with the new contract, can possibly relate; most superficial reading of the declaration shows this. The question, therefore, for consideration is whether the use of ord "construction," in connection with the word "completion," vertising for the new bids and making the new contract, con- ed, as claimed by the defendants, a failure on the part of the iff to comply with the contract, which reserved to the plaintiff ght, upon the defendants' default, "to complete the said work" y's labor, or by contract, or both. We feel constrained to however, notwithstanding the word "construction" is in- l in the declaration without being in the contract, that there a substantial compliance with the terms of the contract. process of completion was necessarily a process of construc- the two words, as there used, have practically the same ing. If there had been nothing to complete, there would been nothing to construct, and vice versa. In De Graff v. St. & Pac. R. R. Co., 23 Minn. 146, the court, in referring to a ad contract, says, "The word 'completing' has substantially ame signification as the word 'constructing,'" and this seems ural and common-sense interpretation of the terms; certainly

it cannot be that the use of the word "construction," limited, as it was, to "said steamers," implied the completion of any other or different steamers than those the defendant the shipbuilding company had agreed to construct; hence, when the new contract was made to construct and complete the original steamers, it meant nothing more in law than to complete them, and that in turn involved completing them in the identical way in which they were originally intended to be completed. The conclusion, therefore, reached is that, in the respect aforesaid, there was no variation or departure from the original contract.

But it is said that the United States did not, so far as the declaration shows, complete the work of construction of said steamers. It is true the plaintiff did not do the work itself, nor was it obliged to; it had a right to do the same by day's work or by contract, as might seem best for the public service. It chose to have it done by contract, and the allegations are that it was so done, that the steamers were delivered to the plaintiff, that the contractor was paid, and that the consequent loss to the plaintiff arose from the defendant's failure to perform its contract.

Another cause for demurrer assigned is that the declaration did not set forth the date of the abandonment by the defendant the shipbuilding company of its contract. The demurrer, however, admits that said defendant failed and neglected to construct and completely equip said two steel screw steamers in accordance with the requirements of the specifications and drawings, attached to said contract, within the period mentioned therein, and, in fact, abandoned said work of construction. These averments are all, and more than was necessary to show a breach of the condition of the bond; the failure to construct and complete within the contract time was of itself a breach, and the addition of the words "and in fact abandoned said work of construction" might well be treated as surplusage. The admission on the part of the defendants by demurring is that the contract was not only not completed within the stipulated time, but was absolutely abandoned, and that it was after this that the new bids were advertised for.

This disposes of all the reasons for demurrer which were urged on the argument. It may be added, however, that the others seem quite unimportant.

The demurrers will both be overruled, with leave to the defendants to plead within 15 days, if they shall so desire.

UNITED STATES, to Use of TIDEWATER STEEL CO., v. PERTH AMBOY SHIPBUILDING & ENGINEERING CO. et al.

(Circuit Court, D. New Jersey. May 17, 1905.)

1. BOND—ACTION—PLEADING—CONTRACT WITH UNITED STATES.

In an action brought upon a bond given under the act of Congress of August 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], against the principal and surety therein named, demurrer was filed to the declaration because it was not averred therein that the claim of the

United States thereunder, if any, had been paid. *Held*, that such averment was unnecessary, because the United States is not a preferred creditor under said bond.

Law.

The same declaration was also demurred to upon the further ground that it did not aver that there were no other persons having claims or demands against the defendants under said bond, or if there were such creditors, that they had been paid. *Held*, further, that such averment was unnecessary, since the act referred to confers an independent right of action upon each creditor having a claim under the bond.

Abus by the Court.)

n Contract. On demurrer to declaration.

eorge H. Pierce, for plaintiff.

drian Lyon, for Perth Amboy Shipbuilding & Engineering Co.

rank P. McDermott, for Surety Co.

ROSS, District Judge. This action is brought upon a bond e by the Perth Amboy Shipbuilding & Engineering Company, rincipal, and the United States Fidelity & Guaranty Company, urety, to the United States of America, dated January 27, 1903, he penal sum of $30,000, and containing the following condition:

ow, therefore, if the above-bounden Perth Amboy Shipbuilding and En- ring Co., shall and will, in all respects, duly and fully observe and per- all and singular the covenants, conditions, and agreements in and by contract agreed and covenanted by said Perth Amboy Shipbuilding and neering Co., to be observed and performed according to the true intent meaning of the said contract, and as well during any period of ex- on of said contract that may be granted on the part of the United States ring the original term of the same, and shall promptly make full pay- s to all persons supplying it labor or material in the prosecution of the provided for in said contract, then the above obligation shall be void and effect; otherwise to remain in full force and virtue."

he suit is in the name of the United States of America, for the of the Tidewater Steel Company, against the obligors in said d; and in the declaration it is alleged that the defendant the h Amboy Shipbuilding & Engineering Company was declared lvent August 3, 1903, by the decree of the Court of Chancery he state of New Jersey, that a receiver was appointed by said rt, that said suit is still pending, and that permission to bring suit has been given by said court. The declaration then sets the bond, and avers that the contract referred to in the condi- thereof was entered into between the Perth Amboy Shipbuild- & Engineering Company and Col. D. D. Wheeler, assistant rtermaster general of the United States army, on January 24, 3, and provided for the furnishing of all the material and labor essary to construct and completely equip two standard steel w steamers for the harbor service of the quartermaster's depart- t, in accordance with the requirements of the specifications and wings thereto attached: that thereupon the defendant the Perth boy Shipbuilding & Engineering Company proceeded with the cution of said contract, and partially built and equipped said mers; that after the said last-mentioned defendant commenced work, to wit, on January 31, 1903, it became and was necessary,

in the execution of said contract, that said defendant should have and use certain material (steel boat plates), particularly mentioned in the declaration, in and for the completion of said steamers, and that the said Tidewater Steel Company did on divers days and times, which are particularly mentioned, deliver to the defendant the Perth Amboy Shipbuilding & Engineering Company, at its request, the above-mentioned material, which was used upon said two steamers in the construction and equipment thereof under said contract; that such material so supplied and used was worth the sum of $7,894.39, which sum the defendant the Perth Amboy Shipbuilding & Engineering Company promised and agreed to pay the said Tidewater Steel Company therefor. The declaration then assigns, as a breach of the said bond, that said Perth Amboy Shipbuilding & Engineering Company has not performed all the undertakings in the said writing obligatory by it to be performed, in this: that it has not made full payments, or any payments, to the Tidewater Steel Company for the material aforesaid supplied by it to the Perth Amboy Shipbuilding & Engineering Company for use in the construction and equipment of said steamers, and actually used therein. It then avers that an itemized statement of the material so furnished and used, with the prices charged therefor, is annexed to the declaration, and that no part thereof has been paid. Then follow certain averments not necessary to be stated, as they have no bearing upon the questions to be decided herein.

To the foregoing declaration each of the defendants has filed a demurrer, and the grounds therefor are as follows:

"Because it does not appear therein that the United States of America has been satisfied for its claims and demands against said defendant on said bond; and also because it does not appear that full payments have been made to all other persons supplying labor or material in the prosecution of the work provided for in said contract; and also because it does not appear whether or not there are any other persons who have any claim or demand against said defendant on said bond for supplying such labor or material, and also because it does not appear that all persons who have any claims or demands against said defendant on said bond for supplying such labor or materials are parties to said suit; and also because no right of action upon said bond accrued to the plaintiff until all claims and demands thereon to the United States have been satisfied, and said declaration fails to show such satisfaction."

It will be unnecessary to consider these objections at any considerable length. The first and last reasons are practically alike, while the remaining three raise substantially the same question.

As to the first and last: They are based upon the theory that the United States is a preferred creditor under the bond, and that consequently it was necessary for the plaintiff to aver in its declaration that its claim had been paid. Such assumed theory, however, is untenable; the United States has no preference under such a bond; the bond was intended for the benefit, not only of the United States, but of all persons furnishing materials or labor under the contract for the performance of which the bond was given as indemnity. Section 3466 of the Revised Statutes [U. S. Comp. St. 1901, p. 2314] has no bearing upon the controversy arising under the bond in suit; it undoubtedly gives a preference to the United States over

creditors against an insolvent debtor, but no such preference tablished under a bond given, as this was, pursuant to the act pril 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p.]. It is unnecessary to reason this matter further, as it has dy been settled by the Circuit Court of Appeals of this circuit e case of United States v. Heaton, 128 Fed. 414, 63 C. C. A. which approved upon this point the decision of the lower court, rted in (C. C.) 124 Fed. 699. Judge Dallas, in deciding the case e Court of Appeals, adopted the language of Judge McPher- as follows:

> ne United States has no priority against a surety, for the reason that ıtute has given it such a privileged position, while it has priority against solvent principal, for the analogous reason that Congress has seen fit enact. The right of a surety, after he has paid the money due upon ond to the United States, to be preferred in the distribution of his in- ıt principal's estate, does not depend at all upon the answer of the ion whether the United States has previously had priority against the r, but rests solely upon the language of section 3468 [U. S. Comp. St. p. 2314], which expresses the legislative will upon the subject. It is ection that is the source of the surety's right, and I think its true con- ion gives priority for so much, and no more, of the government's claim e surety may have been obliged to pay by legal proceedings, or may paid voluntarily in discharge of his obligation upon the bond."

ıe surety company can find ample relief in the premises by pay- he amount of its bond into court, as was done in that case, or suit in equity, as indicated in the cases of Thomas Laughlin v. Am. Surety Co. et al., 114 Fed. 627, 51 C. C. A. 247; United es v. American Surety Co. et al. (C. C.) 126 Fed. 811; and rican Surety Co. v. Lawrenceville Cement Co. (C. C.) 96 Fed. s. c. (C. C.) 110 Fed. 717.

s to the other grounds of demurrer, they must likewise, in our ion, be overruled. The act under which the bond in suit was ı unquestionably allows each creditor to bring an individual for the establishment of his claim. The language used is clear, susceptible of no other interpretation. Numerous suits of this acter have been brought in the courts, as will be seen from an ınination of the above and other reported cases, and we do not in any of them that it has ever been claimed that such a suit ıd not lie, notwithstanding the fact that there might be other ıants under the bond. In the cases cited above such suits were r brought or threatened, and it was to avoid their multiplicity the surety company sought relief, either by paying the amount s bond into court, or by filing a bill in equity in the nature of l of interpleader. Whether there are other, or how many other, itors secured by this bond, or whether all their claims have paid, is, under the act of Congress, a matter of indifference to Tidewater Steel Company. It can sue without respect to their ıs, and they can sue without respect to its claim, since all have pendent causes of action. The case of American Surety Com- v. Lawrenceville Cement Company, supra, besides establish- he propositions that the fund is to be distributed ratably, and no priority can be given to one creditor over another, also

shows indirectly that actions at law were properly commenced in the first instance by the individual creditors, from the fact that the court allowed the several plaintiffs in such actions the costs incurred by them up to the time when the bill of complaint was filed. In our opinion, the grounds of demurrer under consideration must also be overruled.

The defendant the United States Fidelity & Guaranty Company submitted one ground of demurrer additional to the above, to wit, that the declaration stated no cause of action against it. This reason might be passed without consideration, since it does not specify any particular defect in the declaration at which it is aimed; it is equivalent to a general demurrer. The New Jersey statute, however, requires grounds of demurrer to be specific, and in effect abolishes the common-law general demurrer. Waiving, however, the general character of this last reason, we will for a moment consider the point made under it, that the act of Congress (Act Aug. 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]) gives a right of action only to persons supplying labor and materials "for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building, or public work," which provision does not include steamers for the harbor service of the quartermaster's department; and counsel cites in support of his proposition definitions of "public works" from the Century Dictionary and the Am. & Eng. Ency. of Law (2d Ed.). Without quarreling with these definitions, we conclude that the meaning of the words "public work" in the act is broader and more comprehensive than the dictionary meaning given to "public works"; that public work is susceptible of application to any constructive work of a public character, and is not limited to fixed works. The statute should be liberally construed to accomplish its purpose. But without further discussion of the point, it is quite sufficient to say that, whether the foregoing view is correct or not, the defendants are estopped from setting up such defense; they executed the bond well knowing its intent and purpose, and, since the purpose was not immoral or illegal, they cannot now be heard to deny their liability, voluntarily assumed and undertaken.

The demurrers will be overruled as to both of the defendants, with leave to plead within 15 days if they shall so desire.

In re NOEL.

(District Court, D. Maryland. April 17, 1905.)

BANKRUPTCY—RECOVERY OF PREFERENCE—JURISDICTION OF BANKRUPTCY COURT.

Under Bankr. Act July 1, 1898, § 60b (30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445]), as amended by Act Feb. 5, 1903, 32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1903, p. 416], which gives a court of bankruptcy concurrent jurisdiction of suits by a trustee to recover unlawful preferences, the form of the proceeding in which such matter is determined depends upon whether or not the property affected is in the custody of the court. If in the possession of an adverse claimant, a plenary suit is necessary; but, when in the possession of the court, as where the alleged preference was by way of mortgage, and the property has been sold, and the proceeds deposited in the bankruptcy court, that court may determine the validity of the mortgage on a petition filed by the trustee.

SAME—FORM OF PROCEEDING—CONSENT.

Where an injunction granted by a court of bankruptcy, restraining the foreclosure of mortgages on property of a bankrupt estate on the ground that one of such mortgages constituted an unlawful preference, was dissolved on condition that the proceeds of the property applicable to said mortgage should be paid into a bank, subject to the further order of the court, the acceptance of such condition by the mortgagee is equivalent to a consent that the validity of the mortgage should be determined by the court in any appropriate form of proceeding.

SAME—PRESENT CONSIDERATION FOR MORTGAGE—RENEWAL OF PRIOR MORTGAGE.

Where a valid mortgage was given as security for a present loan, the fact that a new mortgage on the same property, given within four months prior to the mortgagor's bankruptcy, was made to secure a renewal of the loan, does not render such mortgage voidable as an unlawful preference.

SAME—VALIDITY OF MORTGAGE—WITHHOLDING PRIOR MORTGAGES FROM RECORD.

Under Code Pub. Gen. Laws Md. art. 21, §§ 13–16, which require mortgages to be recorded within six months after their execution, where a succession of mortgages—the first given to secure a loan, and the others to secure renewals thereof every 45 days thereafter—were withheld from record during a time exceeding six months for the purpose of upholding the mortgagor's credit, the last of the series, although recorded, is void as to creditors and the mortgagor's trustee in bankruptcy.

In Bankruptcy. In the matter of the petition of the trustees declare void a mortgage of the Commonwealth Bank on propty of the bankrupt.

John N. Steele and John Hinkley, for trustees in bankruptcy.
Edgar H. Gans and Robert Biggs, for Commonwealth Bank.

Statement.

MORRIS, District Judge. Edgar M. Noel, who was in a large ay a building contractor, was adjudged a bankrupt May 26, 903, upon his voluntary petition. At the time of his application e owned and was living in a fee-simple dwelling house on Mt. oyal avenue, in Baltimore City. This property was subject to vo mortgages: One was a mortgage executed by himself and ife, December 26, 1900, to Nathan Rohr, and duly recorded, for

$3,000. The other was a mortgage to the Commonwealth Bank of Baltimore for $13,000, dated January 23, 1903, and recorded February 5, 1903; that is to say, within four months prior to his adjudication. After the adjudication the Commonwealth Bank acquired by assignment the $3,000 mortgage, and, by virtue of a consent of the mortgagors contained in the mortgage, but without making the trustees parties to the case, and without application for the sanction of the bankrupt court, procured, August 30, 1903, a decree of the circuit court No. 2 of Baltimore City appointing Robert Biggs trustee to foreclose the above-mentioned first mortgage, and advertised the property to be sold on September 11, 1903. The trustees of the bankrupt's estate filed their petition on September 9, 1903, praying an injunction to stop the sale on the ground that the second mortgage of $13,000 was void as a preference; that the property was worth at least $20,000, having been scheduled by the bankrupt as of the value of $25,000; and that a sale under a decree for foreclosure in the state court would hinder and delay the proper administration of the estate of the bankrupt by the trustees. The court in bankruptcy granted the injunction prayed for. The Commonwealth Bank answered the petition, and made a motion to dissolve the injunction. After a hearing of the motion the court passed an order, October 10, 1903, rescinding the injunction, and permitted a foreclosure sale under the decree in the state court upon condition that the court costs and commissions to be allowed by the state court on the $3,000 first mortgage, and all taxes, water rent, and other charges, should be taken out of the proceeds, and that the first mortgage of $3,000 and interest should be paid to the Commonwealth Bank, and the balance should be deposited subject to the order of this court, to abide the determination of this court as to the validity of the second mortgage of $13,000 given to said Commonwealth Bank. Under the sanction of this order the mortgage was foreclosed, and the controversy now to be determined is as to the validity of the said $13,000 mortgage under which the bank claims the balance of the proceeds of sale, which balance has proved to be less than the amount of its claim.

The trustees of the bankrupt's estate, claiming said balance, filed their petition, praying that the $13,000 mortgage be declared void; setting out the following grounds for the relief prayed for: That on October 23, 1901, Noel obtained from the Commonwealth Bank a loan of $13,000, for which he gave his promissory note payable 45 days after date, and as security he and his wife executed a second mortgage to said bank upon the said Mt. Royal avenue property. The said mortgage was not recorded, and the said note was paid December 7, 1901. That on December 14, 1901, he again applied for and obtained a loan for $13,000 from the bank on the security of his interest in the said property, giving his note payable 45 days after date, and again he and his wife gave a mortgage to said bank on said property. That the mortgage, at the request of Noel, was not recorded. That said loan was then renewed every 45 days, maturing on March 8, 1902, on April 25, 1902, on June 8, 1902, on August 22, 1902, on October 25, 1902, and on January 23, 1903, and

ach of said dates a new note and a new mortgage were given
ne bank by Noel. That none of said mortgages were recorded,
pt the last one, dated January 23, 1903, which was recorded
he bank after notice to Noel on February 5, 1903 (within four
ths prior to Noel's adjudication), and under which the bank
claims. The trustees, in their petition, charge that the loan
Noel made on December 14, 1901, has never been, in fact, re-
, and is the identical loan now claimed by the bank, and at-
pted to be secured by the mortgage dated January 23, 1903,
recorded February 5, 1903; that the alleged payments of the
erent notes given in renewal of said loan were fictitious pay-
ts, and no money passed from Noel to the bank. They charge
neir said petition that at the time the loan was made the bank
w that Noel was largely indebted and was daily incurring new
btednesses, and that, by withholding from record all of the
successive mortgages given to secure the said loan of $13,000,
gave Noel a fictitious credit, which was a fraud upon all his
itors becoming such after December 14, 1901, and was void
o all such creditors. They further charge that on January 23,
, Noel was insolvent, and was so when the mortgage was re-
led on February 5, 1903, within four months of the filing of
l's petition in bankruptcy, and that it is void as an unlawful
erence.

he Commonwealth Bank answered the petition of the trus-
. It protested that the court was without jurisdiction to hear
determine the issues presented in said petition, in the form
ented to the court, and reserved all exceptions it might make
he jurisdiction of the court to hear and determine the same.
sserts that in the dealings between it and Noel as to said loan
13,000 for 45 days, made on December 14, 1901, Noel stated that
as a temporary loan, and that it would be paid at maturity,
asked that the mortgage should not be recorded; that, each
the note matured, Noel made the same request, and was grant-
loan, and the bank took on each transaction a new note and
w mortgage, until finally, on February 5, 1903, the bank notified
l of its intention to put the mortgage on record, and did so.
ts answer the bank avers that it made the loan in absolute good
, without any reason to believe that Noel was financially em-
assed, but, on the contrary, during the years 1901 and 1902 it
reason to believe that Noel was prosecuting a number of large
profitable contracts, and that said loan was only a temporary
mmodation. It asserts that the withholding of the mortgage
record was not with any intent to give Noel a fictitious credit,
o aid him in misleading any person with whom he might have
ness dealings. The answer asserts that the bank did not know
Noel was insolvent on January 23, 1903, and denies that the
ng of the mortgage constitutes a preference, within the meaning
he bankrupt act; that it has not filed any claim or taken part
he bankruptcy proceedings.

he testimony of the witnesses varies but little from the allegations
he pleadings. It appears that Noel in December, 1901, had on

his hands a number of very large building contracts—among them, a contract for the building of the Fifth Regiment Armory, in Baltimore City, at the contract price of about $250,000. He was a customer of the Commonwealth Bank, and had assigned that contract to the bank, so that it was to receive all the payments due to Noel as they were paid, and was to advance him the money required for his current payments in connection with that contract. Finding he needed more money, he applied for this additional loan of $13,000 on the security of a mortgage of his dwelling house; Noel expecting he might need it until he received the final payments on the armory contract, but the bank making no agreement to let him have it longer than the 45 days, at the end of which each note was made payable. With regard to the ultimate recording of the mortgage, it would seem to have resulted from the fact that the bank officers in February, 1903, became convinced that disputes which had arisen with regard to acceptance of the armory, and the complaints about defects in its construction, and the difficulties which Noel was encountering in obtaining the final payments on that contract, would prevent his paying the note at maturity from the source from which he had been expecting the money. They then notified Noel that they would record the mortgage. As to the continuance of the loan, the transaction was that, before the 45-day note matured, Noel would request the bank to continue the loan, and its officers would have a new mortgage prepared, and Noel and his wife would come to the bank and execute it, and he would make a new note. The cashier would then draw his cashier's check for $13,000 to the order of Noel, who would indorse and deposit it to his account, and draw his check on the bank for $13,000, and hand it to the cashier, and would receive back the old note and the old mortgage. The interest was charged up against his account quarterly, together with interest for all the discounts and advances which Noel had from the bank on which interest was payable.

Jurisdiction.

The first question presented is that raised by the Commonwealth Bank by the reservation in its answer of the right to except specially to the jurisdiction of the court in bankruptcy to hear and determine the issues presented by the petition of the trustees, in the form in which they are presented by said petition to the court. It is urged in argument that the question whether or not the mortgage of January 23, 1903, to the bank, is void, and is to be set aside, can be determined (unless by the consent of the bank) only in an independent plenary suit in equity. And in support of this contention counsel for the bank cite Bardes v. Harwarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, Louisville Trust Co. v. Cominger, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413, and other cases. Since the decisions in the cases cited were announced the amendment of February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 410], has given to the District Court in bankruptcy a jurisdiction which was expressly denied to it before. Sec-

e, Bankr. Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. 1, p. 3452], provides that the trustee may avoid any transfer bankrupt which any creditor might have avoided, and may the property so transferred; and by the amendment it is that (Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. St. Supp. 1903, p. 417]):

"the purpose of such recovery any court of bankruptcy as hereinbe-ned and any state court which would have had jurisdiction if bank-ad not intervened shall have concurrent jurisdiction."

pears, therefore, that the objection, if sustainable, is of the echnical character. The court has jurisdiction; the dispute n the parties arises in a proceeding in bankruptcy; all the ions which would characterize a bill in equity are set out in ustees' petition; all the notice and all the opportunity to and to prepare for the trial that the bank could have, it d; and by its answer it has set up all the defenses it could orward under any form of pleading; and by appeal there is ne opportunity to correct any error of law or fact. Dodge lin (C. C. A.) 133 Fed. 363.

nk the distinction between the controversies arising in bank- which must be determined by plenary independent suits ose which may be heard on summary petition depends upon as possession of the subject-matter of the controversy. If nkruptcy court has possession, then, as a rule, the matter e heard upon petition and answer. If a stranger has posses-nd is holding by adverse claim, then an independent plenary in most cases proper. In this case the property was in the sion of the bankrupt, and upon his adjudication his title ssession passed to the trustees. The possession of the trus-uld not be disturbed by any form of adverse legal proceed-ithout the concurrent sanction of the court of bankruptcy. court, having possession of the property, had jurisdiction, otice to those claiming to have liens and incumbrances upon rder the property to be sold by the trustees free of all in-ances, if the court, in its discretion, should determine that sale was for the benefit of the unsecured creditors; and uch a sale, having in its control the fund arising from the would have jurisdiction to determine the conflicting claims parties whose liens had been displaced as to the property d transferred to the fund in the court. Ray v. Norseworthy, 1. 128, 23 L. Ed. 116.

Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, Ed. 1175, it was ruled that the power conferred on the courts kruptcy by section 2 of the act of July 1, 1898, c. 541, 30 Stat. U. S. Comp. St. 1901, p. 3421], to "(7) cause the estates of pts to be collected, reduced to money and distributed, and ine controversies in relation thereto, except as herein other-provided," was controlled and limited by the concluding and that the words "herein otherwise provided" referred to 23 (30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]), defining

the jurisdiction of the United States and state courts, and before the amendment of 1903, by section 23, those courts could take jurisdiction between trustees, as such, and adverse claimants, to the same extent only as though bankruptcy proceedings had not been instituted.

Even before the amendment of 1903, it was held that the bankruptcy courts, after acquiring actual possession of property, or money, did have jurisdiction to determine the validity of liens thereon. In re Kellog, 10 Am. Bankr. Rep. 7-11, 121 Fed. 333, 57 C. C. A. 547.

The first clause of section 23b has been, however, essentially modified by the amendments of February 5, 1903 [U. S. Comp. St. Supp. 1903, p. 413, § 5], to section 67e, by which transfers made by the bankrupt with intent to hinder, delay, or defraud his creditors, within four months, are declared void, and it is made the duty of the trustee to recover and reclaim the same by legal proceedings or otherwise; and for that purpose, by the amendment, jurisdiction is given to any court in bankruptcy. Also by section 70e (32 Stat. 800 [U. S. Comp. St. Supp. p. 417]) the trustee may avoid any transfer which any creditor might have avoided, and may recover the property; and, for the purpose of such recovery, jurisdiction is given to any court of bankruptcy.

But more than that, I think in the present case the bank has consented that the court in bankruptcy is the forum which is to decide the present controversy. After the adjudication, and without the sanction of the court in bankruptcy, the bank proceeded to obtain a decree of the state court for foreclosure of the first mortgage, which it had had assigned to it, and advertised the property for sale under the first mortgage. The trustee filed a petition stating reasons why it was prejudicial to the unsecured creditors to allow that decree to be executed, alleging that the bank's second mortgage was void, and obtained from this court an injunction to stop the sale. Upon the bank's answer to the petition, and upon its motion to dissolve the injunction, the matter came on to be heard. It was apparent that the property ought to be sold for the interest of all, and that the bank's first mortgage was valid; and, because of the bankrupt's wife's right of dower, it was apparent that a sale under the first mortgage would be advantageous. All matters having been considered, the court rescinded the injunction, upon conditions; and those conditions were accepted by the bank, by availing itself of the order of October 10, 1903. By that order the injunction was rescinded, and the bank's counsel was authorized to proceed to sell as trustee under the state court's decree, subject to several conditions, one of which was that "the balance of the proceeds of sale should be deposited in bank in the name of the bankrupt estate of Edgar M. Noel, subject to the further order of this court, * * * without prejudice to the claim of the Commonwealth Bank under an alleged second mortgage for $13,000 held by it, the validity of which is disputed by the trustees in bankruptcy, and which controversy is to be determined hereafter in this court. The question of the costs of these proceedings in

urt is reserved for future order." Subject to the conditions order, the sale was made; the bank received the amount rst mortgage; and the balance of the money was deposited in the name of the bankrupt estate of Edgar M. Noel, subthe order of this court, according to the conditions pre-. The acceptance of the benefits of this order by the bank consent to its terms, which contemplated that the present ersy should be determined in these proceedings in this And as the form of proceeding deprives the bank of no tial right which it could have in any form of suit, I do not should be heard to object either to the jurisdiction, or to sent form of procedure.

Preference.

o the question of preference under the bankrupt act, it that a present loan on security is not a preference. Act 1898, c. 541, 30 Stat. 564, § 67d [U. S. Comp. St. 1901, p. This loan was originally made on the security of the mortnd there never was a time in all the transactions when Noel e money without the bank having in hand the mortgage as y. The loan, from its inception, was always secured by the on of the mortgage, and was always intended to be. If is made upon security, it is not forbidden in good faith to ute a new security for the old one. Sawyer v. Turpin, 91 20, 23 L. Ed. 235; Stewart v. Platt, 101 U. S. 742, 25 L. Ed. ernhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766; In re Shep- Am. Bankr. Rep. 725, note. So, in this case, whether, as led by the trustees, the transaction is treated as being one newed every 45 days, or, as contended by the bank, as a fresh ery time a new note was given, the result is the same. It ended that security should be given with the first loan, and y interval of 45 days it was intended that there should be ituted security.

Maryland Code provides that a deed or mortgage shall be d within six months from its date. This final mortgage corded within one month after its date. It would seem that tention that the mortgage was an unlawful preference is not ed, provided the mortgage which was surrendered on Jan-, 1903, in exchange for the new mortgage executed and de- on that date was a valid security.

Is the Mortgage Void?

contention that, by keeping the several mortgages given me to time from record, the bankrupt intended to hinder, nd defraud his creditors, and that the mortgagee acquiesced intention, and that therefore the mortgage is void, under 67e, or under the state law, requires careful examination. Noel first applied for the loan he was a contractor in fair g, but with a great deal of building work on his hands. He e contractor for erecting, among other buildings, the banking of the International Trust Company, the Fifth Regiment

Armory, a clubhouse for the Baltimore Athletic Club, some warehouses, a hotel in Jacksonville, Fla., and had a large interest in contracts for the Naval Academy buildings at Annapolis, Md.; and there was a sum of about $33,000 due him for constructing the Mt. Holly Inn, which was in jeopardy, and was subsequently lost. He was obviously financially in deep water, but continued on in business until April, 1903, when he was obliged to call a meeting of his creditors, and asked an extension. No satisfactory arrangement being devised, he made his application in bankruptcy May 26, 1903. He scheduled his assets at $310,115.87, and his liabilities at $345,374.19, but his assets have proved illusive. They consisted in a great part of balances which he considered to be due him on his various contracts, but which have proved not collectible, and his convertible assets were all pledged for loans—very largely to the Commonwealth Bank. His schedule of unsecured debts amounts to $137,054.04, and the trustees have in over a year and a half not been able to collect enough to pay a dividend of 5 per cent. on this indebtedness. The fact is that from December, 1901, to January, 1903, he was contracting debts to very considerable amounts, and getting deeper into financial difficulties, and, though hopeful, he was really getting nearer to the crisis when he could raise no more money, and must fail in his building contracts and go into bankruptcy.

Whether or not the unrecorded mortgages which during the period of over a year he was executing every 15 days, and which were intended to be an undisclosed incumbrance on his real estate, is a valid security, or is to be considered invalid, as hindering and delaying creditors, is to be determined by the state law, irrespective of the question of preference under the bankrupt act. Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457. The question is whether a mortgage kept off the record, as this one was, is valid under the Maryland decisions. The object of the recording of conveyances is to prevent the hardship resulting to creditors and purchasers from the existence of secret conveyances, not disclosed by the public records, of property of which the grantor remains the ostensible owner. The reasonable time of six months is provided within which a mortgagee must record his mortgage in Maryland, to be of any avail whatever. Obviously the purpose of the law requiring the recording of mortgages is defeated if, by a contrivance such as was resorted to in this case, a mortgage can be kept in existence, and remain a secret incumbrance, and be ready to be made effective at any moment when a crisis in the affairs of the mortgagor arises. By such a scheme the plain intention of the Legislature is outwitted.

In the leading case of Gill v. Griffith, 2 Md. Ch. 270, the opinion of the chancellor, which was adopted by the Court of Appeals of Maryland, decided that a similar device with regard to a bill of sale of chattel property was void. The reason given in Gill v. Griffith for keeping the bill of sale off the record and renewing it every 19 days was to spare the mortgagor, who was a professional man, the mortification resulting from the community knowing that he

n obliged to mortgage his household effects. The reason
resent case is stated by both Noel and the bank to have
l no doubt was, to prevent the injury to the financial credit
n largely engaged in business, and badly needing credit,
ould result if a mortgage upon his dwelling house was put
cord, and thus became known to those with whom he did
. What was said by the chancellor in the case of Gill
h is equally applicable to this case:

was a fixed design, persevered in for more than twelve months, to
ctual or constructive notice from being communicated to the public
stence of this deed. Whatever may have been the cause of this—
he result of an agreement, promise, or mere acquiescence in the
request of the mortgagor, and to save his feelings from mortifica-
so clearly repugnant to the letter and policy of the Legislature that
o me impossible it can escape condemnation."

lso, Edelhoff v. Horner-Miller Mfg. Co., 86 Md. 595–607,
314.

nnerhassett v. Sherman, 105 U. S. 100, 119, 121, 26 L. Ed.
ll v. Griffith and other similar decisions are approved. In
nt case of Thompson v. Fairbanks, 196 U. S. 516-521, 25
306, 49 L. Ed. ——, it was held that whether a chattel
e which includes after-acquired property is valid is a local
a federal question, as to which the decision of the state
ntrols. The courts of Vermont having held such mort-
lid, and that the taking possession under such a mortgage
ter-acquired property related back to the date of the mort-
e Supreme Court of the United States sustained the lien
ortgagee as to the after-acquired property upon the ground
ne enforcement of a lien held valid by the state decisions,
ided for in a mortgage executed and recorded years before
of bankruptcy. This was possible because the mortgage
n recorded immediately after its execution, and was no-
ll the world of the existence of the lien, and that the mort-
ad the right to take possession of property subsequently
as provided for in the mortgage. The Supreme Court
ge 521 of 196 U. S., page 308 of 25 Sup. Ct. (49 L. Ed.

ankrupt was therefore not holding himself out as unconditional
the property, and there was no securing of credit by reason of his
unconditional ownership. The record gave notice that he was not
onditional owner. There was no secret lien, and if defendant can-
e the benefit of this mortgage which he obtained in 1891, as a lien
cquired property, * * * it must be because of some provisions
nkruptcy law, which we think the court ought not to construe or
to enforce beyond its fair meaning."

decision, favorable to the mortgagee, turned upon two
First, that such a mortgage of after-acquired property
n held valid by the state court; and, second, that notice
xistence had been given by its having been promptly re-

pinion of the Supreme Court in Sawyer v. Turpin, 91 U.
3 L. Ed. 235, proceeds upon the ground that the bill of sale

upheld in that case was valid under the Massachusetts law, even if there was an agreement not to record it. Under the Maryland decision, a secret mortgage kept off the record by repeated renewals for over six months is held to be invalid as to creditors.

By the provisions of Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452]:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered, or its value collected from whoever may have received it, except a bona fide holder for value."

By section 1 (25) "transfer" is defined as including "the sale and every other different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."

The policy of requiring notice to creditors by recording is most fully recognized in the present bankrupt act. By section 3b, a petition may be filed against an insolvent within four months after the act of bankruptcy, and it is enacted that "such time shall not expire until four months after the date of recording or registering the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay and defraud his creditors," etc., or from the date when the beneficiary takes notorious, exclusive, or continuous possession. Section 60 provides that, where the preference consists of a transfer, such period of four months shall not expire until four months after the date of recording or registering the transfer, if by law such recording or registering is required.

Section 67d provides:

"Liens given or accepted in good faith and not in contemplation or in fraud upon this act and for a present consideration, which have been recorded according to law, if record thereof was necessary to impart notice, shall not be affected by this act."

In Stewart v. Platt, 101 U. S. 731, 739, 25 L. Ed. 816, relied upon by counsel for the bank, it was held that although the bill of sale was invalid for want of proper record, as against creditors who had obtained judgments and levied executions before the application in bankruptcy, it was good as against the assignee in bankruptcy, because it would have been good against the bankrupts themselves, and that the assignee, representing only general creditors, could not dispute the claim of the mortgagee, which the mortgagors themselves could not have disputed. This decision was made under the bankrupt act of 1867. By that act, while there passed to the assignee "all property conveyed by the bankrupt in fraud of his creditors," it did not contain the provision of section 70d of the act of 1898, that the trustee may avoid any transfer which any creditor might have avoided, and (section 67e) that it shall pass to the trustee as assets of the bankrupt's estate, without its being required that any creditors should have been in a position to attack the transfer by reason of having a judgment and ex-

n. Sheldon v. Parker, 11 Am. Bankr. Rep. 152; Mueller v. (Wis.) 8 Am. Bankr. Rep. 442–445, 88 N. W. 229; Beasley ggins (Fla.) 12 Am. Bankr. Rep. 355, 37 South. 213; Chesa- Shoe Co. v. Seldner, 10 Am. Bankr. Rep. 466, 122 Fed. 593, C. A. 261.

e proof is convincing that a large part of the unsecured in- lness of over $137,000 was contracted after December 14, the date of the first of the series of unrecorded mortgages. laims are in great part for work and material and structural and iron work which went into the buildings in process of ruction by Noel between that date and the date of the last age of the series, and the credits were given and debts con- d during the existence of this secret lien on Noel's property. onclusion is not to be resisted that during all that period Noel n fact insolvent, and constantly getting more deeply so. The ssive mortgages were during all this time in the possession e bank, and its act in keeping them alive by successive re- s, so as to be within the time limited for recording, and yet ng them off the record, was an act in contravention of the nd done by it to the injury of other creditors, for its natural was to delude them as to Noel's real financial condition.

Conclusion.

n constrained to hold, for the reasons stated, that the scheme hich the mortgage originally given December 14, 1901, was off the record until February 5, 1903—far beyond the six is limited by the Maryland Code of Public General Laws le 21, §§ 13, 14, 15, 16)—in pursuance of the understanding en Noel and the bank that it should be kept unrecorded for xpress purpose of upholding Noel's credit by concealing its nce from persons dealing with him, renders the mortgage void creditors and as to the trustees in bankruptcy.

decree will be entered to that effect.

DIAMOND COAL & COKE CO. v. ALLEN.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1905.)

No. 2,069.

1. FEDERAL COURTS—RULES OF EVIDENCE—TESTIMONY OF WITNESS ON FORMER TRIAL.

Rev. St. §§ 863–867 [U. S. Comp. St. 1901, pp. 661–664], prescribe the modes of taking proof in actions at law in the courts of the United States to the exclusion of all others, and under such provisions the testimony of a witness given on a former trial of the same case cannot be read in evidence.

2. MASTER AND SERVANT—INJURY TO SERVANT—EVIDENCE OF MASTER'S NEGLIGENCE.

In an action to recover for the injury of plaintiff while working in a mine by the breaking of a draft chain which allowed a loaded car to run back down a grade upon him, evidence that there was a flaw on the inside of the broken link of the chain, which extended to one side, but would not be discoverable by inspection before the chain was broken, is not alone sufficient to charge the mining company with negligence, so as to warrant the submission of the case to the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1003.]

In Error to the Circuit Court of the United States for the District of Utah.

On December 21, 1900, the plaintiff (defendant in error) was in the employ of the defendant as a miner in defendant's coal mine at Diamondville, Wyo., and in what is called the back entry of level "No. 3rd North." He was following a car load of coal, which was being hauled by a horse, to block the wheels of the car whenever the horse should stop; as the car, moving upon iron tracks, was ascending a considerable grade, to the main entry of the mine. At about 12 feet from the main entry this grade was steeper than at other places. The gauge of the track was 3 feet, and the box of the car flared to a width of 4 four feet at its top. The sloping passage, up the grade of which the car was being drawn, was of varying narrow width, and at its narrowest place was 7½ feet wide. The car was hauled up the slope with a heavy load of coal, to a point about 12 feet from the main entry (beyond which the track would have been about level), and had reached the steepest part of the grade, when the horse stopped, and the plaintiff blocked the wheels of the car to prevent it from running backward down the slope. When the horse started forward again and moved the car, the plaintiff stooped and removed the blocking which had held the car wheels; but almost immediately, when the car had moved but a few feet, and while plaintiff was still at the place where he had removed the blocking, the chain which attached the whiffletree to the car broke, by the parting of one of its links, and the heavily loaded car started back and ran down the slope at great speed, striking, throwing down, and severely injuring the plaintiff.

Edward S. Ferry (Joseph T. Richards, on the brief), for plaintiff in error.

W. L. Maginnis (Charles Stout, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

)CHREN, District Judge, after stating the case as above, de-
ed the opinion of the court.

There had been a former trial of this action in the same court,
hich one William F. Woolsey had testified as a witness for
tiff. Upon this trial, on proof that this witness was about 200
s distant from the place of trial, but without proof of any
t to procure his attendance, or that it was not practicable to
obtained his testimony by deposition de bene esse, or other-
as provided in Rev. St. U. S. §§ 863-867 [U. S. Comp. St. 1901,
661-664], the plaintiff offered the testimony of this witness
n on such former trial to be read from the stenographer's notes.
ndant objected to the same as incompetent. The court over-
l the objection and admitted the evidence, and the defendant
excepted. This ruling was erroneous.

ne Supreme Court has held repeatedly that the provisions of
Revised Statutes as to the mode of proof in actions at law
a complete system, and that every case must fall under the
ral rule or the exceptions there specified, and that no state
lation can add to or take from the methods of procuring evi-
e so provided. Ex parte Fisk, 113 U. S. 713, 723, 5 Sup. Ct.
28 L. Ed. 1117; Union Pac. Co. v. Botsford, 141 U. S. 250,
up. Ct. 1000, 35 L. Ed. 734; Hanks Dental Ass'n v. Tooth
n Co., 194 U. S. 303, 307, 24 Sup. Ct. 700, 48 L. Ed. 989.

ne general provision of the Revised Statutes is as follows:

c. 861. The mode of proof in the trial of actions at common law, shall
oral testimony and examination of witnesses in open court, except as
nafter provided." [U. S. Comp. St. 1901, p. 661.]

ne exceptions in respect to circumstances under which testi-
y may be taken by deposition, etc., are stated in the sections
h follow the one above quoted. Speaking of these exceptions,
Justice Miller says (113 U. S. 724, 5 Sup. Ct. 729, 28 L. Ed.
):

nese are the exceptions which the statute provides to its positive rule
the mode of trial in actions at law shall be by oral testimony and ex-
ation of witnesses in open court. They are the only exceptions therein
provided. Does the rule admit of others? Can its language be so con-
d?

n the contrary, its purpose is clear to provide a mode of proof in trials
y to the exclusion of all other modes of proof; and because the rigidity
e rule may, in some cases, work a hardship, it makes exceptions of such
as it recognizes to be entitled to another rule, and it provides that rule
nose cases.

nder one or the other all cases must come. Every action at law in
rt of the United States must be governed by the rule or by the excep-
which the statute provides. There is no place for exceptions made by
statutes. The court is not at liberty to adopt them or to require a party
nform to them."

one of the exceptions allows as evidence the testimony of a
ess given at a former trial of the case; and Mr. Justice Miller,
age 723, 113 U. S., page 728, 5 Sup. Ct. (28 L. Ed. 1117), of the
quoted from, speaking of oral testimony and examination of a

witness in open court, within the meaning of the act of Congress, says:

"This obviously means the production of the witness before the court at the time of the trial, and his oral examination then; and it does not mean proof by reading depositions, though those depositions may have been taken before a judge of the court, or even in open court, at some other time than during the trial."

This court in C., St. P., M. & O. Ry. Co. v. Myers, 80 Fed. 361, 365, 25 C. C. A. 486, held that a stenographic report of the testimony given on a former trial by a nonresident witness, absent in Ohio, was rightly excluded because incomplete. It appearing that such evidence was admissible in the courts of Minnesota (where the trial was had) and in other jurisdictions the court said: "We can see no substantial objection to the admission of such testimony when on the first trial the witness was fully examined and cross-examined," etc. This observation was aside from any point decided in the case; and it does not appear that the United States statutes or any of the decisions of the Supreme Court on the subject were in any way called to the attention of the court. Later, in Salt Lake City v. Smith, 104 Fed. 457, 469, 43 C. C. A. 637, this court held that the sections of the Revised Statutes referred to provide a complete system for the practice of the courts of the United States in the procurement and admission of the testimony of witnesses, and that it was error to admit evidence of the testimony of witnesses given at a former trial of the case.

2. The court committed a like error in receiving, over the objection and exception of defendant, evidence of the testimony of plaintiff's witness William Johnson, given on the same former trial of the case.

3. This action was brought to recover damages for injuries sustained by the plaintiff, which he alleged were caused by negligence attributable to the defendant. Negligence is never presumed, and plaintiff could be entitled to recover only upon producing evidence of some negligence chargeable to defendant which was a proximate cause of his injuries. He produced no such evidence, and defendant's request for a peremptory instruction to the jury to return its verdict in defendant's favor should have been granted. At the trial the plaintiff made no effort to maintain by proof any of the allegations of the complaint charging the defendant with negligence, except only the allegations which charge, in substance, that the chain which broke was defective, and that the defects were or should have been known by the defendant, and were discoverable by ordinary and reasonable care in the inspection of the chain, which inspection the defendant failed to make. And this was the only matter submitted to the jury as affecting plaintiff's right of recovery, as appears from the following excerpt from the court's charge:

"His complaint is that this defect in the chain should have been discovered by the defendant company. It is not simply that the chain broke, but that there existed a defect in the chain in the shape of a flaw in the weld, which the defendant could, and by the exercise of ordinary care would, have found out before that time. Now, if there was not such a defect as it could rea-

ably have found out before that time, there is no cause of action against defendant at all. In order to find a verdict against the defendant, you uld have to find that this flaw, this defect in the weld, was such a defect t by a reasonable inspection, such as an ordinary prudent man would ke, if he was conducting that business, would have been discovered before t time. * * * In order to find any verdict against the defendant, you st find this defect in the chain, this imperfection in the welding of the in, was such an imperfection that in conducting its business with ordinary e they should have discovered that defect before this accident."

It is common knowledge that a draft chain is a simple implement, hich can hardly get out of repair except by being broken, and dinarily requires and receives no special inspection. And all the idence in the case shows that no inspection of draft chains is had any mines, except as they are observed by persons using them. he defendant used the same care employed by other prudent min-s.

But the plaintiff could not charge the defendant with negligence not discovering the defect without showing that the defect was ch that it would have been disclosed upon a reasonably careful spection. The only testimony as to the defect was that of the aintiff's witness, William Armstrong, the boss to whom the driver, ood, handed the broken link just after the accident. Armstrong stified that the flaw was shown by a black speck or spot inside of e metal after it had parted, and that, although this flaw came from e center to one side of the metal, yet in his opinion there was othing in the appearance of the surface by which the flaw could ve been discovered by inspection. There was therefore no evi-nce to sustain the charge of negligence in respect to the chain. The judgment is reversed and a new trial ordered.

CHRISTENSEN v. METROPOLITAN ST. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1905.)

No. 2,101.

TRIAL—DIRECTION OF VERDICT—QUESTIONS OF NEGLIGENCE.

While the questions of negligence and contributory negligence are ordinarily questions of fact to be passed on by a jury, yet if it clearly appears from the undisputed facts, judged in the light of that common knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, or where the evidence is of such conclusive character that the court would be compelled to set aside a verdict in opposition to it, the case may properly be withdrawn from the jury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 279–346; vol. 46, Cent. Dig. Trial, §§ 379, 380, 383, 384, 391.]

STREET RAILROADS—CARE IN EQUIPMENT OF CARS—SCREENS PROTECTING WINDOWS.

Screens with large meshes fastened across the lower half of the windows of a street car on the side next to the poles supporting the trolley wires are a sufficient protection against the accidental injury of passengers from such poles, and a sufficient warning of the danger of such

injury to absolve the railway company from the charge of negligence in that regard.

3. SAME—INJURY OF PASSENGER—CONTRIBUTORY NEGLIGENCE.

A passenger in a street car who, on account of a sudden illness, extended her head through a window, above a screen which covered the lower half of the window, and was injured by striking against a trolley pole beside the track, being obliged in order to so reach the window to stand up or kneel upon the seat, was chargeable with contributory negligence, as matter of law, which precludes a recovery against the company for the injury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1380.]

In Error to the Circuit Court of the United States for the District of Kansas.

John H. Atwood (Atwood & Hooper and McFadden & Morris, on the brief), for plaintiff in error.

O. L. Miller (Miller, Buchan & Miller, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

RINER, District Judge. This is an action brought by Augusta Christensen against the Metropolitan Street Railway Company to recover damages for personal injuries which she alleges were caused by the negligence of the defendant street railway company. The action was commenced in the state court, and removed by the defendant in error to the Circuit Court of the United States for the District of Kansas.

The plaintiff in error (also plaintiff below), in her amended petition, alleges, in substance, that the defendant was a corporation duly organized, and at the time of her alleged injury was engaged in maintaining and operating a system of street railway, upon and along certain streets in the cities of Kansas City, Kan., and Kansas City, Mo.; that one of the defendant's branch lines, extending from the Union Depot in Kansas City, Mo., to a station called Riverview, in the City of Kansas City, Kan., was constructed upon an elevated structure along Central avenue in Kansas City, Kan., and across the Kansas river, and along Ninth street, in Kansas City, Mo.; that for the purpose of conducting electricity, which supplied the power for running its cars, the defendant, overhead and on a line nearly perpendicular with the center of its tracks, strung a copper wire, known as a "trolley wire," and, in order to hold the wire in position, had, on the side of the track, erected large poles of wood or iron upright; that extending out from the top, or near the top, of each of the poles, was an arm, and to the end of the arm, or near the end of the arm, the trolley wire was fastened. It is further alleged that, to make it reasonably safe for public travel, and to protect the lives of its employés and passengers transported by its cars, it was necessary to place these poles, supporting the trolley wire, at a distance not less than three or four feet from the rail on either side of the track; that, if the poles were placed nearer than that distance to the track, it would be necessary, in order to

protect the lives and limbs of its passengers, to place screens or bars on the windows of its cars, to prevent passengers from extending any part of their body outside of the cars. It is further alleged that on the 3d of October, 1900, the plaintiff in error became and was a passenger upon one of defendant's cars, boarding the car north of Riverview Station, and that she paid the conductor the regular fare entitling her to transportation to the Union Depot in Kansas City, Mo. It is further alleged that one or more of the poles used by the defendant, supporting the trolley wire, had been placed nearer than three feet to the side of the track, and was by defendant permitted to remain so close to the track as to endanger the lives and limbs of passengers upon the cars passing along the track, because of the liability of the passengers coming in contact therewith, which fact was wholly unknown to the plaintiff. It is further alleged that the defendant failed to equip and furnish the car upon which the plaintiff was a passenger with screens or bars at the windows to prevent passengers from extending their heads, arms, or other portions of their body out of the car window, or to give any warning whatsoever not to do so. It is then alleged that the defendant's servants in charge of the car upon which the plaintiff had taken passage permitted the car to become crowded and overloaded with passengers to such an extent that the seats in the car were all taken, and the aisle, or space between the seats, was jammed with persons standing therein, who leaned and crowded upon the plaintiff; that, on account of the overloaded and crowded condition of the car and the failure of the employés and servants to properly ventilate it, the air in the car became foul and stifling, and caused the plaintiff to become suddenly sick and dizzy with violent nausea, and, in order not to vomit upon the passengers or persons in the car, plaintiff, without any knowledge or notice that the poles of the defendant were so near the side of the track, slightly extended her head out of the window in the side of the car, near the place where she was sitting, for the purpose of vomiting, and as she did so she received a severe blow on the head by her head coming in contact with one of the poles erected and maintained along the side of the track by the defendant; that by reason thereof plaintiff was rendered unconscious, and remained so for a long period of time, was severely bruised and injured in and upon her head, causing subacute meningitis, with effusion into the ventricles of the brain, accompanied by double vision, unequal pupils of the eyes, jerking of the muscles of the extremities, constant headache, sleeplessness, numbness of the extremities, and constipation, by reason whereof she was caused to suffer, and at the time the action was brought was still suffering, great physical pain and mental anguish, and was unable to perform her usual duties. She further alleges that she was seriously and permanently injured, and prayed that she be allowed damages in the sum of $10,000.

To this petition the defendant answered, first, by a general denial, and, for a second and further defense, alleged that, if the plaintiff received any injury at the hands of the defendant, she so carelessly and negligently conducted and demeaned herself at the time of the

accident as to cause or directly contribute to any injury she may have received.

When the case was first called for trial in the circuit court, at the conclusion of the statement made by counsel for plaintiff, counsel for defendant moved for a judgment upon the statement, which application was overruled, and the case subsequently came on for trial before the court and a jury. At the conclusion of the plaintiff's evidence, the defendant filed a demurrer to the evidence, which, after argument, was sustained by the court, and a judgment was thereupon entered in favor of the defendant. The plaintiff duly excepted to the ruling of the court upon the demurrer to the evidence, and sued out this writ of error to reverse the judgment entered in favor of the defendant.

The evidence set out in the record establishes the following facts: That the trolley wires that carry the current were suspended on cross-arms or brackets on perpendicular poles erected on the elevated structure upon which the tracks were laid; that the distance between these poles and the side of a passing car would vary from six to ten inches; that the seats in the car in which the plaintiff was a passenger ran lengthwise of the car, and were located along the sides of the car, with the back of the seat against the side of the car; that the plaintiff was sitting with her back to a window on the side of the car where she was seated, and facing the opposite side of the car; that the window was down, the upper end of the sash extending about two inches above the back of the seat; that extending across the windows on the outside of the car, and securely fastened to the car, were iron screens covering the windows up from the window sills for a distance of from 14 to 16 inches, leaving an open space of something like 14 inches between the top of the screen and the top of the car window; that the meshes in these screens were about three-quarters of an inch square; that the screens placed across the windows of the car were such that would effectually prevent passengers from being injured by any involuntary action on their part; and that in order to put her head outside of the car window, over this screen, plaintiff would necessarily have to arise from her seat, turn about, and either stand or kneel upon the seat.

While a street railway company engaged in the transportation of passengers, as the defendant in this case was, is bound to exercise the highest degree of care and skill which a cautious or prudent man would exercise under the circumstances for the protection of its passengers, yet it has a right to assume that passengers patronizing its cars will travel in the usual way, and occupy the seats provided for that purpose, or, if the car is crowded, those standing will occupy the open space, or aisle, in the center of the car between the seats, and in either case the screens upon the windows of the car in which the plaintiff was injured, were entirely sufficient to protect passengers from any involuntary action on their part, such as might be caused by a lurching or swaying of the car while the car was in motion. In other words, we think that the company was not required to anticipate that the plaintiff might become ill

nd attempt to put her head out of the window, when it would be mpossible for her to do so without turning about and either kneeling or standing upon the seat. But it is insisted by counsel for plaintiff in error that because Judge Hook, when the case was first alled for trial, declined to sustain a motion for judgment upon he statement of counsel, and that Judge Pollock, upon the trial of the case, decided that the plaintiff's evidence did not authorize a ecovery, demonstrates that the case is one where reasonable men may fairly arrive at different conclusions; therefore the case should have been submitted to a jury. The record does not contain the statement made by counsel when the case was before Judge Hook, nd it may be, as is generally the case, that in the statement of the ase the facts were not as fully disclosed as they were by the evilence when the case was before Judge Pollock.

While the question of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury, yet f it clearly appears from the undisputed facts, judged in the light of that common knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, or where the evidence is of such conclusive character that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of a jury. Railroad Company v. Husen, 95 U. S. 465, 24 L. Ed. 527; Schofield v. Chicago, Milwaukee & St. Paul R. R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224, and cases there cited; Northern Pacific Railway Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; N. W. Rd. Co. v. Davis, 53 Fed. 61, 3 C. C. A. 429; Missouri Pacific Ry. Co. v. Moseley, 57 Fed. 921, 6 C. C. A. 641, and cases cited. In North Penn. Railroad v. Commercial Bank, 123 U. S., 727, 8 Sup. Ct. 266, 31 L. Ed. 287, the Supreme Court said: "It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way."

While the plaintiff's sudden illness undoubtedly placed her in a very uncomfortable and distressing position, yet that fact would not authorize her to disregard unmistakable warnings of danger. She must have known that the heavy screens which barred the windows were placed there for no other purpose than to prevent passengers from extending their arms or heads out of the windows, as the meshes in the screen were too large to serve any other purpose. To disregard this plain warning was, we think, such contributory negligence upon her part as will necessarily preclude a recovery in this case.

The judgment of the Circuit Court is affirmed.

ST. LOUIS TRANSIT CO. v. THOMPSON et al.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1905.)

No. 2,109.

1. STREET RAILROADS—ACTION FOR INJURY OF PASSENGER—INSTRUCTIONS.

In an action by a passenger against a street railroad company to recover for a personal injury, it appeared that, after stopping at the place where plaintiff intended to alight, pursuant to a signal from her companion, the car started up before she got off; that in response to a signal it again stopped, after moving about its length, with something of a jerk; that at that time plaintiff was standing on the platform or near the door, and was thrown down by the jerk and seriously injured. There was evidence tending to show that plaintiff was still in her seat when the car started after the stop, and that she moved to the door afterward, while the car was in motion. *Held*, that it was error to refuse an instruction asked by defendant that if the jury found such to be the fact, and that the car had stopped at the crossing a reasonable length of time to allow passengers to alight, and the motorman exercised proper care under the circumstances in making the second stop, plaintiff could not recover, even though there was a jerk which caused plaintiff to fall.

2. SAME.

Under such evidence, the jury should have been instructed that if the circumstances were such that the conductor, in the exercise of the utmost care, was authorized to call for the emergency stop, and if that stop was made with the utmost care there could be no recovery, and the failure to so instruct was error.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Joseph W. Jamison (Boyle, Priest & Lehmann and Crawley & Jamison, on the brief), for plaintiff in error.

Ford W. Thompson (Mr. W. B. Thompson, on the brief), for defendants in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

RINER, District Judge, delivered the opinion of the court.

This is an action brought by Frances Augusta Meeker against the St. Louis Transit Company and the United Railways Company to recover damages for personal injuries alleged to have been suffered by her while being carried as a passenger on one of the cars of the defendants by reason of the negligence of the defendants' servants in operating the car.

In the amended petition it is alleged that on the day the plaintiff received the injuries complained of the St. Louis Transit Company and the United Railways Company were operating a street railway system in the city of St. Louis, Mo., for the purpose of carrying passengers thereon as a common carrier of passengers for hire. The amended petition then proceeds as follows:

"Plaintiff for her cause of action against defendants states that upon the 31st day of March, 1903, the defendants, through their agents and servants in charge of their car, received the plaintiff as a passenger on one of their cars at or near the corner of Broadway and Locust street, in the city of St.

Louis, Mo., and for a valuable consideration, paid to defendants' servants in charge of said car, undertook and agreed with plaintiff to carry her safely as a passenger on said car to West Spring avenue, in the city of St. Louis, aforesaid, a customary stopping place for the receipt and discharge of passengers, and to there allow her to alight in safety from said car. However, plaintiff avers that defendants' servants in charge of said car, unmindful of defendants' agreements and undertaking to carry plaintiff safely and permit her to safely alight from said car at her destination, did fail in their duty to thus carry her safely and permit her to safely alight from said car, in that, when said car had stopped in response to a notice and signal given by plaintiff to defendants' servants in charge and control of said car, by pressure of the electric bell provided by defendants for the purpose of notifying their servants to stop said car, and while plaintiff was in the act of alighting from said car, and after she had arisen from her seat within said car and passed on to the rear platform of said car, and was about to leave the same, defendants' servants in charge of said car negligently caused and permitted said car to be started forward and then stopped again with a sudden jerk, thereby throwing plaintiff violently forward over the step from the rear platform into said car, whereby she sustained a great and permanent injury to her body, both external and internal, and to her nervous system; that by reason of such injury so sustained the plaintiff has suffered, and will suffer, great pain of body and mind, and has been permanently injured; and has lost, and will lose, the earnings of her labor, and has been put to great expense, and will hereafter be put to great expense for surgical and medical attention, medicines, and nursing, and will require during the remainder of her life constant nursing, aid, and attention, to her damage in the sum of thirty-five thousand dollars ($35,000.00), for which sum she prays judgment, together with the costs of suit."

The defendant the St. Louis Transit Company answered the amended petition, first, by a general denial, and, second, by averring that whatever injuries the plaintiff sustained were contributed to or caused by her own carelessness or negligence, in that she attempted to alight from the car while it was in motion. To this second defense plaintiff replied, and the case came on for trial before the court and a jury, resulting in a verdict in favor of the plaintiff for $20,000.

At the close of all of the evidence, and before the case was submitted to the jury, the defendant the United Railways Company asked, and the court gave, an instruction directing a verdict in favor of that defendant, and the court thereupon entered a judgment against the St. Louis Transit Company, and thereafter the last-named company sued out this writ of error.

After the record was filed in this court the plaintiff died, and on the 14th day of September, 1904, upon the application of W. B. and Ford W. Thompson, who were made executors of plaintiff's will, by an order entered of record the case was revived in the name of the executors.

The following facts are, we think, established by the evidence: That the plaintiff was seriously and permanently injured on the date alleged in her amended petition; that she was a woman 50 years old and a widow; that on the 31st day of March, 1903, she was acting in the capacity of general demonstrator of the Norka Food Company of Michigan; that Norka food is a breakfast food, and her business was to demonstrate its merits to the public; that on the date she received her injuries she, in company with Mr. H. P. Moyer, who was manager of the breakfast food company, board-

ed one of the cars of plaintiff in error in the city of St. Louis; that Mr. Moyer paid the fare for both; that they proceeded west on the car on which they had taken passage, over what is known as the Olive street line, to West Spring avenue, their destination; that when the car arrived at East Spring avenue it stopped, and when the car started again Mr. Moyer rang the bell as a signal to stop at West Spring; that the car came to a stop at West Spring avenue, and both Mr. Moyer and Mrs. Meeker arose and started to leave the car, he preceding her; that other passengers, the witnesses varying as to the number, got off the car, some from the rear platform and one at least from the front platform. Mr. Moyer, on cross-examination, stated that, while he had no recollection of seeing other passengers passing out of the car ahead of him to get off from the rear platform, he did see one passenger get off from the front end of the car as he (Moyer) arose from his seat, and that the conductor was watching that passenger; that before he reached the step, pursuant to a signal given by the conductor, the car started, and that Mr. Moyer then shouted to the conductor, who was in the front end of the car, "Hold on," "Wait a minute," or "Stop the car"; that the conductor, who at the time had his hand on the bell rope, tapped the bell to stop, and the car immediately came to a stop with a jerk sufficient to throw Mrs. Meeker back into the car, breaking her hip and otherwise seriously injuring her.

The conductor testified that in stopping the car he gave what is known as a "short bell" to railroad men—that is, one bell given quick—which was the same as an emergency signal; that after starting the car it did not move more than its length before it was stopped the second time. Upon cross-examination he testified that when the car started up neither Mr. Moyer nor Mrs. Meeker were standing either in the aisle or on the platform; that as soon as he touched the bell the motorman put on the power, the car commenced to move forward, and that almost simultaneously with the starting of the car Mr. Moyer and Mrs. Meeker attempted to leave the car. Another witness, Joseph Carroll, also testified that neither Mr. Moyer nor Mrs. Meeker attempted to leave the car when it first stopped at West Spring avenue. Near the close of his testimony this statement was repeated in response to the following questions asked by one of the jurors:

"Juror: Q. Do I understand the witness to say that after the car had stopped at West Spring avenue, then when the signal was given to start again that Mr. Moyer and the plaintiff were still in their seats? A. Yes, sir.

"Juror: Q. That when the call to stop the car was made, that Mr. Moyer was on the platform and the plaintiff in the car? A. Standing up in the car, near the door.

"Juror: Q. And that the car was going between the time that he got up and until he reached the platform, and nothing was said about stopping the car in the meantime? A. When he reached the platform there was a yell made to stop the car."

The motorman testified that after making the first stop at the proper place on the west side of Spring avenue, "where he made a fairly good stop for passengers to get off," that he again started the car in obedience to a signal of two bells, given by the conductor;

he car ran about its length, probably between 30 and 40 feet, he again stopped it upon a signal of one bell, which he testi- was a little louder than the ordinary bell; and that he took it ranted that there was something wrong in stopping the car e coming to the next street. He further testified that he did ake an emergency stop, but that he stopped the car by throw- ff the power and applying the brake, and that the brake used an air brake. When asked about the jerk at the time he ed the car the second time, he said:

ll, it probably jerked some—a little more than if I had been letting r coast along expecting to make a stop. When you feed the car up, m to stop it immediately after you throw off the current, it is very hard he it stop without more or less jerk to a car. The electricity is in the , and you aim to stop so quick that you are really applying the brake t power when you do that, and it will make more or less jerk; but he car was moving slowly, and I didn't notice any particular jerk about soft. Of course, I am accustomed to little jerks anyway, and didn't o notice about it being very much of a jerk, but it might have jerked le more than the ordinary stop where the car was coasting up to a and then when you apply the brake. You hardly ever make very much jerk stopping that way, but under these circumstances it might have l a little bit more. I aimed to stop the car at once. I didn't know was the matter; didn't know whether some one was trying to get on or ing of that sort, so I probably stopped the car maybe a little bit quicker those circumstances; we usually do in making a stop after we start; he thing is to stop the car as quick as possible."

further testified that, taking into consideration the size of the weight, load on the car, and the grade upon which the car moving, it could not have been stopped "any smoother than it stopped."

the trial the defendant the St. Louis Transit Company request- e court to give the following instruction to the jury:

If the jury find and believe from the evidence that in obedience to a l defendant's servants in charge of its car caused the same to come top at or near the intersection of Olive st. and West Spring avenue, e city of St. Louis, in order to discharge passengers, then and there ng and offering to alight at said point, and there remained standing a ent length of time to afford reasonable opportunity for a woman of ary activity to alight from said car, and that after so waiting defend conductor signaled or notified the motorman in charge of said car to d on his journey; and if you find from the evidence that in obedience id signal said motorman caused said car to move forward and that eed of the same was increasing; and if you find from the evidence that e time or after the giving of said signal for said car to go ahead, or while said car was again moving forward, plaintiff arose from her seat started toward the rear platform of said car, or had already stepped or was in the act of stepping upon the rear platform of said car when tiff's companion, Moyer, or some other passenger, hallooed to the con- r to stop said car, if you find they or either of them did so hallo; if you find from the evidence that said conductor, in obedience to such and or request, signaled his motorman to stop the car, and that the rman in obedience to said signal caused his car to stop, and that in ing said car under said circumstances said motorman exercised that e of care that a careful and skillful motorman would be expected to ise under the same or similar circumstances—then plaintiff cannot re , and your verdict will be for defendant, and this is true although you further find from the evidence that said car was stopped suddenly and a jerk, and that the jerking motion of said car caused plaintiff to fall."

This request was refused by the court, and the defendant company duly excepted. We think, under the evidence, the defendant was entitled to have this instruction given to the jury. The theory of the case as embodied in this instruction is not covered in the general charge given by the court to the jury, and we think it was error to refuse this request. The car having once stopped at West Spring avenue for the purpose of discharging or taking on passengers, the stop having been properly made and in a manner not complained of, and after again starting the car, would, as the evidence shows, in the ordinary course, proceed to the next street; but instead of doing so the motorman received an emergency signal to stop the car at once, and if in obeying the signal he stopped the car, and in doing so exercised the degree of care that a careful and skillful man engaged in that business would be expected to exercise under the circumstances, the defendant company would not be liable.

We think, also, under the evidence in this case, that there should have been an instruction to the jury to the effect that if the circumstances were such that the conductor, in the exercise of the utmost care, was authorized to call for the emergency stop, and if that stop was made with the utmost care, there could be no recovery, and that a failure to so instruct the jury was error.

The other assignments of error relate to the refusal of the court to give certain other instructions requested, to the charge given by the court to the jury, and to the admission and rejection of evidence. They have all been carefully examined, but as they are without merit, it is unnecessary to discuss them.

For the errors above suggested, the judgment of the Circuit Court must be reversed, with directions to grant a new trial.

BOSTON TRAVELER CO. v. PURDY.

(Circuit Court of Appeals, First Circuit. May 16, 1905.)

No. 575.

COPYRIGHT—INFRINGEMENT—RECOVERY OF PENALTY.

Rev. St. § 4965, as amended by Act March 2, 1895, c. 194, 28 Stat. 965 [U. S. Comp. St. 1901, p. 3414], relating to the recovery for infringement of copyright, was not changed by the proviso added by the amendment that, in case of infringement of copyright of a photograph, the recovery shall not be less than $100 nor more than $5,000, so far as the rule of Bolles v. Outing Co., 20 Sup. Ct. 94, 175 U. S. 262, 44 L. Ed. 156, is concerned.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Edmund A. Whitman (N. Sumner Myrick, on brief), for plaintiff in error.

Samuel K. Hamilton (Hamilton & Eaton, on brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This suit was brought on section 5 of the Revised Statutes, amended by the act of March 2, 1895, 94, 28 Stat. 965 [U. S. Comp. St. 1901, p. 3414], for the alleged ringement of copyrighted photographs. The act as thus amend- is as follows:

Sec. 4965. If any person, after the recording of the title of any map, chart, matic or musical composition, print, cut, engraving or photograph, or mo, or of the description of any painting, drawing, statue, statuary, or el or design intended to be perfected and executed as a work of the fine , as provided by this act, shall, within the term limited, contrary to the risions of this act, and without the consent of the proprietor of the copy- t first obtained in writing, signed in presence of two or more witnesses, ave, etch, work, copy, print, publish, dramatize, translate or import, er in whole or in part, or by varying the main design, with intent to le the law, or, knowing the same to be so printed, published, dramatized, slated or imported, shall sell or expose for sale any copy of such map or r article, as aforesaid, he shall forfeit to the proprietor all the plates on ch the same shall be copied, and every sheet thereof, either copied or ted, and shall further forfeit one dollar for every sheet of the same found is possession, either printing, printed, copied, published, imported, or ex- d for sale; and in case of a painting, statue, or statuary, he shall forfeit dollars for every copy of the same in his possession, or by him sold or sed for sale: provided, however, that in case of any such infringement he copyright of a photograph made from any object not a work of fine , the sum to be recovered in any action brought under the provisions his section shall be not less than one hundred dollars, nor more than five sand dollars, and: provided, further, that in case of any such infringe- t of the copyright of a painting, drawing, statue, engraving, etching, t, or model or design for a work of the fine arts or of a photograph of ork of the fine arts, the sum to be recovered in any action brought through provisions of this section shall be not less than two hundred and fifty ars, and not more than ten thousand dollars. One half of all the fore- g penalties shall go to the proprietors of the copyright and the other half he use of the United States."

The verdict was for the plaintiff below, and the defendant below k out this writ of error.

The Revised Statutes contained neither of the provisos of the act March 2, 1895, except the substance of the closing sentence, di- ting that one-half of the penalty should be for the use of the ited States. It cannot be contended, and in fact it is not con- ded, that this case is not fully within Bolles v. Outing Company, U. S. 262, 20 Sup. Ct. 94, 44 L. Ed. 156, except that the latter se before the amendatory act. It is claimed by the plaintiff be- that Bolles v. Outing Company does not necessarily apply, on ground that the first of the two provisos gave a new right or ew remedy, and that it is not limited by section 4965 as it stood the Revised Statutes. It is true that it must be acknowledged, said in United States v. Whitridge, 197 U. S. 135, 143, 25 Sup. Ct. , 49 L. Ed. ——, that a proviso is not always limited by what pre- les it. On the other hand, the general rule is stated in United tes v. Newhall (C. C.) 91 Fed. 525, 529, as follows:

"Under a familiar principle of statutory construction, a proviso is to be ctly construed, and it takes no case out of the enacting clause unless what s not fall fairly within its terms."

In this case, however, it is so clear, for various reasons, that this oviso is so limited, that we need not discuss this at length. It

is only necessary to state that the following language, "the sum to be recovered in any action brought under the provisions of this section," renders any other construction impracticable. We have no occasion to go further than this, but it is not difficult to perceive that the true purpose of this amendment was to prevent, on the one hand, forfeitures in extravagant amounts, and, on the other, to give a more substantial relief than the possible meager sum of a single dollar; and it is reasonable to suggest that its probable practical application is to give relief to the extent of $100 when any part of 100 copies or sheets are "found," and of not more than $5,000 in any event of a maximum number of copies. The result of this would be that, so far as the penalty is concerned, it becomes, on the one side, less oppressive, and, on the other, more remedial, which would be a sufficient explanation of the amendment. However this may be, the words which we have quoted necessarily determine the construction to be given to the proviso under consideration. The result is that, notwithstanding the act of March 2, 1895, Bolles v. Outing Company controls this suit. Other interesting questions are involved, but it is not necessary to consider them.

The judgment of the Circuit Court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day, and the plaintiff in error recovers its costs of appeal.

RADEL v. LESHER et al.

(Circuit Court of Appeals, First Circuit. April 28, 1905.)

No. 567.

1 TRIAL—QUESTIONS FOR JURY—CONFLICT OF EVIDENCE.

Where the decisive question at issue in an action was whether the construction of an electric railroad by plaintiffs for defendant was under an express contract, or under general authority given by defendant, which virtually made plaintiffs his agents in the doing of the work, and the testimony as to the conversation between the parties by which the arrangement was made was in direct conflict, such issue was properly submitted to the jury.

2. SAME—RECEPTION OF EVIDENCE.

A situation is oftentimes presented on a trial where evidence is material and competent upon one theory of the case, while it would be neither material nor competent upon the theory on which the adverse party is proceeding, and in such case, when the correct theory depends upon questions of fact it is not error to admit such evidence to be considered by the jury under proper instructions.

3. SAME—MEASURE OF DAMAGES.

In an action to recover for the building of a line of electric railroad, which plaintiffs alleged was done under a general authority from defendant, which in effect made them his agents in doing the work, the right of recovery on such theory was not upon a quantum meruit, and it was not error to admit evidence on behalf of plaintiffs showing the amount actually expended by them for labor and materials.

In Error to the Circuit Court of the United States for the District of Rhode Island.

The following is the opinion of the Circuit Court on defendant's etition for a new trial, by BROWN, District Judge:

At two trials of this case to different juries, there was submitted for a pecial finding the following question: "Did an express contract at a fixed rice exist between the plaintiffs and defendant for the construction of the oad from Wickford to East Greenwich?" Two juries have answered "No" o this question. At each trial I was of the opinion that this was a ques- on for the jury, and that the defendant's motion that a verdict be directed or the defendant should be denied. At the last trial there was much con- ict of testimony on this issue, and I am of the opinion that it cannot be aid, as a matter of law, that the evidence so conclusively established the efense of an express contract as to require the direction of a verdict on that round. Exception was duly taken to the denial of the motion to direct a erdict, and, if I am in error on this point, the appellate court can give relief. ee Kelley v. Cunard, SS. Co. (C. C.) 120 Fed. 536, 542; Cunard SS. Co. v. Kelley, 126 Fed. 610, 611, 61 C. C. A. 532.

It is contended also that the damages are excessive. At the first trial the erdict was for $14,198.56, with interest from December 5, 1900. At the econd trial the verdict was for $12,773.74, and interest figured at $2,725.01. have no reason to believe otherwise than that the jury endeavored to deal airly with this question.

The plaintiffs offered evidence as to the number of teams and laborers mployed upon the work, the amounts expended upon pay rolls, etc., as to he materials furnished, and as to usual prices for what was furnished, as o money expended, etc. In my opinion, this was competent evidence. The efendant called expert witnesses, who, in answer to hypothetical questions ased upon estimates or measurements of the excavation and trackwork, etc., ctually accomplished, gave their opinion as to a proper price for the com- leted work. Each of these modes of figuring a fair compensation is liable o error. There is the possibility that more laborers and teams were paid or than were necessary; that there was wasted labor. Evidence on this oint was offered on both sides. There is also the possibility that the esti- ates upon which the experts based their figures omitted some matters for hich charges could be made properly. Theoretically, perhaps, the same esult should have been reached, whichever mode of computation was em- loyed. Actually there was a wide discrepancy. The jury's verdict appa- ently was the result of a compromise between the views of opposing wit- esses. Two apparently fair-minded and ordinarily intelligent juries have eached substantially the same result. The plaintiff's evidence on this point s much stronger than at the previous trial, and I am of the opinion that the erdict should not be disturbed on the ground that the damages are exces- ive.

I am of the opinion that the affidavits are insufficient to warrant the grant- ng of a new trial for newly discovered evidence.

Petition for a new trial denied.

Walter F. Angell (T. F. I. McDonnell and Arthur M. Allen, on rief), for the plaintiff in error.

Milton Reed and Amasa M. Eaton (Frank S. Arnold, on brief), or defendants in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. In 1899 there was a written contract etween Radel and the Leshers whereby the Leshers were to build n electric railroad between Narragansett Pier and Wickford, in the tate of Rhode Island, for which Radel was to pay a contract price or track laid, wires run, and material excavated, etc. There is nothing in controversy, however, about the contract for the first

year, or the operations thereunder, and it is only material as having some relation to the claims of the parties as to the second year's operations.

Under some arrangement between the parties—an arrangement to which the present controversy relates—the Leshers in 1900 had to do with building an extension of the road from Wickford to East Greenwich, and with completing some part of the road between Narragansett Pier and Wickford. The position of Radel was that the operations of 1900 were under a special contract, which resulted from a parol agreement between himself and the Leshers; that the operations of 1900 were to be upon the terms and conditions expressed in the written contract of the year before. In other words, that by parol agreement the written contract of 1899 was extended over the operations of 1900, while, on the other hand, the Leshers claim that there was no contract engagement; that the interview at Bridgeport had reference only to the question of his taking up the work for Mr. Radel, and as to the probable expense of building the road, in view of the advance in prices for labor and material; and that there was no engagement or suggestion, even, that he was to proceed under a contract.

The questions raised for our consideration depend largely, if not altogether, upon the relations of the parties. If the work was to be carried on under a special contract, as Radel contends, the point against recovering under the common counts would quite likely be well taken. If, on the other hand, the relation was that of principal and agent, with the broadest possible authority to the agent—authority coextensive with the necessities usual in carrying forward an enterprise wholly committed to an agent's hands—then unquestionably the common counts would be a proper remedy for recovering what the agent's services were reasonably worth, and, in the absence of fraud, for money paid for material and labor in prosecuting the contemplated enterprise in the usual manner. This would be upon the ground that a prosecution of the work in the usual way was within the scope of the authority conferred.

Upon this pivotal question of what the relations actually were there is a very serious dispute, and one which cannot possibly be settled as matter of law. If the parties were in accord as to the talk at Bridgeport about taking up the second year's operations, then it might be a question of law as to the effect of the conversation and as to the obligations under the contract; but that we need not decide, because the relations depend upon what the conversation was, and the parties are seriously and substantially in dispute as to its tenor and effect, one party testifying to a conversation which tends to establish a contract to go forward upon the terms of the year before; and the other party, denying this, testifies to a request to go on and build the road, and to a conversation tending to show relations inconsistent with contractual relations. Thus an issue of fact is raised, and upon the trial there was positive and substantial testimony upon both sides of the issue as well as probabilities and circumstances which had substantial bearing one way and the other upon the disputed question.

There being substantial evidence on both sides, the issue was one which necessarily had to be submitted to the jury under instructions as to what the obligations would be in case the jury should find the facts to be the one way or the other. The disputed question was submitted to the jury under general instructions upon the subject, and, there being no specific objection to the instructions, we need not inquire whether they were sufficiently comprehensive, or in detail technically correct. The only point taken was that there was no evidence to warrant submitting the question to the jury, and one to warrant a verdict for the plaintiffs, and upon this we must find and hold against such contention.

A situation is oftentimes presented where evidence is material and competent upon one theory of the case, while it would be neither material nor competent upon the theory upon which the adversary is proceeding. That is true of this case, and, in the hypothetical situation which confronted the learned judge below, he could only act upon the theory that, if the jury should find that the work was being done under a special contract, then the evidence as to the reasonableness of the claim for services, and that the expenditures were such as were usual and necessary, would become wholly immaterial, while, on the other hand, if the jury should believe the other view, then it would have a material and competent bearing upon the question as to what the plaintiffs' services were reasonably worth, what he had paid out in the defendant's behalf, and what he was entitled to recover.

The assignments of error directed against rulings which admitted certain evidence as to expenditures are grounded upon the theory that such evidence was not competent under the quantum meruit count for building the road, because, as contended, under such circumstances it would not be the cost of the labor and materials which have gone into the work, but what the completed structure is fairly and reasonably worth. In the view we take of this case, we need not consider whether this would be so or not, and this is for the reason, as appears from the record, that the jury, under instructions which submitted the issue of fact between the parties, decided the case upon a different theory of the relations than that contended for by the defendant, namely, that, under the relations which they found to exist, the recovery should be for work, labor, and materials furnished under authority and direction from Radel to build the railroad. The fact of such relation being found, we see no objection to the evidence as legitimately tending to establish what the plaintiffs were entitled to recover under that view of the case.

The judgment of the Circuit Court is affirmed with interest, and the defendants in error recover costs in this court.

POST PUB. CO. v. BUTLER.

(Circuit Court of Appeals, Sixth Circuit. May 18, 1905.)

No. 1,379.

1. LIBEL—RETRACTION—STATUTES—CONSTRUCTION.

Rev. St. Ohio, § 5094, declares that, if a libel shall be published in good faith through a mistake of fact, with reasonable ground to believe that the statements were true, and the publisher on demand, and within a reasonable time, publishes a full and complete retraction, etc., the presumption of malice should be thereby rebutted. *Held*, that under Const. Ohio, art. 1, § 16, declaring that all the courts shall be open, and every person, for an injury done him in his person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay, section 5094 should be construed so as to become operative only upon a demand being made for a retraction; and it is optional with the person libeled to stand upon his rights under the old law, or to waive a part by demanding and accepting a retraction under the law as amended.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 168.]

2. SAME—INSTRUCTIONS.

A second publication, unrequested and in the nature of a correction, may be a proper circumstance to be considered by the jury in mitigation of damages in an action for libel; but its significance is entirely a question for the jury to determine.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 168.]

3. SAME—EVIDENCE.

Evidence as to the circumstances which induced a press association to send out a libelous telegram is immaterial, in an action brought by the party libeled against a newspaper which published the dispatch without knowledge of the circumstances of its origin.

4. SAME—PUNITIVE DAMAGES.

Where a telegram, which grossly libels a woman widely and favorably known and who could have been easily reached, is published without inquiry as to the truth of the statements therein contained, it is for the jury to determine whether there was such a wanton disregard of the plaintiff's rights as to justify an award of punitive damages.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 363.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

J. C. Harper and Alfred G. Allen, for plaintiff in error.

Joline, Larkin & Rathbone and Prescott Smith, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action for libel. There was a verdict and judgment, to reverse which this proceeding is prosecuted. On August 11, 1903, the Cincinnati Post published the telegram printed below in the first column, which was sent it by the Scripps-McCrae Press Association. The next day it pub-

shed the telegram printed in the second column, which was furshed it by the same association.

(The Post, August 11, 1903.)

FALL OF ANNIE OAKLEY.

amous Woman Rifle Shot in the Police Court in Chicago Charged with Robbery by an Old Negro.

(By Scripps-McRae Press Association.)

Chicago, Aug. 11.—Annie Oakley, no won the applause of King Edard of England by an exhibition of arksmanship at Buckingham Pale, was a prisoner in the Harrison reet Police Court Monday. She as arrested on complaint of Charles urtis, who charged her with robry. She pleaded guilty and was ed $25. According to the police, e woman was addicted to the use of ugs. Annie Oakley formerly was ith "Buffalo Bill's" show and comanded the salary of a light opera ima donna, was petted and feted d awarded the honors at meetings fashionable gun clubs. The woan was arraigned yesterday morng in Justice Caverly's court in the arrison Street Police Station, and r pitiful condition discovered. She destitute and was forced to accept elter from an old colored man nam- Curtis. It was he who had her rested. He relented and would not pear in court against her on seeing r shattered condition. Judge Cavly, nevertheless, sent her to the idewell for 25 days to be restrained d cared for and treated there.

(The Post, August 12, 1903.)

IMPOSTOR.

Woman Who Claimed to be Annie Oakley Was not the Famous Rifle Shot.

(By Scripps-McRae Press Association.)

Chicago, Aug. 12.—The real Annie Oakley, the police have learned, was not a prisoner at the Harrison Street Station on Monday. The woman, who posed as the expert rifle shot, is declared to be an impostor. Annie Oakley in private life is Mrs. Frank Butler, and she is living peacefully in Nutley, N. J. The prisoner sent to the Bridewell claimed to be the daughter-in-law of W. F. Cody ("Buffalo Bill"), but Mrs. Butler denied this in a telegram.

The action was based upon the first publication. The second was lied upon by the defendant as a retraction. The plaintiff, Annie utler, wife of Frank E. Butler, is a woman of unblemished reputaon, who resides at Nutley, N. J. She was born in Darke county, hio, where she has friends and relatives living. She is and has een for many years an expert rifle shot, who has exhibited her rearkable skill throughout the world, principally in connection with ol. Cody's Wild West Show. She is known professionally as Annie Oakley," and is the only expert rifle shot who has exhibited nder that name. At the time of the occurrence in the Chicago olice court, purported to be described, she was living quietly in ew Jersey. The statements made in the publication which rerred to her were both false and defamatory. The telegram was eceived by the telegraph editor of the Post over the Scripps-Mcae Press Association wire at about 10 o'clock in the morning,

and was at once headlined and put in course of publication. No effort whatever was made by any one connected with the Post to test its truth. As the editor of the Post stated, "It was an interesting news item because of the celebrity of the person involved." It was published "to make the paper interesting," and it was published immediately, for fear of a "scoop" by some rival. The court held, as a matter of law, that the second telegram was not a retraction. The jury returned a verdict for $9,000—$8,500 compensatory and $500 punitive. On motion for a new trial, the verdict was reduced to $2,500, for which judgment was entered. The rulings of the court on the admission of testimony and upon the charges refused, as well as that given, are here for review.

1. The important question involved is the construction and application of the amendment made in 1900 to section 5094 of the Revised Statutes of Ohio, regulating proceedings in actions for libel or slander, which reads as follows (94 Ohio Laws, p. 295):

"If it shall appear at the trial, that the publication complained of was made in good faith, through mistake of fact, but with reasonable ground for believing that the statements therein contained were true and that the publisher, upon demand and within a reasonable time thereafter, published a full and complete retraction in as public a manner as that in which said original publication was made, the presumption of malice attaching to or growing out of the publication of said libelous matter shall be thereby rebutted; provided that nothing contained in this act shall prevent the person libelled from alleging and proving actual malice on the part of the publisher and any special damage resulting to him therefrom."

The defendant claimed the benefit of this statute, submitting that the second publication was a retraction, but contending that, whether it was or not, the statute applied, for no demand for a retraction was made, and, in the absence of such demand, the statute became operative without one. On the other hand, the plaintiff insisted that the statute only becomes operative upon a demand for a retraction, it being optional with the person libeled to stand upon his rights under the law as it was, or to waive part by demanding and accepting a retraction in lieu thereof. The court below took the view that, to make the statute operative, it was necessary that a retraction be published, but declined to pass on the question whether a demand for it must be made by the person libeled.

In determining between these constructions, we must bear in mind any applicable constitutional limitations, for a statute ought, if possible, to be so construed as to avoid conflict with the Constitution, although such construction may not be the most obvious or natural one. 1 Lewis' Sutherland Stat. Const. § 83; Indemnity Co. v. Jarman, 187 U. S. 197, 205, 23 Sup. Ct. 108, 47 L. Ed. 139; Attorney-General v. Williams, 178 Mass. 330, 335, 59 N. E. 812; Wood v. Atlantic City, 56 N. J. Law, 232, 234, 28 Atl. 427. The Constitution of Ohio provides that:

"All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay." Article 1, § 16.

In the Post Publishing Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921, where it was contended that one who offers his services to the

ublic as an officer thereby surrenders his private character to the ublic, and is deemed to consent to any imputation, however false nd defamatory, if made in good faith, Judge Williams, speaking or the court, said (page 89 of 50 Ohio St., page 926 of 33 N. E.):

"We do not think the doctrine either sound or wholesome. In our opinion, person who enters upon a public office or becomes a candidate for one no ore surrenders to the public his private character than he does his private roperty. Remedy by due course of law for injury to each is secured by the me constitutional guaranty, and the one is no less inviolate than the other."

See, also, Post Pub. Co. v. Hallam, 59 Fed. 531, 542, 8 C. C. A. 01.

The nature of the right thus referred to by Judge Williams which guarantied by the Constitution of Ohio is outlined with great orce and clearness by Judge Sanborn in his opinion in Palmer v. Iahin, 120 Fed. 737, 741, 57 C. C. A. 41, 45:

"The unprivileged publication, in writing or print, of a false charge that nother is guilty of a crime, or of a false charge which tends to expose anher to public hatred or contempt, entitles the person thus defamed to reover of the publisher full compensation in damages for all the injury to his eputation, business, and feelings which the defamatory publication caused. written or printed article of this character is libelous in itself. From its ublication, the conclusive presumption of actual damages to its victim, and legal malice—that is to say, of 'an act done wrongfully without legal stification or excuse'—at once arises. The fact that the publisher was without malice, in the popular acceptation of that term—that is to say, without ill ill, bad motive, hatred, or intent to injure his victim—constitutes no defense the latter's claim for compensatory damages, and no evidence to mitigate or educe their amount, because the actual damages to the party libeled are the me whether they are inflicted by the publisher with a good or an evil intent, nd the victim is as clearly entitled to full compensation for a wrong inflicted ith a laudable motive, or through mistake or inadvertence, as for one perpeated with a diabolical purpose or intent. The intent or purpose with which uch a publication is made is immaterial in the trial of the claim for the ctual or compensatory damages which the party injured may seek. It is nportant only when a claim for exemplary damages is to be considered."

Such was the rule in Ohio since long before the adoption of the resent Constitution, malice being presumed from the publication one. Stevens and Wife v. Handly, Wright, 121, 122; Sexton . Todd, Wright, 316, 320; Seely v. Blair, Wright, 358, decided 832–1833. And it is the rule to-day. Mauk v. Brundage, 68 Ohio t. 89, 67 N. E. 152, 62 L. R. A. 477, decided 1903. In this latter ase, in which it was claimed that the publication, which was libelus per se, was privileged, Judge Spear said (pages 97, 98, of 68 hio St., page 155 of 67 N. E., 62 L. R. A. 477):

"Whether or not the occasion gives the privilege is a question of law for the ourt, for, unless there is a privileged occasion, the publication of defamatory atter is legally malicious, it being a case of a wrongful act intentionally one, without just cause or excuse; that is, in the absence of a justifiable occasion for the publication, malice is but an inference of law, and should not e left as a question of fact for the jury. Folkard's Starkie, § 674; Borage v. Prosser, 4 B. & C. 247."

It thus appears that in Ohio, up to the time of the amendment f 1900, a person injured in reputation by the publication of false

and defamatory matter had a remedy at law, irrespective of the motive of the publisher. The injury being caused by the publication, and the remedy being for the injury, malice was presumed from the publication, and the motive only became material in considering whether exemplary damages should be assessed by way of punishment. We cannot but believe that the construction contended for by the defendant destroys this right or remedy guarantied by the Constitution. No matter how serious the injury to one's reputation, the wrong done is remediless if it shall appear that the publication was made in good faith, through a mistake of fact, and with reasonable ground for believing it true. If this defense be made out, the libeled person is remitted to the recovery of "special damages," which he may obtain by alleging and proving "actual malice." In other words, even if he prove "actual malice," thus effectually rebutting the defense of good faith, he is, nevertheless, restricted to the recovery of "special damages"—damages with respect to his property, business, profession, or occupation, which are computable in money. The right to general or compensatory damages is taken away. And yet such right is the very essence of the remedy by an action for libel, and such damages usually the only ones recoverable. In most cases it is impossible to show any pecuniary loss by reason of the libel. Park v. Free Press Co., 72 Mich. 560, 565, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544; Hanson v. Krehbiel, 68 Kan. 670, 673, 75 Pac. 1041, 64 L. R. A. 790. Thus the statute virtually destroys the right to recover for an injury to one's standing and reputation alone. A statute somewhat similar to this before the Supreme Court of Minnesota in Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. 936, 3 L. R. A. 532, 12 Am. St. Rep. 707, was sustained seemingly because of the mandatory provision for a retraction. Similar enactments in Michigan, Kansas, and North Carolina have been held unconstitutional. Park v. Free Press Co., 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544; Hanson v. Krehbiel, 68 Kan. 670, 75 Pac. 1041, 64 L. R. A. 790; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648.

We can see no way of sustaining the constitutionality of this law except by placing upon it the construction contended for by the plaintiff. Not only is a retraction required to put it into operation, but the retraction must be made at the demand of the person libeled. By such demand the injured person waives the remedy he had under the law as it stood, accepts the retraction in lieu of general damages, and consents that he be restricted, in addition to the reparation thus afforded, to a recovery of special damages where he can show actual malice. Under this interpretation he is not deprived of any constitutional right because he consents to the application of the new law to his case. If he does not consent, he still has the remedy under the old law. A man is entitled under the Constitution to a trial by jury, but he may waive it. So he is entitled to a remedy at law for an injury to his reputation, but he may demand and accept a retraction instead. In the case before us no demand

a retraction was made, and no retraction was published, and the ute therefore did not apply.

The second publication may, in a sense, be regarded as a correc-, but it was so worded as not to be even that in a satisfactory se. The statements in the first publication were direct and ex- it; those in the second indirect and indefinite. The second does refer to the first, or assume to withdraw or correct its state- nts. No apology whatever is made. Allen v. Pioneer Press , 40 Minn. 117, 124, 41 N. W. 936, 3 L. R. A. 532, 12 Am. St. . 707; Gray v. Times Co., 74 Minn. 452, 458, 77 N. W. 204, 73 . St. Rep. 363; Gray v. Tribune, 81 Minn. 333, 335, 84 N. W. ; Palmer v. Mahin, 120 Fed. 737, 746, 57 C. C. A. 41.

. It is also urged that the court erred in declining to give the owing special charge:

"The defendant has put in evidence a correction which it made the day owing the publication complained of. It has introduced testimony tending how that this correction was published in as public a manner as that in ch the original publication was made. It is admitted that this publication made voluntarily, without any request by the plaintiff. These are all ificant circumstances evincing the good faith of the defendant, and that mistake which it made was an honest one."

This charge characterizes the second publication as a "correc-," which the court below did not concede. It closes by saying, ese are significant circumstances evincing the good faith of the endant, and that the mistake which it made was an honest one." ile the second publication might have been a proper circum- nce to be considered by the jury in mitigation of damages, the guage of the request is too strong. The second publication may may not have been "a significant circumstance." That was for jury to determine. The charge was properly refused.

. The point is submitted that the court erred in excluding testi- ny taken in Chicago with respect to the origin of the libelous egram. While the facts thus offered in evidence may have in- ced the Scripps-McRae Press Association to send out the story, y were not known to the defendant prior to the publication, and refore could in no degree have affected its action. They were perly excluded. Morey v. Morning Journal, 123 N. Y. 207, 25 E. 161, 9 L. R. A. 621, 20 Am. St. Rep. 730; Palmer v. Mahin, 120 d. 737, 747, 57 C. C. A. 41; Sun Printing, etc., Co. v. Schenck, 40 C. A. 163, 98 Fed. 925; Butler v. Barret (C. C.) 130 Fed. 944, .

. It is also assigned as error that the court submitted the ques- n of punitive damages to the jury, the contention being that no e for such damages was presented. We think a case was. Not- thstanding the telegram grossly libeled a woman widely and orably known and easily reached, no inquiry whatever as to the th of its statements was made. Because it carried a "spicy ry," and for fear of a "scoop," it was rushed into print. Assured- it was for the jury to say whether such conduct did not evince eckless and wanton disregard of the plaintiff's rights equivalent an intentional violation of them. Post Pub. Co. v. Hallam, 8 C.

C. A. 201, 207, 59 Fed. 530; Morning Journal Ass'n v. Rutherford, 2 C. C. A. 354, 357, 51 Fed. 513, 16 L. R. A. 803; Butler v. Barret (C. C.) 130 Fed. 944, 950.

The judgment is affirmed.

FARMERS' LOAN & TRUST CO. v. NEW ENGLAND WATERWORKS CO. et al.*

UNITED WATERWORKS CO., Limited, v. SAME.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1905.)

Nos. 1,118, 1,130.

CORPORATIONS—MORTGAGES—FORECLOSURE — INCOME — APPLICATION — FISCAL AGENTS.

Where the income from certain waterworks companies, paid to its fiscal agents, was sufficient to pay installments of interest or coupons on prior mortgage debts, but such agents misapplied such income to the payment of a subsequent lien, they were not thereafter entitled to hold such coupons or installments of interest as outstanding debts under the mortgage lien, to the prejudice of bondholders.

Appeal and Cross-Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This case arises on the petition in the Circuit Court of Samuel L. Peck, et al., committee of bondholders under the mortgage to the Farmers' Loan and Trust Company, setting forth the fact that in the decree heretofore entered in this case, there was reserved the question of whether twenty-seven hundred dollars of interest installments under the Caldwell mortgage held by The C. H. Venner Company were still due and unpaid; and whether thirteen thousand nine hundred eighty dollars of interest coupons under the Farmers' Loan and Trust Company mortgage held by The C. H. Venner Company are in fact unpaid; and asking that the court require the claims of The C. H. Venner Company and others holding said coupons, to present the same to the court, that the amount remaining due, if any, might be ascertained and determined. Under this petition The C. H. Venner Company presented its claims for the twenty-seven hundred dollars and the thirteen thousand nine hundred and eighty dollars, respectively; averring that the coupons and installments of interest for these amounts had been purchased by The C. H. Venner Company for value, and assigned to it, and were still outstanding debts against the company under the mortgage. To this claim the petitioners answered that the coupons had not been purchased by The C. H. Venner Company; that they had not legally been assigned to it; and that they were not outstanding debts under the mortgages; the answer averring that the coupons were, in fact, taken up and paid by the said The C. H. Venner Company, with moneys belonging to the Water Works Company, applicable to that purpose.

Further facts are stated in the main case, the decision in which has just been handed down. The New England Water Works Co. et al. v. The Farmers' Loan & Trust Co. et al. (C. C. A.) 136 Fed. 521.

The Circuit Court decreed that The C. H. Venner Company was entitled to receive the twenty-seven hundred dollars represented by installments of interest secured by the Caldwell mortgage, said to be assigned to The C. H. Venner Company; as also seventeen hundred and forty dollars represented by coupons detached from bonds secured by the mortgage to the Farmers' Loan and Trust Company; and for said amounts the said The C. H. Venner Company was entitled to the protection of the lien of said mortgages. As to

*Rehearing denied April 11, 1905.

other coupons presented by The C. H. Venner Company, the court de-
d that they were paid and extinguished, and were not liens under the
tgages. From this decree the appeal and the cross appeal are prosecuted.
further facts are stated in the opinion.

. Markham Marshall, for Samuel L. Peek et al.
ames Hamilton Lewis, for C. H. Venner Co.

efore JENKINS, GROSSCUP, and BAKER, Circuit Judges.

ROSSCUP, Circuit Judge. The foreclosure decree in the case
The New England Water Works Company, et al., vs. The Farm-
Loan and Trust Company, Trustee, et al., reserved for further
sideration, the question of what should be done with the twen-
seven hundred dollars of past due interest, held by The C. H.
nner Company, under the Caldwell mortgage, and the thirteen
usand nine hundred and eighty dollars of past due coupons
d by The C. H. Venner Company under the Farmers' Loan and
st Company mortgage. The decree of the Circuit Court, now
er review, takes up and decides this feature of the case.

he petitioning bondholders claim that The C. H. Venner Com-
y was the fiscal agent of all the water works companies in-
ved in this controversy; that as such fiscal agent, it received
income of all the companies; that the income of the companies
the years named—1898–1899–1900—were sufficient, after the
ment of operating expenses, to meet and pay the interest in
stion; that but for the application of this income to coupons
turing on the subsequent mortgage made by the Boston Com-
y to the International Trust Company, and to the rents osten-
y accruing to the Boston Company under its contract with the
w England Company, there would have been sufficient to pay
se installments of interest and coupons as they matured; that
Farmers' Loan and Trust Company mortgage, and the Cald-
l mortgage, including this interest, was a lien upon the pumping
ion and mains, prior in equity to any claim of the Boston Com-
y thereon for rentals, or any lien of the International Trust
mpany on account of its mortgage; wherefore, the use of these
neys to pay such rentals and interest was an unauthorized di-
sion of the moneys belonging to the New England Company,
the uses of The C. H. Venner Company, who being the bene-
ary of the rents and of the interest, thereby became the bene-
ary of the diversion.

We have already held that the Farmers' Loan and Trust Com-
y mortgage, and the Caldwell mortgage, including the interest
pons, are liens, prior in equity to any title of the Boston Com-
y upon the pumping station, with its connecting mains, or to
lien of the International Company growing out of the mort-
ge executed by the Boston Company. Connected with this, the
dence in this case satisfies us that had The C. H. Venner Com-
y applied the income received by it, as the fiscal agent of the
w England Company, to the payment of this interest as it ma-
ed, without diversion of any such income to payments that
ght not to have been made until the interest was thus met and

retired, no outstanding installments of interest or coupons would now be in existence. These two conclusions determine the question before us. The C. H. Venner Company cannot be permitted to apply the money, that ought to have gone to the payment of interest, to its own personal purposes. It cannot, under these circumstances, hold the coupons or installments of interest as outstanding debts under the mortgage lien. Nothing more injurious to the bondholders could be conceived; for under the terms of the mortgage, the coupons and unpaid interest take priority, in the marshaling of assets, over the principal itself. And nothing could be more inequitable, for the transaction amounts to a direct diversion of income that under the rights of the parties ought to have been devoted, and under the duty resting on The C. H. Venner Company, as fiscal agent, should have been applied by it, to the payment of the interest maturing on the bonds.

The decree of the Circuit Court is reversed so far as it holds that The C. H. Venner Company is entitled to payment of the coupons and interest installments, represented in the claim presented held by it, with instructions to enter a decree finding that The C. H. Venner Company has no claim growing out of the interest and coupons involved in this suit, and to disallow such claim.

MEEHAN et al. v. NELSON et al.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1905.)

No. 1,125.

1. CONTRACTS—CONSTRUCTION—PERFORMANCE.

Where defendants contracted to convey a half interest in a certain mining claim, in consideration of plaintiffs sinking three holes to bedrock on certain lines, the contract did not require that the entire bottom of each hole should disclose bedrock, but was complied with if any part of each hole extended to bedrock.

2. SAME—EVIDENCE.

In a suit for specific performance of a contract to convey a certain interest in a mining claim in consideration of complainants sinking three holes to bedrock, evidence *held* to sustain a finding of performance by complainants.

3. SAME—SPECIFIC PERFORMANCE—DISCRETION.

Where defendants contracted to convey a half interest in a mining claim, in consideration of complainants sinking three holes thereon to bedrock, a decree for specific performance, on complainants having fully complied with their contract, was a proper exercise of discretion, though the property in the meantime had largely increased in value.

Appeal from the District Court of the United States for the Third Division of the District of Alaska.

This suit was brought to enforce the specific performance of a contract, which is set forth in the amended complaint as follows:

"Gold Stream, Feb. 6, 1903.

"This is an agreement between M. Meehan and T. Larson of the first part and O. A. Nelson & G. N. Hensley of the second part. In consideration of sinking three holes to bedrock on or near the lines of Three and Four Above

n Fairbanks, trib. of Fish of Fairbanks Mining District of Alaska. In
eration they receive one-half interest in No. 3 Above Dis. on Fair-
Cr. M. Meehan.
rk to begin immediately. In case of water driving them out will ex-
ime until July 1, 1903. M. Meehan.
"T. Larson."

s alleged that plaintiffs performed all the conditions of said agree-
previous to the time fixed for the performance thereof; that demand
nade upon defendants to execute a conveyance of the interests men-
in said agreement, and that they refused so to do.

cause was tried before the court, and the court, having fully consid-
he matter, found the following facts:

That at the time of the commencement of this suit defendants owned
ere possessed of that certain placer mining claim described in plain-
complaint, and containing 20 acres.

That on the 6th day of February, 1903, plaintiffs and defendants, M.
n and T. Larson, entered into the agreement mentioned in said com-
, and that at the time said agreement was made defendants owned
ere possessed of the placer mining claim therein described, to wit, placer
g claim 'Number Three Above Discovery,' on Fairbanks Creek, Alaska.

That immediately thereafter plaintiffs commenced the performance
ir part of said agreement, and continued, until they completed same, in
g three holes to bedrock on said claim as therein provided, within the
and at the places therein designated, and that plaintiffs performed all
nditions of their agreement with the defendants to be performed under
rms.

That immediately after the completion of said agreement plaintiffs
d defendants M. Meehan and T. Larson of the completion of same, and
nded of defendants, prior to the commencement of this action, a convey-
of said one-half interest in said mining claim, which demand was by the
lants never complied with.

That the defendants, after the completion of the sinking of three holes
aintiffs under their contract, and without inspecting said work, prom-
laintiffs to make said conveyance, but delayed, neglected, and failed to
the same and to examine and inspect said work until it was impossible
do by reason of said holes having caved in and filled with water, when
lants refused to convey said interests in said claim to said plaintiffs
their request so to do, and which request was never by the defendants
ied with.

That at the times hereinbefore set forth the defendants were, and
since have been, in possession of said mining claim.

That during said time defendants have worked and mined said claim
gh laymen, and have collected and received all the royalties, rents,
rofits of the said described premises, amounting in the whole to three
and dollars.

That prior to the filing of the amended and supplemental complaint
plaintiffs demanded of the defendants an accounting of said royalties
f the payment to them of their share of the same, and that defendants
d to make said accounting, and to make payment to plaintiffs of their
of the same."

conclusions of law from the foregoing facts the court found:

That plaintiffs performed all of the conditions of their agreement with
efendants to be by them performed.

That plaintiffs are entitled to prevail herein and to a decree of this
decreeing a specific performance of said agreement, and to a conveyance
e-half of the claim described herein.

That defendants are estopped from questioning plaintiffs' rights to said
ses under said agreement by reason of the facts stated in the fifth
raph of the findings of fact herein.

That the plaintiffs are entitled to a judgment and decree for one-half
e rents and royalties collected and received by the defendants, M. Mee-
nd T. Larson, and for their costs and disbursements in this behalf ex-
d."

A decree was entered in favor of the plaintiffs, in accordance with the findings, from which decree this appeal was taken.

There are 11 assignments of error, to the effect that the court erred in its several findings of fact and conclusions of law, the pivotal point being "that the facts proven by the evidence produced at the trial of said cause were not sufficient to support said decree."

John Garber, Sidney V. Smith, and Claypool, Stevens & Cowles, for appellants.

H. J. Miller (T. C. West, of counsel), for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

Appellants claim that "the finding that plaintiffs performed the work is wholly unsustained by the evidence." It will be observed that under the contract the three holes were to be sunk to bedrock. Counsel for appellants admit that the testimony in relation to holes 1 and 2 is clear, positive, direct, and certain. They were sunk "to bedrock." The controversy between the parties is confined solely to hole 3. Was it sunk to bedrock?

O. A. Nelson, one of the plaintiffs in the court below, testified, among other things, as follows:

"Q. Did you do anything under that arrangement in the way of carrying out the agreement? A. I fulfilled the contract."

It is argued that this answer was a mere conclusion of law, not constituting any legal evidence which this court should consider as tending to show the fact that the hole was sunk to bedrock. The record shows that no objection was made by defendants to this answer as being a mere conclusion. No motion was made to strike the testimony out, and no questions on cross-examination or otherwise were asked the witness by either party as to what he meant by his statement, "I fulfilled the contract." Of course, the contract could not have been fulfilled unless the hole had, as a matter of fact, been "sunk to bedrock." If any inference is permissible from the conclusions given by the witness, it would be that the hole was sunk to bedrock. Without stopping to inquire whether the appellants would be estopped by such testimony given, without objection on their part being taken at the trial, and conceding for the purposes of this opinion that the objections to this testimony can now be raised on appeal and exceptions taken, we proceed to examine further testimony given by this same witness, viz.:

"A. After the work was done I went over on Captain Creek one trip: that was on the 6th of March. Q. State how soon after that you met Meehan and Larson? A. We started to pull out of there the 7th. * * * and on the 8th we got out as far as the mouth of Twin. I think at Golden City on the 8th or 9th we saw Meehan and Larson. Q. State what took place there. A. We told them that the work was done and told Meehan * * * I supposed they would like to go and investigate, and he told me: 'I guess the work is all right. When you go into town make out your papers, and some time when we both come in we will sign them. * * *' Q. What did you do next with regard to making out the papers according to Mee-

s instructions? A. * * * I think it was on the 16th of May the pa- were made out, although I saw Meehan before that time in town, and him we hadn't got the papers made out yet. Q. When did you see him ? A. The next I saw him after I got the papers, that was some time in . I went out on purpose to see him. Q. State what happened on that sion. A. Why, he had told me before that they were going to bale the r out of the holes, and see whether they were to bedrock or not, and I told to go ahead. I expected they had done that when I went out there the papers, but he said he hadn't done it, and was going out to do the ."

gain, in the further course of his examination the following stion and answer appear:

. Will you state the depth to bedrock? A. The first hole was a strong et deep and one foot down in the bedrock. The second hole is 17 and some es to bedrock, I think 3 inches or something like that—anyway, it is a g 17 feet; and the other one is 22 feet or about that."

Ve are unable to accept the statement of the learned counsel for ellants "that this answer asserts nothing more positively than the first hole went down a foot into bedrock, that the second went to bedrock, and that the third hole was 22 feet deep." answer must be considered with reference to the question asked o the depth of the three holes to bedrock. To answer the ques- the statement of the witness as to the first hole being "one foot n in the bedrock," and the second hole "to bedrock," was mere olusage, and it was unnecessary for the witness to repeat the ds "to bedrock" in respect to the third hole in order to complete answer to the question as asked. Suppose the question had n asked, "What was the depth of the third hole to bedrock?" the answer given, "22 feet or about that." Would not that have n a complete, direct, and positive answer to the question? The stion was a leading one, but no objection was taken to it, and answer must be accepted as evidence.

his is the only positive and direct evidence on this point. In connection it is deemed proper to state that the evidence in the rd shows clearly that the defendants, having been informed by plaintiffs that they had fulfilled the contract, took no steps to or examine the holes with the view of satisfying themselves the contract had or had not been completed until about five ths after such information was given, and then the banks of holes were caved in, and the facts could not be ascertained by nvestigation of the holes. In the meantime, according to the imony of the defendants, "property constantly increased in value Fairbanks Creek from the time these shafts were sunk." It was e time in November, 1903, when defendants "felt pretty certain the contract was not fulfilled"; they heard reports "that there something that was not what it ought to be." So defendants cluded to sink shafts near the holes sunk by plaintiffs, and went n to bedrock to run drifts under the holes sunk by plaintiffs, rder to ascertain whether or not such holes had been sunk to rock. The greater portion of the testimony on both sides was elation to this work. The testimony of plaintiffs tended to show the drifts did not run under or to the shafts sunk by plaintiffs,

while the testimony of defendants tended to show that they did. Upon this point there was a wide diversion of opinion. Steelsmith, a witness for plaintiffs, speaking of the holes and drifts sunk and run by defendants in relation to holes 1, 2, and 3 sunk by plaintiffs, said:

"It seemed that there was more variation in hole number 3 than there was in number 2. While the drift was not so long there, there was a doubt left in my mind as to whether the drift ran under the shaft, or as to whether it reached the shaft. Q. How much variation was there? A. I could not say as to that. There was plenty of space for the Nelson shaft to have been to bedrock. Q. Why did you think that? A. * * * If this shaft should have been to bedrock, the width of the drift would not take in the width of the shaft, so that, while there was no indication there on the face of the side wall of the drift showing that they had been disturbed, it still left space in the bottom of that shaft, according to my notion, that that shaft could have been to bedrock without this drift proving that it was not. Q. The drift didn't strike the old shaft? A. No, sir; it ran to the left. While there was nothing to prove that it was to bedrock, I didn't consider that the drift underneath it would give it a fair test to prove that it was not."

Gibbs, speaking of the variation, said:

"At the back end of the hole it must have varied at least three feet. We obtained the direction of that hole. * * * I placed the stick in the bottom of the hole, looking right at the center of the drift on the back, and left the candle there, and when I got on top there was the stick pointing off to the left, and there was Nelson's hole to the right of the stick."

Crabbe testified:

"We went to hole No. 3, and measured that from the top—put the same stick across to get the center location of the hole. It was 22 feet and 8 inches deep. The length of the drift was 10 feet 4 inches as it ran in, and, as near as we could come to telling from our pole on the top, it was bearing off to the left. Q. How much? A. About 4 or 5 feet anyway—at the least; I could not exactly tell. * * * Q. Could you tell whether it would strike the Nelson and Hensley shaft from what you saw? A. I should not judge myself that it would strike the Nelson and Hensley shaft at all."

To illustrate the character of the testimony upon the part of the defendants as to the work done by them, we take the witness Boss, who had taken a lay from defendants on a part of the ground. He testified that the drift in shaft 2 bore a little to the left of hole 2:

"In a distance of 12 feet I should judge it was about 15 or 18 inches. Q. Where did it strike the old shaft? A. Under the up-hill end of the shaft. Q. How much of the old shaft did it expose? A. I don't know."

With reference to shaft 3, sunk by defendants, he said:

"The hole was sunk 23 feet and 3 inches, and the drift was driven 11 feet and 6 inches. * * * Q. How did this drift compare with reference to the old shaft? A. As near as I could judge, exactly to the center. * * * Q. What was the result of the exposure made at any part of this drift with reference to the old shaft? A. Well, we didn't see anything that looked like an old shaft there. It was what I supposed to be solid gravel."

In his cross-examination he said that they ran a drift 11 feet "to be sure we had got over far enough" to reach the hole sunk by Nelson and Hensley. The drift which was run was larger at the starting point than it was at the end.

"Q. Did you enlarge that hole and widen it so there would be no chance of your missing it? A. No, sir."

mer, a witness for the defendants, testified that he went into 3, and measured the drift back about 11 feet and a half.

e went there to find out whether this drift ran under the other shaft, e lined it up with the other shaft. * * * We put a pole down the n, and lined it up on top the same way. * * * Found out that they in line. Q. Did you make any examination of the drift with reference t shaft, to see what that showed as to bedrock? A. I could not say er that goes to bedrock or not. I didn't have no pick."

ter the conclusion of the testimony the court desired "more rate information in relation to the location of the shafts sunk elson and Hensley on the upper end of the mining claim 'Num- Three Above Discovery,' on Fairbanks Creek, in controversy; he court, deeming it important to ascertain accurately whether ot the shafts so sunk by Nelson and Hensley, and called 'Num- Two and Three' in the evidence in this case, were sunk to ock, and whether or not the drifts running from the new s Numbers Two and Three, alongside the old, bore to the left missed the old shafts, or actually went under them; and, all es to the litigation in open court consenting thereto," the court inted R. A. Jackson, a qualified and expert surveyor, "to make ccurate survey of the said old shafts Numbers Two and Three, the drifts running therefrom toward or underneath the old s on said mining claim Number Three in litigation, for the ose of determining accurately their position with regard to other," etc. Jackson, as referee, thereafter, on August 1, reported to the court that he made a survey of the new shaft ber Three and the tunnel, and "found that it would tap the on shaft Number Three nine-tenths of a foot from the south of said shaft, crossing the east side line and penetrating under haft one and one-tenth foot, at an elevation of two and two- s feet from bedrock."

is apparent from the decree rendered by the court that it did consider the report of the surveyor established the fact, as ed by the appellees, that hole No. 3, sunk by Nelson and Hens- did not go to bedrock. The bedrock at the bottom of the holes not level. The contract did not require that the entire bottom e holes should disclose bedrock. If any part of the hole went drock the contract was complied with. The fact that a tunnel rom the new shaft Number Three would tap the Nelson shaft, ated in the report, does not prove that the Nelson shaft or hole ber Three was not sunk "22 feet or about that" to bedrock.

equity causes the rule is well settled that the findings of the t below upon the facts are to be taken as presumptively cor- and unless an obvious error has intervened in the application e law, or some serious or important mistake has been made e consideration of the evidence, the decree should not be dis- ed. Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105; Stuart ayden, 72 Fed. 402, 408, 18 C. C. A. 618; Snider v. Dobson, ed. 757, 21 C. C. A. 76; Denver, etc., R. R. v. Ristine, 77 Fed. 3 C. C. A. 13; Lansing v. Stanisics, 94 Fed. 380, 36 C. C. A. Harding v. Hart, 113 Fed. 304, 51 C. C. A. 264; Lilienthal v.

McCormick, 117 Fed. 89, 97, 54 C. C. A. 475; Tilghman v. Proctor, 125 U. S. 136, 149, 8 Sup. Ct. 894, 31 L. Ed. 664; Crawford v. Neal, 144 U. S. 585, 596, 12 Sup. Ct. 759, 36 L. Ed. 552; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; Warren v. Keep, 155 U. S. 265, 267, 15 Sup. Ct. 83, 39 L. Ed. 144.

After a careful examination of all the evidence, we are unwilling to say that the court below committed any mistake in the consideration of the evidence applicable to the points under discussion, or the conclusion which it deduced therefrom. The court had the witnesses before it, and had knowledge of the conditions existing in the vicinage where the holes were sunk, and was, in the very nature of things, better able to understand and apply the testimony of witnesses than we are.

It is true that specific performance, as claimed by appellants, is not a matter of absolute right, but rests entirely in judicial discretion, to be exercised according to the settled principles of equity so as to reach the ends of justice. Snow v. Nelson (C. C.) 113 Fed. 353, 356; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Story, Eq. Jur. § 742.

As is said in 26 Am. & Eng. Ency. Law (2d Ed.) 67:

"It must appear that the contract is fair, just, and equitable in all its parts. If, therefore, a decree of specific performance would work hardship or injustice upon the defendant, or operate oppressively upon him, a court of equity will decline to interfere."

The contract was fair and just between the parties, and the record herein does not show that its enforcement would work any hardship or injustice upon the defendants. The fact that it was shown by the complaint that one McMahon had an interest in the premises did not deprive defendants from establishing their rights, if any they had, as against the plaintiffs herein, and the record shows that in the answer of McMahon he asks that his interest in the premises "be not determined in this action."

The decree of the District Court is affirmed, with costs.

FRANKLIN v. CONRAD-STANFORD CO.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1905.)

No. 2,023.

1. JURISDICTION OF FEDERAL COURTS—ACTION ON NOTE—CITIZENSHIP OF NOMINAL PAYEE.

A note made payable to the cashier of a bank as trustee, the consideration for which was furnished by the bank, which was the real owner, may be sued on by the bank in its own name, or by its receiver, without indorsement or assignment, under the statute of Utah, and the citizenship of the cashier is immaterial to affect the jurisdiction of a federal court in that state of an action thereon.

[Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

2. PLEADING—AMENDMENT.

The fact that an amendment of a complaint was allowed by consent, on application by the plaintiff, after he had sold the cause of action

and before the substitution of the purchaser, does not invalidate such amendment.

JUDGMENT—IMPEACHMENT—ESTOPPEL BY ADMISSION OF SERVICE.

A written admission of service of summons in an action in a Montana court, conforming to Code Civ. Proc. Mont. § 642, which makes such admission sufficient proof of service, estops the defendant from subsequently denying the jurisdiction of the court to render judgment against him.

ABATEMENT—ACTION ON NOTE—PENDING SUIT TO FORECLOSE MORTGAGE.

A suit to foreclose a mortgage securing a note, in which the property was sold and the proceeds applied on the amount found due on the note, but in which no formal deficiency judgment has been rendered, is not a bar to a second action on the note in another jurisdiction to recover the amount of such deficiency.

EVIDENCE—COMPETENCY.

An offer to prove by oral testimony that a contract for a novation was "drawn," by which defendant was to be released from liability on a note, was properly rejected, where the contract was not produced nor its execution proved.

In Error to the Circuit Court of the United States for the District Utah.

On September 5, 1896, the First National Bank of Helena, Mont., sold and veyed to the plaintiff in error (defendant below) a large amount of real ate, consisting of mining property, for the price of $74,900; in considera- whereof the defendant executed his promissory note as follows, and de- red the same to the payee thereof:

4,900. Helena, Montana, September 5th, 1896.

On or before thirty months after date, for value received, I promise to to George O. Freeman, trustee, the sum of Seventy four thousand nine ndred dollars, together with interest thereon from date until paid, at the e of six per cent. per annum, payable semi-annually; interest and prin- al payable at the Montana National Bank Helena, Montana.

"Peter A. H. Franklin."

At the same time, and to secure the payment of said note, said defendant cuted his deed of mortgage of the same real estate and mining property Edward W. Beattie, of said Helena, as trustee, who accepted the trust, l the mortgage was duly recorded. Said Freeman was the cashier of the st National Bank of Helena, and its trustee in respect to said promissory e, which, together with said mortgage, belonged in fact to that bank; and l promissory note was indorsed by said Freeman to that bank.

On January 15, 1897, said First National Bank of Helena was declared in- vent by the Comptroller of the Currency, who duly appointed J. Sam own as receiver of that bank, its property and assets. In May, 1897, upon ault in the payment of interest accruing on said note, and pursuant to visions contained in said mortgage, said Edward W. Beattie, trustee, and l J. Sam Brown as such receiver, commenced an action in the District urt of the Fifth Judicial District of Montana, county of Jefferson, against l Peter A. H. Franklin, the Hope Mining Company, and others to fore- se said mortgage. In that action the proof of the service of the summons the defendant Franklin was his acknowledgment in writing, signed by n as follows:

n the District Court of the Fifth Judicial District of the State of Montana, in and for the County of Jefferson.

dward W. Beattie, Trustee, and J. Sam Brown, as Receiver of the First National Bank of Helena, Montana, Plaintiff, vs. Peter A. H. Franklin et al., Defendants.

"The undersigned, who is one of the defendants in the above-entitled ac- n, hereby admits and acknowledges service of the summons in said action l copy of the complaint, as made upon him in ——— County, Montana, s ——— day of June, 1897. P. A. H. Franklin."

The defendant did not otherwise appear in that action. Other defendants were served, and therein a decree of foreclosure was rendered and entered on December 8, 1897, which directed sale of the mortgaged premises for the payment of costs, a prior lien, attorney's fees, and the mortgage debt $74,900, and interest at 6 per cent. per annum from September 5, 1896. Sale was made, after proper notice and pursuant to said decree, by the sheriff of Jefferson county, Mont., of the mortgaged property to Eugene T. Wilson, who had become receiver of said bank as successor of J. Sam Brown, for the sum of $75,000, on January 8, 1898, leaving the mortgage debt unsatisfied to the amount of $8,805.60, as appears by the sheriff's return and a docket entry, January 26, 1898, in the clerk's office, but no formal judgment for such deficiency appears.

This action was begun in May, 1902, by Edward W. Beattie, trustee, and Eugene T. Wilson, as receiver of said First National Bank of Helena, plaintiffs, against Peter A. H. Franklin, defendant, to recover $8,805.60 as upon a judgment of said state district court, January 26, 1898, with interest at 6 per cent. per annum from that date. On December 4, 1902, Edward W. Beattie, trustee, transferred all his title and interest in said cause of action to Eugene T. Wilson, receiver; and on December 22, 1902, pursuant to written stipulation, and by leave of court, the complaint herein was amended, making Eugene T. Wilson, receiver, sole plaintiff, and adding to the complaint a second count, pleading said promissory note, mortgage, receivership, foreclosure, sale under the decree, application of the proceeds, and the fact of the deficiency of $8,805.60 remaining unpaid on said note, and demanding judgment therefor, with interest.

When the cause came on for trial, May 7, 1903, upon petition showing that Eugene T. Wilson, as such receiver, had on November 14, 1902, duly sold and transferred to the Conrad-Stanford Company the causes of action upon which recovery was sought, with all property, real and personal, of the First National Bank of Helena, counsel for plaintiff moved that said Conrad-Stanford Company be substituted as plaintiff in this action. The counsel for defendant objected to such substitution as to the second cause of action, because it had been added to the complaint after such transfer. The court overruled the objection, and the defendant excepted.

George F. Goodwin (Henry V. Van Pelt and Charles C. Dey, on the brief), for plaintiff in error.

Harrison O. Shepard (Richard B. Shepard and Joseph L. Rawlins, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. It appears clearly and without question that the entire consideration for defendant's note for $74,900 was received by him from the First National Bank of Helena, of which bank George O. Freeman was the cashier; and, being made to Freeman as trustee, the note showed upon its face that he was not the beneficial owner. The note at its inception was therefore the property of that bank, which, as the real party in interest, could, under the Utah Code, maintain an action upon it without any indorsement or assignment by Freeman, and no such indorsement or assignment was needed to vest the title to the note in the receiver of that bank appointed by the comptroller. The citizenship of Freeman could not therefore affect the jurisdiction of the Circuit Court in this case.

2. The amendment of the complaint on December 22, 1902, making Eugene T. Wilson, receiver, sole plaintiff, and adding a second

count to the complaint, was made pursuant to written stipulation of the parties and leave of court. The second count did not set forth any new cause of action, but, upon a fuller statement of facts, sought the recovery of the very same indebtedness which was sought to be recovered under the first count, namely, the balance of said note above what had been paid by the proceeds of the mortgage foreclosure, and which balance was still unpaid, whether there was a valid deficiency judgment for it or not. In substance, the cause of action in the two counts was one and the same, the second count being added (by consent) to avoid the chance of failure to prove a completed judgment for the deficiency in the foreclosure suit. But when at the commencement of the trial the present plaintiff, the Conrad-Stanford Company, then the owner of the cause of action, in whatever form, petitioned to be substituted as plaintiff, the defendant objected, not to the substitution generally, but to the substitution so far as the second count in the complaint was concerned, because the whole cause of action, in whatever form it might be alleged, had been sold and transferred to the Conrad-Stanford Company on December 14, 1902; and, when the amendment by inserting that second count was made, Eugene T. Wilson, the then plaintiff, had sold and did not own the cause of action in any form. The real ground of the objection was the claim that the amendment of the complaint on December 22, 1902, inserting the second count, though consented to by defendant when made, was an amendment which the then plaintiff was not entitled to make. But this is not true, because the written stipulation of the defendant and leave of court gave the then plaintiff the right to make the amendment when it was made. He was still the nominal plaintiff, and, remaining liable for costs, was interested in the success of the action until his vendee should be regularly substituted in his stead. Whether the defendant then knew of the sale of the cause of action, with all the assets of the bank, by Wilson as receiver to the Conrad-Stanford Company, does not appear, and is immaterial. The defendant was in no way prejudiced, as, had that amendment not been made till after the Conrad-Stanford Company had been substituted, that company would have, in the discretion of the court, the right to make it, and the issues on the trial would have been the same. The fact that defendant's note was not fully paid was not disputed, and any court in furtherance of justice would have allowed this amendment to prevent failure by a possible inability to prove a regularly entered judgment for the deficiency in the foreclosure suit, the amendment being but a statement of further facts for the recovery of the same debt. Section 954, Rev. St. U. S. [U. S. Comp. St. 1901, p. 696], as well as section 3005, Rev. St. Utah 1898, contains most liberal provisions for amendments at any stage of an action at law, and the whole subject is so carefully investigated, and authorities considered, in McDonald v. Nebraska, 101 Fed. 171, 41 C. C. A. 278, that no further citation is needed to support the ruling of the Circuit Court.

3. The written admission of the defendant that the summons and copy of complaint in the foreclosure suit were served upon him in

Montana in June, 1897, was sufficient proof of a valid service under section 642 of the Montana Code of Civil Procedure, which makes the written admission of a defendant sufficient proof of such service. This admission was made with the intent that the Montana court should act upon it, as that court did, and defendant is estopped from now denying the truth of the admission. Besides, as the judgment in this case is rendered upon defendant's note, and not on the supposed deficiency judgment, it is immaterial whether the proof of service of the summons in the foreclosure action was, as to him, sufficient. The only effect of that foreclosure upon this action was to greatly reduce the defendant's liability on the note. So that in this action he was neither harmed nor prejudiced by the judgment of foreclosure and credit of the proceeds of sale in the Montana suit. Whether title to the mortgaged property passed or did not pass by the foreclosure sale, there remained due on the note the full amount that has been recovered by plaintiff in this action. It was properly held that the Montana court had not yet, in the foreclosure suit, rendered a final judgment for the deficiency still owing on the note; and that suit is, as to such deficiency, still pending. Such pendency is no bar to this action. Ins. Co. v. Brune, 96 U. S. 588, 24 L. Ed. 737.

4. The fifth and sixth assignments of error were not pressed on the argument, and are untenable. The offer to show by defendant's testimony that there was an agreement between defendant, the First National Bank, and the Hope Mining Company that the latter company should assume defendant's obligations and defendant be released therefrom, and that a contract to that effect was "drawn" without offering to produce such contract, or even to show by the witness that it had ever been executed by any one, was properly rejected as incompetent.

The judgment is affirmed.

The following is the opinion of the court below (MARSHALL, District Judge):

This case is before the court upon the defendant's motion for a new trial. The action was originally brought on May 5, 1902, by Edward W. Beattie, trustee, and Eugene T. Wilson, as receiver of the First National Bank of Helena, Mont. The complaint then consisted of one count, and was based upon an alleged judgment for a deficiency recovered by the plaintiffs against the defendant in a state court of Montana. On December 22, 1902, Eugene T. Wilson, as receiver, alone and by consent of defendant, filed an amended complaint in two counts. The first count is identical with the original complaint, except that it alleges a transfer of the cause of action by Edward W. Beattie, trustee, to Eugene T. Wilson, as receiver, pending the action. The second count is based upon a note made by the defendant, which it is alleged was secured by a mortgage. A foreclosure of the mortgage in the state court of Montana is averred, an order of sale, a sale in pursuance of the order, leaving a deficiency of $8,805.60 due as ascertained by the decree, a report of the sale, and a confirmation by the court. Payment of the unsatisfied part of the note is sought. It is further alleged "that the First National Bank of Helena, Montana, was, at the several times hereinafter mentioned, a corporation organized and existing under the law of the United States of America relative to the organization of national banks, and formerly engaged in business, in pursuance thereof, in the [city] of Helena, in the state of Montana"; and, further, that the defendant made to George O. Freeman, as

trustee, "who was then acting as such trustee for and in behalf of said First National Bank," the note in question, which was as follows:

"$74,900. Helena, Montana, September 5", 1896.

"On or before thirty months after date, for value received, I promise to pay to George O. Freeman, trustee, the sum of seventy-four thousand nine hundred dollars, together with interest thereon from date until paid, at the rate of six per cent. per annum, payable semi-annually; interest and principal payable at the Montana National Bank, Helena, Montana.

"Peter A. H. Franklin."

"That afterwards said promissory note was by said George O. Freeman duly indorsed over to the said First National Bank, and that said plaintiff, Eugene T. Wilson, as receiver as aforesaid, is the owner and holder of said promissory note."

The citizenship of Freeman does not appear, but it is averred that the bank became insolvent, "and on, to wit: the 15th day of January, 1897, the Comptroller of the Currency of the United States duly determined that said bank was insolvent, and duly appointed J. Sam Brown a receiver of the said bank and the property and assets thereof, in accordance with the provisions of the act of Congress in that behalf, and by and with the concurrence of the Secretary of the Treasury of the United States, for the benefit of the creditors and depositors of said bank, with all and singular the powers of the receivers in such case made and provided. That thereafter the said J. Sam Brown was succeeded in the trust and receivership of the said First National Bank of Helena, Montana, by Eugene T. Wilson, plaintiff herein."

The defendant denied that Wilson was the owner or holder of the note, and alleged affirmatively that prior to the filing of the amended complaint he had transferred, assigned, and set over to the Conrad-Stanford Company, a corporation, all of the assets of the bank in his hands as receiver, including the alleged claims sued on, and that hence he was not the proper party plaintiff, and had no interest in the cause of action, at the time of the amendment. Subsequently the Conrad-Stanford Company applied to be substituted as a plaintiff for Eugene T. Wilson as receiver on the ground of a sale to it upon November 14, 1902, of the judgment and note sued on by the receiver, which sale was had on an order of court, pursuant to the provisions of section 5234, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3507]. This substitution was permitted, over the objection of the defendant. The plaintiff failed on the first cause of action, and recovered on the second.

The first question for consideration is whether the court had jurisdiction of the second cause of action. In section 1 of the judiciary act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 470), as amended in 1887 (Act March 3, 1887, c. 373, 24 Stat. 552), and 1888 (Act Aug. 13, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), it is provided: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." It is not shown that Freeman, as trustee, could have prosecuted a suit in this court to recover upon the note. If the plaintiff can only claim as assignee of Freeman, it would seem that the statute quoted precludes jurisdiction. It is, however, contended that jurisdiction is saved by the second paragraph of section 4 of this act (25 Stat. 436 [U. S. Comp. St. 1901, p. 514]). This section provides:

"That all national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

No jurisdiction is attempted to be granted by this section. The last clause simply limits the effect of the first. If the cause of action is admitted to fall within the last clause, it is simply freed from the requirement that the National Bank shall be deemed a citizen of the state of Montana. With respect to this suit, the bank should then be considered a federal corporation, and an action instituted by it or its receiver one arising under the laws of the United States. But the limitation of the jurisdiction to entertain suits to recover the contents of assigned choses in action applies to suits arising under the laws of the United States equally with suits between citizens of different states. It is true that, as to most suits arising under the laws of the United States, the assignor could, from the nature of the action, sue in a Circuit Court of the United States if no assignment had been made, and the statute would be satisfied. But this is not so if the federal incident is only attached by the character of the assignee, as in this case. To permit such an assignee to sue in the federal court when his assignor could not there sue, would be to permit a suit which could not be prosecuted if no assignment had been made, and would be a direct violation of the statute. But is it true that the bank claims only as assignee? It is alleged in the complaint, and not denied in the answer, that, in taking the note, Freeman was acting as trustee for and in behalf of the bank. I am of the opinion that under such circumstances the bank could sue as the real party in interest under the Utah Code, and without any assignment from Freeman. Williams v. Simons et al., 70 Fed. 40, 16 C. C. A. 628; Rogers v. Gosnell, 51 Mo. 466; Conyngham v. Smith, 16 Iowa, 471; Cottle v. Cole, 20 Iowa, 481; Edmunds v. Ills. Cent. R. Co. (C. C.) 80 Fed. 78.

The provision of the Code referred to has the effect of changing into a legal title what was prior to it a right only cognizable in equity. It is to be given effect in federal courts in actions at law. Albany & Rensselaer Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982; Delaware Co. v. Diebold Safe Co., 133 U. S. 473, 488, 10 Sup. Ct. 399, 33 L. Ed. 674.

The averment of the assignment by Freeman may be considered surplusage. The right of the bank while a holder of the note to maintain the suit then sufficiently appears, and its receiver was admittedly entitled to institute the action, unless prevented by the fact that some assignor could not have maintained it if no assignment had been made. It would seem that the second cause of action was within the jurisdiction of the court.

It is alleged, in support of the motion, that the court erred in permitting the Conrad-Stanford Company to be substituted as plaintiff with respect to the second cause of action. The argument is that the second count introduced a new cause of action; that as to it the action was commenced when the amended complaint was filed, and bears no relation to the time of the filing of the original complaint; that prior to the filing of the amended complaint Wilson, receiver, had sold the note, and was no longer a proper plaintiff to recover upon it; that the transfer to the substituted plaintiff was not during the pendency of the suit on the note, and to permit the substitution would be to give vitality to a suit which otherwise must have failed as instituted by one having no interest, legal or equitable, in the cause of action. This, it is claimed, is not permitted by the Utah Code. The provisions of the Utah Code with respect to amendments are extremely liberal. They are identical with the provisions of the codes of other states, which have been held to permit the substitution of the proper plaintiff where suit has been instituted by one not entitled to sue, and the defense has been interposed that some one else should have sued. The authorities on this question are collated in McDonald v. Nebraska, 101 Fed. 171, 41 C. C. A. 278. But it must be admitted that the Supreme Court of Utah has construed the Utah statute otherwise (Skews v. Dunn, 3 Utah, 186, 2 Pac. 64; Wilson v. Kiesel, 9 Utah, 397, 35 Pac. 488), in that following the Supreme Court of California in the case of Dubbers v. Goux, 51 Cal. 153.

If the right to allow the substitution depended upon the provisions of the Utah Code, the court would be embarrassed by these decisions of the Supreme Court of Utah construing that Code. But as pointed out in McDonald v. Nebraska, supra: "The right and duty of the federal courts to allow amendments does not rest on state statutes only; it is conferred on them by the judiciary act of 1789,"—now section 954, Rev. St. U. S. [U. S. Comp.

.901, p. 696]. Under this section "it has come to be the settled law that re, either by mistake of law or fact, a suit is brought in the name of a ng party, the real party in interest, entitled to sue upon the cause of on declared on, may be substituted as plaintiff, and the defendant derives enefit whatever from such mistake; but the substitution of the name of proper plaintiff has relation to the commencement of the suit, and the e legal effect as if the suit had been originally commenced in the name he proper plaintiff. The name of the proper plaintiff may be brought he record at any time during the progress of the case, and may even be rted after verdict and judgment." McDonald v. Nebraska, 101 Fed. 171, 41 C. C. A. 278. This decision of the Circuit Court of Appeals of this uit is binding here, and renders further discussion of the question unssary.

astly, it is contended that the foreclosure suit is still pending in the state t of Montana for the purpose of obtaining a deficiency judgment, and such pending suit is ground for abating this action. This is an action aw in personam. It in no way involves any interference with the conduct he suit in the state court of Montana, nor does it affect any property in the jurisdiction of that court. Under these circumstances it is set by the highest authority that the pendency of an action in a state court o ground for abating an action subsequently brought in a federal court the same cause of action. Insurance Co. v. Brune's Assignee, 96 U. 88, 24 L. Ed. 737; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Ogden v. Weaver, 108 Fed. 564, 567, 47 C. C. A. 485.

he motion for a new trial is denied.

KIMBER v. YOUNG.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1905.)

No. 2,096.

ECEIT—BREACH OF WARRANTY—ACTIONS—JOINDER.

A complaint joining a cause of action for breach of warranty in the sale of certain bonds with a cause of action for deceit growing out of and only presenting different phases of the same transaction, and both tending to support a single recovery, was not demurrable for misjoinder of causes of action.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 471.]

AME—FRAUD—KNOWLEDGE.

In an action for deceit, either knowledge on the part of defendant of the falsity of the alleged representations or what in law is equivalent thereto must be averred and proved.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 3–5.]

AME—FALSE STATEMENTS—MATTERS OF OPINION.

In an action for deceit in the sale of corporate bonds, allegations that defendant knew the bonds to be good, and that they would be paid, principal and interest, at maturity, though stated positively as a fact, were mere matters of opinion, the falsity of which was insufficient to create a liability.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 12, 13.]

AME—MATERIALITY.

Where, in an action for deceit inducing a purchase of certain bonds, the complaint admitted that the bonds were actually executed and issued by the corporation, an alleged representation that the provisions and recitals of the bonds must be met whether the corporation would or no, was but an assertion that payment of the bonds and performance of other stipulations appearing thereon were not merely optional with the company, but existed as a legal obligation, and was insufficient to sustain the action.

5. SAME.

Where a complaint for deceit charged that defendant, who was president of a corporation, in order to induce plaintiff to accept certain bonds as part consideration for the purchase of property, represented that others had agreed to accept some of the bonds in part payment of property sold to the corporation, that the bonds offered to plaintiff would come in before those held by defendant and his associates, and that as to such bonds plaintiff would occupy a preferred place among the bondholders, which representations were false, and there was no reference in the complaint to any recitals in the bonds which would impugn plaintiff's averment that, aside from defendant's representations, she was wholly without knowledge or means of acquiring the same with reference to the truth of the facts, such representations were material, and as to them the complaint stated a cause of action.

6. SAME—WARRANTY.

Where a count in a complaint for breach of warranty in the sale of certain bonds alleged that defendant warranted the validity of the bonds, and that the warranty was false, but other averments disclosed that there was no real contention that the bonds were not executed by the corporation, and did not constitute valid obligations, such count was demurrable.

Lochren, District Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

Virginia Kimber sued Frank C. Young to recover damages alleged to have been caused by his deceit and breach of warranty in respect of certain corporate bonds purchased by her. A demurrer directed to her amended complaint, which was in two counts, was sustained by the circuit court. She elected to stand upon her pleading, and judgment was accordingly rendered that she take nothing by her action. This writ of error is to review the judgment.

The first count contained the charge of deceit, and it consisted of the following averments: The plaintiff, the owner of certain mining interests, contracted to sell and convey them to the defendant, or, at his request, to a mining and milling company of which he was president and a director, for a cash consideration of $162,500. Some time afterwards, and before the sale was consummated, the company executed a series of 6 per cent. bonds aggregating $750,000, and maturing in 10 equal annual installments. When defendant came to close the transaction with the plaintiff, he prevailed upon her to accept for her property $125,500 in cash and $37,000, the remainder of the purchase price, in bonds of that amount, which were a part of the first maturing installment of the series mentioned. To induce her to accept the bonds in lieu of cash, which she was entitled to under the contract of sale, the defendant represented to her in writing that other persons who had sold mining property to the company had agreed to accept such bonds in part payment; that the bond issue was all in the hands of the trust company; that the provisions and recitals of the bonds must be met whether the company would or no; that the bonds offered to her were due absolutely July 1, 1901, and would come in before those held by defendant and his associates; that she might depend upon being honorably dealt with, and upon the interest coupons being promptly met; that he (the defendant) knew the bonds offered her to be good, and that as to said bonds she would occupy a preferred place among the bondholders. With like purpose he also represented to her son, who was her agent, that the bonds "were first-class securities, good in all respects, and that he knew the same would be paid, principal and interest, at the maturity thereof." When these representations were made, the defendant was president of the company which issued the bonds, was largely interested in and wholly conversant with its affairs and condition, and knew that she would rely upon and be governed by what he said. She was ignorant and had no means of acquiring knowledge of the value and character of the bonds other than through his representations,

well knew. She had been acquainted with him for many years, and, ng a broker, she had from time to time employed him to invest her and therefrom arose a relation of trust and confidence which had xisted between them. Under these circumstances she relied upon e said concerning the bonds offered her, and in such reliance delivered nveyances of her mining interests to the defendant for his company, cepted in payment $125,500 in cash and the bonds to the amount of . The representations of the defendant proved to be wholly false thout foundation. Default was made in her bonds at maturity. She ne mining company, the maker thereof, and her action was defeated n the efforts of defendant. The bonds were worthless, and had been before their maturity, and in view of the premises she had been ed in the sum of $37,000.

second count of the complaint was based upon the same transaction, s for breach of a warranty as expressed in these paragraphs:

t at the said time and to induce this plaintiff to accept the said bonds e of said sum of $37,000 the said defendant then and there in writing ly affirmed their regularity and validity to this plaintiff, and did as- er in writing that he, the said defendant, knew them, and each of o be good, whereby and by means whereof the said defendant repre- and warranted the said bonds to this plaintiff, and that the same by reason thereof, be paid principal and interest at the maturity , and the plaintiff, relying wholly upon said representations, assur- and warranties of said defendant, did accept and was induced to ac- e said bonds as aforesaid for and in place of the said sum of money, liver her conveyances of said mining claims and premises to said com-

plaintiff, further complaining, alleges that said representations and ty of said plaintiff to this defendant that said bonds were good and nd that same would be paid as aforesaid, were wholly false; that d warranty has been broken and disregarded, in consequence whereof d plaintiff has suffered great damage and injury, to wit, the face or ed value of said bonds being the just and full sum of thirty-seven nd dollars ($37,000)."

ddition to the charge of a breach of warranty this count also con- averments found in the first count, and tending to give it the char- f a cause of action for deceit. They may be disregarded, however, e counsel for both parties have treated the first count as containing a f action for deceit and the second as setting forth merely a cause of for a defaulted warranty; and we shall so consider them.

rles S. Thomas (Wm. H. Bryant, Harry H. Lee, and Wm. P. rn, on the brief), for plaintiff in error.

rles R. Bell (Daniel Sayer, on the brief), for defendant in

ore SANBORN and HOOK, Circuit Judges, and LOCHREN, ct Judge.

OK, Circuit Judge, after stating the case as above, delivered inion of the court.

ht grounds were assigned in defendant's demurrer, but, so they need be considered, they present but three questions: there an improper joinder of causes of action in the same aint? Did the first count state a cause of action for deceit? e second count state a cause of action for breach of warranty? re was no misjoinder of the causes of action. The existence e was entirely compatible with the existence of the other. grew out of and presented but different phases of the same ction, and both tended to support a single recovery. It is

contended that the count for breach of warranty is upon contract, and therefore could not be united with one for deceit which is ex delicto. But an action for breach of warranty may be either in contract or in tort, at the pleasure of the pleader. Schuchardt v. Allens, 1 Wall. 359, 368, 17 L. Ed. 642; Shippen v. Bowen, 122 U. S. 575, 581, 7 Sup. Ct. 1263, 30 L. Ed. 1172. In fact, the ancient remedy was an action in tort, and the practice of declaring in assumpsit was an expedient afterwards adopted for the purpose of enabling the plaintiff to join the money counts with those upon the warranty. Williamson v. Allison, 2 East, 451. Under the modern system of pleading the actual facts constituting a cause of action are narrated, and, as a consequence, the line of distinction between tort and contract is frequently so shadowy and uncertain that it is difficult to determine to which class an action belongs. The proper construction in such cases is that which makes the complaint or declaration, as a whole, maintainable, and the different counts consonant with each other. It is well settled that, when they grow out of the same transaction, an action for deceit and an action on the case for breach of warranty may be joined. Shippen v. Bowen, supra; Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. 696, 30 L. Ed. 810; Schuchardt v. Allens, supra; Bliss on Code Pleading, § 120. The joinder was permissible under the Colorado Code. Mills' Ann. Code, § 70.

To afford sufficient basis for an action of deceit the representation must have been of material facts, and must have had such relation to the transaction in hand as to operate as an inducement to the action or omission of the complaining party (Slaughter's Adm'r v. Gerson, 13 Wall. 379, 383, 20 L. Ed. 627; Smith v. Chadwick, 20 Ch. D. 27); and it must have been relied on by him (Marshall v. Hubbard, 117 U. S. 415, 6 Sup. Ct. 806, 29 L. Ed. 919; Ming v. Woolfolk, 116 U. S. 599, 6 Sup. Ct. 489, 29 L. Ed. 740; Stratton's Independence v. Dines [C. C.] 126 Fed. 968, 977). The basis of the action of deceit is the actual fraud of defendant—his moral delinquency; and therefore his knowledge of the falsity of the representation, or that which in law is equivalent thereto, must be averred and proved. There is much confusion in the authorities upon this subject, due in part to the erroneous assumption that that which is merely evidence of fraud is equivalent to the ultimate fact which it tends to prove, and also to the assumption, likewise erroneous, that an untrue representation which would be sufficient to support a suit in equity for a rescission of a contract is equally as available in an action of deceit. In Derry v. Peek, 14 App. Cas. 337, 356, a well-reasoned case, Lord Fitzgerald said:

"The action for deceit at common law is founded on fraud. It is essential to the action that moral fraud should be established, and since the case of Collins v. Evans, 5 Q. B. 804, 820, in the Exchequer Chamber, it has never been doubted that fraud must concur with the false statement to maintain the action. It would not be sufficient to show that a false representation had been made. It must further be established that the defendant knew at the time of making it that the representation was untrue, or, to adopt the language of the learned editors of the Leading Cases, that 'the defendant must be shown to have been actually and fraudulently cognizant of the false-

his representation, or to have made it fraudulently without belief vas true.'"

e same case Lord Herschell said:

nk the authorities establish the following propositions: First, in sustain an action of deceit there must be a proof of fraud, and noth- t of that will suffice; secondly, fraud is proved when it is shown alse representation has been made (1) knowingly, or (2) without be- s truth, or (3) recklessly, careless whether it be true or false."

ord v. Goddard, 13 How. 198, 211, 14 L. Ed. 111, it was said:

gist of the action is fraud in the defendants and damage to the Fraud means an intention to deceive. If there was not such in- if the party honestly stated his opinion, believing at the time that d the truth—he is not liable in this form of action, although the rep- ion turned out to be entirely untrue. Since the decision in Hay- Creasy, 2 East, made in 1801, the question has been settled to this England. The Supreme Court of New York held likewise in Young l, 8 Johns, 23, 5 Am. Dec. 316. That court declared it to be well hat this action could not be sustained without proving actual fraud efendant, or an intention to deceive the plaintiff by false representa- The simple fact of making representations which turn out not to be connected with a fraudulent design, is not sufficient. This decision le forty years ago, and stands uncontradicted, so far as we know, in erican courts."

court has said that an action of deceit "requires for its foun- a false statement, knowingly made, or a false statement made rance of, and in reckless disregard of, its truth or falsity, and consequences such a statement may entail. The evil intent intent to deceive—is the basis of the action." Union Pac. . v. Barnes, 64 Fed. 80, 12 C. C. A. 48.

Lindman v. Bank, 112 Fed. 931, 945, 50 C. C. A. 623, 636, 57 A. 108, Judge Lurton said:

re the plaintiff can recover in an action of deceit, he must prove two that the representation was false, and that the person making it was false. * * * Such an action differs essentially from one for rescission of a contract on the ground of misrepresentation. In er kind of suit it is immaterial whether the representation was made stly or not. If the contract was obtained by misrepresentation, how- nestly made, it cannot stand. But when the action is for fraud and t is not enough to show that the representation was untrue; for, if honestly believed to be true, that is a good defense. Derry v. Peek, Cas. 337. But a representation recklessly made, without knowledge ruth, could not be a statement honestly believed."

lse statement recklessly made, without knowledge of its truth ity, is the equivalent of actual fraud. It is a false statement ngly made, within the settled rule. Cooper v. Schlesinger, S. 148, 155, 4 Sup. Ct. 360, 28 L. Ed. 382; Smith v. Richards, 26, 38, 10 L. Ed. 42; Lynch v. Trust Co. (C. C.) 18 Fed. 486.

. Justice Story observed:

affirmation of what one does not know, or believe to be true, is equally, ls and law, as unjustifiable as the affirmation of what is known to be ly false." Story, Eq. Juris. § 193.

false representation relied on as the ground of an action of must have accomplished the purpose of deception. Ming v. olk, supra. The plaintiff must have used due diligence to

discover for himself the truth or falsity of the representation (Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203), or the relations of the parties to each other or the location or character of the subject-matter of the transaction must have been such as to excuse investigation and to justify his reliance upon the assertion of the other. Again, the representation must be of existing and ascertainable facts, and not mere promissory statements based upon general knowledge, information, and judgment. Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105; Patent Title Co. v. Stratton (C. C.) 89 Fed. 174, 178. It was said in Union Pacific Ry. Co. v. Barnes, supra: "An action for false and fraudulent representations can never be maintained upon a promise or a prophecy." Nor is mere expression of opinion sufficient, though it be false, and be expressed in strong and positive language. Johansson v. Stephanson, 154 U. S. 625, 14 Sup. Ct. 1180, 23 L. Ed. 1009. Positive statements as to value are generally mere expressions of opinion and as such cannot support an action of deceit. Gordon v. Butler, 105 U. S. 553, 26 L. Ed. 1166; Blease v. Garlington, 92 U. S. 1, 9, 23 L. Ed. 521.

In Haycroft v. Creasy, 2 East, 92, the words complained of were, "I can positively assure you of my own knowledge that you may credit Miss R. to any amount with perfect safety." They were held not to be actionable, though it turned out that Miss R. was an impostor, who had succeeded in deluding many persons by false pretensions to wealth. It was observed that the use of the word "knowledge" by the defendant was merely an emphatic statement of his opinion concerning a matter which was peculiarly the subject of judgment or opinion, rather than of accurate knowledge; and reliance was also placed upon the absence of an affirmative showing of intentional fraud.

In Deming v. Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743, the representation that a certain railroad bond "was of the very best and safest and was an A No. 1 bond" was held a mere expression of opinion of value, and that it was not actionable, even though made in bad faith.

In Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113, it was said:

"The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell. All men know this, and a buyer has no right to rely upon such statement."

In Belcher v. Costello, 122 Mass. 189, the representation was that certain notes taken by plaintiff as collateral security were good. It was held that it was not the statement of a fact, but the expression of an opinion merely, and that the trial court erred in submitting to the jury the question whether it was intended by defendant to represent that the makers of the notes were in good pecuniary circumstances, and able to pay them, and in saying that, if they so found, the representation would be as to an existing fact.

In Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379, it was held that a false representation that certain corporate stock which was sold was worth at least 80 per cent. of the par value thereof was not actionable.

In Warner v. Benjamin, 89 Wis. 290, 62 N. W. 179, which was action for damages for fraudulently inducing the plaintiff to purase worthless mining stocks, it was held that representations the defendant that the plaintiff could not lose upon her investent, and that the mines would pay dividends in the near future, ere mere expressions of opinion, and of a promissory character, d did not afford a ground for recovery.

Reading the complaint in the light of these principles, what do e find? There is no direct charge that the defendant was actued by fraud or evil motive; that he knew that his representations ere false; that he made them for the purpose of deceiving the aintiff; or that he made them recklessly, neither knowing of their uth or falsity, nor caring. In the absence of such averment or e equivalent, it is obvious that an essential element in an action deceit would be lacking. It appears from the complaint, however, that defendant was the president and a director of the comny that issued the bonds, and that he was wholly conversant with affairs and condition; and it may therefore properly be said that false statement by him as to such matters, being neither of mere inion or judgment nor a prediction as to the future, was a false atement knowingly made within the rule. But it is entirely clear at this implication of scienter arising from defendant's official nnection with his company and his knowledge of its affairs apies only to existent facts, and does not, as matter of law, reach d cover the question of good faith in the expression of his opinn as to the worth of its securities were it material to be consided. The defendant's knowledge of the affairs of the company d his opinion predicated thereon are things wholly different. ctual conditions have but an evidential bearing upon the question sincerity with which one's opinion is entertained. Error in the ite judgment of man must always be expected. Account must e taken of imperfect appreciation of those things which lie before e eyes, and sanguine hopefulness, and even credulity; all of which ay be entirely consistent with the utmost good faith. So far, erefore, as the words of the defendant were mere expressions of s belief, the case has not even been brought within the doctrine those cases which declare to be actionable an intentionally false atement of opinion. The charge in a pleading of an erroneous inion based upon known conditions is not a charge of intentional d faith, fraud, or deceit.

The statement of the defendant that the bonds offered to the aintiff were first-class securities, that he knew them to be good, d knew that they would be paid, principal and interest, at marity, was a mere expression of his judgment or opinion as to their alue, and a prophecy as to the financial prosperity of his company. is true that the words of the defendant were positive and ematic, but, after all, they were only expressions of his belief. From e very nature of things, he could not have looked into the future, d foretold with certainty the successful conduct of the business; d, so far as the worth of the bonds depended upon the value of e property of the company, part of which was purchased of the

plaintiff herself, it is common knowledge that it might naturally be susceptible of the widest difference of estimate. Enterprises such as that behind the bonds in question not infrequently disappoint the anticipations of their projectors, and statements like those made by defendant should be taken not as representations of existing facts, but rather as expressions of expectancy and opinion.

It is not perceived how the representation that "the bond issue was all in the hands of the trust company" was material, how the falsity of the statement operated to the prejudice of the plaintiff, or was matter of inducement to her acceptance of the bonds sold to her.

The representation that the provisions and recitals of the bonds must be met whether the company would or no, is but an assertion that the payment of the bonds and the performance of such other stipulations as appeared thereon were not merely optional with the company, but existed as a legal obligation. As it was admitted in the first count of the complaint that the bonds were actually executed and issued by the company, there is nothing substantial in this averment. Another representation which is said to have been false was "that the bonds offered to this plaintiff were due absolutely July 1, 1901." Were nothing else to be said as to this, it appears elsewhere in the same count that the bonds matured on the day mentioned.

It was also charged that defendant represented that other persons had agreed to accept some of the bonds in part payment of mining property sold by them to the company; that the bonds offered to the plaintiff would come in before those held by defendant and his associates, and that as to such bonds she would occupy a preferred place among the bondholders. These representations were material, and were well calculated to induce the plaintiff to accept the bonds. There is no reference in the complaint to any recitals of the bonds themselves which would impugn her averment that, aside from the representations of defendant, she was wholly without knowledge or means of acquiring the same. In respect of these representations a cause of action is stated in the first count of the complaint, and the demurrer thereto should have been overruled. But it should be said that if, upon the trial, it is found that the alleged representation of priority of the plaintiff's bonds was merely that they would be paid at maturity, and would therefore be out of the way before those of succeeding installments would mature—a priority in time of payment, rather than of lien or obligation—it would be merely promissory in character and not actionable.

In an action of false warranty it is not necessary to allege or prove the scienter of the defendant, and in that respect it differs from an action of deceit. But the rule that applies to the latter, excluding from the class of actionable representations those which are purely expressions of opinion or belief or which are of a promissory character applies as well to an action of false warranty.

From the face of the two paragraphs of the second count which appear in the statement preceding this opinion there may arise an

nce that the plaintiff charged that defendant warranted the
ty of the bonds, and that the warranty was false. But in view
other averments, and what was said at the argument and in
iefs, there is no real contention that the bonds were not gen-
were not actually executed by the company, and did not con-
e valid obligations. The demurrer to the second count was
rly sustained.
e judgment of the Circuit Court is reversed, and the cause re-
ed, with directions to overrule the demurrer to the first count
complaint, and to permit the defendant to answer.

CIIREN, District Judge (dissenting). I concur fully in the
oing opinion excepting the conclusion that in respect to the
d representations of the defendant "that other persons had
d to accept some of the bonds in part payment of mining prop-
sold by them to the company, that the bonds offered to the
iff would come in before those held by defendant and his as-
es, and that as to such bonds she would occupy a preferred
among the bondholders," in the first count of the complaint,
nnection with the general averment that all representations
by the defendant were false, states a cause of action. That
sets forth very many distinct representations, as made by the
dant, followed by the sweeping general allegation "that the
statements, assurances, representations, and inducements of
lefendant were and are wholly false, ungrounded, and without
lation." There is no averment as to what the facts really were,
his is but an averment of a bare naked conclusion. The office
pleading is to state facts that the other party may be advised
at the claim he is called upon to meet is based upon. In this
count of this complaint many of these representations of de-
nt so in general terms alleged to be false are shown by the
stated in the same count to have been true; others are mere
ments of opinion or prophecy. In respect to the particular
tions above quoted, there is no averment that other persons
ot agreed to accept some of the bonds in part payment for
g property sold by them to the company; and as that count
e complaint shows that the company's issue of $750,000 of
s was to mature at the rate of $75,000 per year for ten years,
37,000 of bonds received by plaintiff maturing July 1, 1901,
of the second lot to mature, and would in fact "come in" be-
he installments coming due during the eight succeeding years,
laintiff would occupy a preferential place; hence that portion
s representation also appears to have been true. But the fault
e pleading is that it states no facts to support its charge of
ood and fraud. To aver that a representation is false or fraud-
, without stating the actual facts, is insufficient. Specht v.
, 12 Or. 117, 122, 6 Pac. 494. The true rule applicable to such
ading is tersely stated by Judge Hook in Williamson v. Beards-
137 Fed. 467 (just filed), as follows: "There was, however,
ntire absence of averment of substantive facts justifying the
ge of fraud, and in such a case the mere use by the pleader of

the terms 'fraudulent' and 'fraudulently' signifies nothing." Precisely so in respect to the terms "false" and "falsely." I think the demurrer was properly sustained.

KIRK v. UNITED STATES et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1905.)

No. 142.

1. BAIL BONDS—DEFAULT—ACTIONS.

Where a defendant indicted for conspiracy to defraud the United States executed a bond conditioned that he would appear on a specified day, and from day to day and from term to term should the case be continued, and answer to such things as should be objected against him, etc., and on his failure to appear as required the bond was duly estreated, the United States thereby acquired a perfect cause of action against the surety enforceable in a proper forum after due notice.

2. SAME—FEDERAL COURTS—JURISDICTION—PROCESS.

Where a surety on a bail bond resided in another district from that in which the bond was filed, and remained in the district of his domicile, his personal liability on the bond could not be established in any other district than that where he resided.

3. SAME—SCIRE FACIAS—TWO RETURNS NIHIL—PERSONAL SERVICE.

Where the surety on a bail bond filed in a federal court sitting in Georgia continued openly to reside in New York during all the time proceedings were pending in Georgia on the bond, two returns nihil in Georgia to a writ of certiorari after forfeiture of the bond in the district in which the bond was filed were not equivalent to personal service, so as to authorize a personal judgment against such a surety.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This is an appeal from a decree of the Circuit Court for the Northern District of New York, restraining the defendant Clinton D. MacDougall, as marshal, from selling the property of the complainant upon an execution for $40,000 and interest, issued on a judgment entered in the District Court of the United States for the Eastern Division of the Southern District of Georgia, on a forfeited bail bond, signed by the complainant as surety, and John F. Gaynor as principal. The facts appear in the opinion, delivered by Judge Ray on granting the preliminary injunction (C. C.) 124 Fed. 324, and by Judge Hazel at final hearing (C. C.) 131 Fed. 331.

See 130 Fed. 112, 64 C. C. A. 446.

Taylor L. Arms, Asst. U. S. Atty.

Abram J. Rose, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The bail bond signed by complainant was for the appearance of Gaynor to answer an indictment, found in the Eastern Division of the Southern District of Georgia, charging him and others with conspiracy to defraud the United States. The bond required Gaynor to appear in Georgia on the second Tuesday in February, 1902, "and from day to day and from term to term should the case be continued, and then and there to answer to such matters and things as have or shall be objected against

and to stand to, abide, and perform the orders of the court, ot depart the said court without leave." Gaynor was ordered pear in court on March 6 and also on March 17, 1902. He ot appear on either day, or on March 7th, to which day the edings, at the request of his counsel, were adjourned, and the was duly estreated. The United States thereupon acquired fect cause of action against the surety on the bond and noth- as thereafter required but to enforce the liability in the proper n after due notice to the surety.

e course adopted was as follows: On March 17th a writ of facias was issued by the District Court for the Southern Dis- of Georgia, directed to the marshal of that district "and to the hals of the United States." The writ was entitled "The Unit- tates v. John F. Gaynor, Principal, William B. Kirk, Surety," after reciting the facts, directed the defendants to show cause erm of court held at Savannah on the second Tuesday of May, why $40,000 should not be levied against their property. The personal service of this writ was made April 5, 1902, on the dant Kirk at his home in Syracuse, N. Y., he having been for years a resident of that city and a citizen of the state of New . On April 2d and again on July 15th the Georgia marshal return that the defendants could not be found within his ct. On July 17th an alias writ of scire facias was issued re- ble at Savannah on the second Tuesday of August, 1902, and nilar return "Not found" was made by the Georgia marshal. e is no proof that the alias writ was ever served personally ne defendant Kirk at Syracuse or anywhere else. On Janu- 2, 1903, the orders of the court forfeiting the bond were made and execution was directed to issue to the marshal for the nern District of Georgia, to the marshal for the Northern ict of New York and to the marshals of the United States. xecution, dated April 2, 1903, was issued to the marshal of the hern District of New York. It is to prevent the sale of his erty under this execution that the present action was instituted irk.

e question to be determined is whether the property of the plainant situated in the state of New York, he being a citizen at state and a resident of the city of Syracuse, can be taken xecution issued on a judgment of the District Court of Georgia ed without personal service of process within the jurisdiction at court. The question may be still further simplified as fol- : Were two returns nihil in the Georgia district equivalent to onal service? It is a fundamental rule of law that the prop- of a citizen of one state, situated within its boundaries, cannot eached by process issued out of the courts of another state, e he has not been served in the latter state, or in any manner nitted to the jurisdiction of its courts. This is true of both and federal tribunals. So long as such person remains in listrict of his domicile he must be proceeded against there and ersonal liability can be established in no other manner. The eedings of a court of another state have no extra territorial

force and it acquires no right to proceed because its process has been served on such person in the state where he resides. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; G. & B. Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670. We are cited to no authority holding that a different rule prevails where the proceeding is by scire facias, whether to revive or continue a former proceeding or in the nature of an original action.

Per contra, where the proceeding is in personam it seems to be clearly established that the writ, with certain exceptions, only one of which it is necessary to mention, must be served precisely as other writs are served. The legal fiction making two returns nihil equivalent to personal service is applicable only to the jurisdiction of the forum. The reason for this apparently paradoxical rule may be readily conjectured. It would, for instance, in a case like the one in hand, prevent a surety residing in the Georgia district from frustrating the ends of justice by concealing himself or absconding. Upon what theory it can be invoked against the complainant it is difficult to understand. It would strain the rules of logic to the breaking point to hold that two returns stating that Kirk cannot be found in Georgia, where he has never been, can be regarded as service upon him there when, during the entire period in controversy, he has been openly and notoriously residing at Syracuse, N. Y., where he could be found at all times. If the surety had property in the Georgia district, or if he had deposited money with the clerk as security it is quite likely that his title could be divested by scire facias proceedings there, but when it is sought to make him personally liable and to sell his property in the Northern District of New York he must be proceeded against in that district. The Supreme Court, though upon different facts, has held the law to be as above stated. Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837. The same principle was recognized in Brown v. Wygant & Leeds, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284. It may be that the giving of the bond in question was part of a deliberate scheme on the part of Gaynor to escape beyond the jurisdiction of the court; it may be that the liability of the complainant can be readily established and that he has no defense upon the merits, but with such considerations we are not concerned in the present action. In this country, and, indeed, in every civilized state, no man can be deprived of his property without due notice and opportunity to be heard and, after giving much consideration to the facts and law presented by this record, we are constrained to think that neither of these privileges has been accorded this complainant.

The decree is affirmed.

DAY v. MOUNTIN.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1905.)

No. 2,119.

ENDOR AND PURCHASER—SPECIFIC PERFORMANCE—CONTRACT ENFORCEABLE.
A contract for the sale of land, made in good faith, may be specifically enforced by the vendor, notwithstanding the fact that he did not have title at the time it was made, where such fact was stated and known to both parties, and he acquired the title before the time for performance arrived.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 257–277.]

ME—TITLE OF VENDOR.
A contract for the sale of lands which requires the vendor to furnish an abstract showing clear title calls for title in fee simple, and cannot be specifically enforced by the vendor where the only title shown to a substantial part of the lands is a government entry without final proofs, the legal title remaining in the United States.

ppeal from the Circuit Court of the United States for the Dis- of Minnesota.

he case having been fully argued on both sides, the court below g duly advised in the premises, rendered orally the following sion:

CHREN, District Judge. This is a suit in equity, which was commen- y James B. Day against William Mountin, Jr., to obtain a decree award- pecific performance of a contract entered into on the 21st day of March, by which Frank Day, of Hartford, Wis., agreed to sell to this defendant convey the land described in the bill, amounting to about 260 acres, in ounty of Blue Earth, in this state, for the sum of $15,000, to be paid as ded for in the contract, part of it by the assumption of a mortgage upon and, and part of it, amounting to $10,000, by a second mortgage upon the and a first mortgage upon some other land owned by Mountin, and a d mortgage on still other land.

e bill alleges that on the 21st day of March, 1902, the complainant, James ay, was the owner of this tract of land of 260 acres, which was incum- by a mortgage for $4,850 to David Mountin, a brother of the defendant; that Frank Day, who is a brother of the complainant, on the 21st day arch, 1902, at Good Thunder, in the state of Minnesota, entered into a act with the defendant by which he, Frank Day, sold and agreed to ey to the defendant and his assigns that tract of land, by deed of war- , for the sum of $15,000, on or before April 21, 1902; defendant to ne a mortgage of $5,000 upon the purchased premises, and for the ce—$10,000—to give a second mortgage on the same, and also a first gage on specified land of the defendant, and a second mortgage on the land. The mortgages were to bear interest at the rate of 5 per cent., oth parties were to furnish abstracts showing a clear title, the interest payable semiannually. The agreement, which is copied in the bill, goes provide that, should default be made in the payment of the several sums oney, either or all or any part thereof, or in the payment of the interest xes, or any part thereof, "or in any of the covenants of the agreement kept and performed by the party of the second part, then this agreement void at the election of said party of the first part, time being of the ce of this agreement. And in case of default by said party of the second in whole or in part, in any or either of the covenants of this agreement by him kept or performed he hereby agrees upon demand of the said of the first part quietly and peaceably to surrender to him possession id premises and every part thereof, it being understood that until such

default said party of the second part is to have possession of said premises." It further agrees that the covenants and agreements, and all of them, shall run to the heirs, executors, administrators, and assigns of the respective parties.

The evidence in the cause shows that at the time of this agreement this tract of 200 acres belonged to the complainant—he had the legal title—and that the defendant, under his brother, who was complainant's grantor, had been in possession of it some 20 years, and was holding under the complainant upon an old agreement that he should pay the taxes levied upon the land; and he was in such possession at the time when this written agreement with Frank Day was entered into.

There is one question that has not been argued at all. It does not appear in the pleadings, but it certainly appears upon the face of the agreement, and especially in the situation of the parties as shown by the evidence, that, at the time this agreement was made, Frank Day had no interest whatever in this land, legal or equitable, and that the defendant did have the possession under a verbal lease from his brother, the former owner of the land—a lease which had run so long that in law it would be regarded as a lease from year to year; and, as this written agreement provides distinctly that if the defendant shall be in default "in any or either of the covenants of this agreement entered into to be performed, he hereby agrees upon demand of said party of the first part quietly and peaceably to surrender to him possession of said premises and every part thereof, it being understood that until such default said party of the second part is to have possession of said premises," that question is this: Whether the parties having by this clause provided for the compensation which Frank Day, the vendor, should receive in case the defendant should make default on his part in the covenants of this agreement; whether the agreement is that the defendant shall either perform his covenants therein as specifically provided, or, as an alternative for nonperformance, shall deliver up this possession of the land which he had at the time, which was of course of some value, and which was something that Frank Day had no interest in, whether it was not an agreement to turn over to him something of value, and whether that was not the particular provision that was made, and the particular thing that he was required to do and obligated himself to do, in case of default in the performance of his agreement to purchase.

But it is not necessary to dispose of the case upon that ground. It appears, and is alleged in the bill, that on the 23d of March, two days after the making of the written contract, these parties came together, the complainant then being with Frank Day and the defendant; and the defendant at that time made an excuse for not performing alleging that his wife was absent, and would be at Mankato on the following day; and that thereafter, on or about the 24th day of March, before there had been any change with respect to the title, while the title was still in the complainant, and while Frank Day was still a stranger to the title, and the complainant a stranger to the contract of sale, the defendant met Frank Day and the complainant in Mankato, "but, instead of carrying out said contract, informed your orator and said Frank Day that he would not purchase said land and would not execute said mortgage, as required by said contract, and would not carry out said contract upon his part either then or in any future time."

Now, while this contract is doubtless a valid one in law between the parties to it, the question that is presented here is whether it is such a contract, under all the circumstances, as a court of equity will specifically enforce. Courts of equity for a long period have enforced specific contracts for the sale of land, in cases that were deemed proper for the exercise of equitable jurisdiction, upon the ground that when the contract was fair and reasonable, and no advantage taken by one party of the other, the damages recoverable by one party from the other in an action at law were not always adequate. It would seem, really, that the reason for invoking equitable jurisdiction to decree specific performance for the sale of land rests upon a stronger basis when invoked by the purchaser than when invoked by the vendor, where the sale is only for money to be paid, as the damages recoverable at law appear to provide adequate and ordinary compensation to the vendor for the breach of the contract, while such damages may be far from an adequate compensation to the pur-

, if he had a special reason for desiring to purchase a particular piece
d, over and above and aside from its marketable value. Equity does
that class of cases, any more than in any other classes of cases, give
unless the case made by the complainant is in all respects fair and
ble, and where the remedy, as well as the obligation, is mutual between
rties—where they stand on an equal footing. It was for some time held
rts of equity that a unilateral contract would not be enforced, for this
: that it was in form a contract only binding upon one party. But it
lso held that the other party by accepting such contract, and by per-
g or accepting performance to any extent, became equally bound; and
are courts of equity have enforced specific performance of contracts
ere unilateral in form. But I think in no case will such decree be
where the remedy was not mutual at the time the contract was made.
ot required, where a vendor seeks specific performance, that he shall
hat at the time he made the contract he had the complete legal title
self. If he had an equitable title, such as would give him the right
suit at law or otherwise to enforce his right to title against whoever
he legal title, so that he would obtain the legal title, then he had an
interest in the land and a reasonable hope of obtaining the title he
cted to convey.

re time is not by the terms of the contract made the essence thereof,
uld be allowed a reasonable opportunity to obtain the title and ten-
rformance, and he would not, therefore, be cut off from this equita-
medy. But I know of no case, and I do not think the ingenuity
nsel has been able to find any, at least none have been presented
where the bald statement has been agreed to in a court of equity
person with no right, no interest whatever in the land, legal or
ble, can make a contract to sell that land to another, and then obtain
le from some one else, and secure afterwards the aid of a court of
to enforce the performance of such contract. And this is true, for
ry obvious and sufficient reason that the other party, the vendee, would
ve the same remedy against him, he not having the title, and no spe-
erformance could be decreed or enforced against him. It might be op-
with him, after the contract was made, whether he obtained the title
, or it might be that he would be unable to obtain the title. Whether
s able to or not, whether he was willing or not, would make no differ-
f he was unable to at the time when he made the contract, and the
had to take the risk. The mere fact that he became able afterwards
not give him the right to enforce the contract by the decree of a court
ity.

, it appears from the allegations of the bill and from the evidence in
se that, while the title was in the same condition that it was when this
ct was made, on the 24th of March, 1902, the parties met together,
at the defendant, as far as he could, repudiated and rescinded the con-
and refused to carry it out then or at any future time. This is alleged
bill. At that time it appears that Frank Day, the other party to the
ct, and the owner of the contract at that time, and a party to the con-
still, had no title. He was not in a position to convey the premises to
fendant, although the owner of the title was present and was willing
part to volunteer to convey. But the defendant had not obligated him-
receive such a title, and he was not bound to do so. The other party
not then carry out the contract according to its terms. I am inclined
nk that, under the circumstances, at that time the defendant had the
o rescind the contract and to refuse to be longer bound by it; I mean,
as any relief from a court of equity is concerned. He did nothing fur-
o lead the other parties on to do anything more towards carrying out
ntract, and there are no equities raised against him which would entitle
ndor to a decree for specific performance.

the whole case, I think the complainant is not entitled to any decree
s cause, notwithstanding the fact that afterwards Frank Day transfer-
him this contract, and he tendered conveyance of the land, and also a
of the land made by Frank Day. So, without considering the question
er the abstract was sufficient or not, I am inclined to think that com-

plainant is not entitled to recover, and a decree may be entered dismissing the bill, with costs.

H. W. Sawyer, for appellant.

H. L. Schmitt and A. E. Clark (J. W. Schmitt, on the brief), for appellee.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

RINER, District Judge. This is a bill in equity brought by appellant (complainant below) to enforce specific performance of a contract to purchase two hundred and sixty (260) acres of land situate in Blue Earth county, Minn.

The contract is in the following words, to wit:

"This agreement, Made and entered into this 21st day of March, A. D. 1902, by and between Frank Day of Hartford, Wis., party of the first part, and William Mountin, Jr., party of the second part, Witnesseth: That the said party of the first part, in consideration of the covenants and agreements of said party of the second part, hereinafter contained, hereby sell and agree to convey unto said party of the second part, or his assigns, by deed of warranty, upon the prompt and full performance of said party of the second part of his part of this agreement, the following described premises situate in the County of Blue Earth and State of Minnesota, to wit: the northwest quarter of the southeast quarter (N. W. ¼ of S. E. ¼) in Section eighteen (18); also the north sixty (60) acres of the southeast quarter of section nineteen (19); also the southwest quarter of section twenty (20) all in township one hundred and six (106) North, Range twenty-seven (27) containing in all two hundred and sixty acres (260) more or less, according to Government survey. And said party of the second part, in consideration of the premises, hereby agrees to pay to said party of the first part, as and for the purchase price of said premises the sum of Fifteen Thousand Dollars in manner and at the times following, to wit: Fifteen Thousand Dollars on or before April 21st, 1902; Party of the second part is to assume a mortgage of $5,000 on above premises; for the balance $10000— to give a second mortgage on same, also a first mortgage on the northwest quarter of section twenty (20) also the east half of the southeast quarter and the southwest quarter of the southeast quarter of section eighteen all in said township 106, Range 27, also a second mortgage on the north half of the northeast quarter and the northeast quarter of the northwest quarter except the west two acres of the northeast quarter of the northwest quarter of section nineteen, said township 106, Range 27, said mortgage to bear interest at the rate of 5%. Both parties are to furnish a complete abstract showing clear title. Interest payable semi-annually. But should default be made in the payment of said several sums of money or any or either of them, or any part thereof, or in the payment of said interest or taxes, or any part thereof, or in any of the covenants herein to be by said party of the second part kept or performed, then this agreement to be void, at the election of said party of the first part, time being of the essence of this agreement. And in case of default by said party of the second part in whole or in part, in any or either of the covenants of this agreement to be by him kept or performed he hereby agrees upon demand of said party of the first part, quietly and peaceably to surrender to him possession of said premises and every part thereof, it being understood that until such default said party of the second part is to have possession of said premises. All the covenants and agreements herein contained shall run with the land and bind the heirs, executors, administrators and assigns of the respective parties hereto. The within mortgage is to run eight years from date of delivery of deed. It is Mutually Agreed by and between the parties hereto that the time of payment shall be an essential part of this contract; and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, admin-

s, and assigns of the respective parties. In testimony whereof, Both have hereunto set their hands and seals the day and year hereinbefore

Frank Day. [Seal.]
"William Mountin, Jr. [Seal.]"

alleged in the bill that on the 21st day of March, 1902, com-nt was the owner of the land described in the contract; that 23d day of March, the complainant and Frank Day called the defendant and informed him that complainant was ready nvey the premises to Frank Day, and that Frank Day was to convey the same to him, and to furnish an abstract show-perfect title as soon as the defendant was ready for it; that fendant made no objection to the contract at the time, and that he and his wife would be at Mankato the following day; n the 24th of March the defendant met the complainant and Day at Mankato, but, instead of carrying out the contract, ned complainant that he would not purchase the land, and not execute the mortgage, as required by the contract, and not carry out the contract on his part either then or at any time; that Frank Day thereupon demanded that the defend-rry out the contract upon his part, and then and there offered as able and willing to convey the premises to defendant as led in the contract, but that defendant absolutely refused to It is then alleged that on the 26th of March, 1902, Frank nd Mammie Day, his wife, by their contract in writing, duly nd assigned the contract between Frank Day and William tin to the complainant, subject to the performance by the ainant of each and all the conditions of the contract to be med by Frank Day; that on the 28th of March, 1902, the ment was duly recorded in the office of the register of deeds ie Earth county, Minn.; that on the 2d day of April, 1902, the dant was notified that the contract had been assigned, and a of conveyance of the premises described in the contract, to-r with an abstract, were presented to defendant, ready for ry to him upon his executing and delivering to complainant ortgage for $10,000 as provided in the contract; that the com-nt at the same time demanded that the mortgage be delivered, ne terms of the contract upon the part of the defendant com-with on or about the 22d day of April, 1902; that thereupon efendant again positively refused to carry out the contract his part, either then or at any future time. It is further al-that thereafter, and before the commencement of this suit, lainant tendered to defendant a deed conveying the lands de-d in the contract, containing full covenants of warranty, sub-o said mortgage executed by Frank Day and his wife to him, efendant, and also a separate deed to the lands executed by the lainant and his wife to the defendant, containing full cove-of warranty, subject to the mortgage, together with an ab-of title; that, by reason of his entering into the contract ing to purchase the lands, the defendant has been enabled to has had, and now has the quiet and peaceable possession of

the land, without any contract or agreement as to terms, except that he would purchase the land.

To this bill the defendant first filed a plea in bar, which was overruled by the court. Thereafter, on the 31st of October, 1902, the defendant filed an answer, in which he admitted that he was in possession of the land, but alleged that he came into possession of it by reason of an oral lease entered into between himself and David Mountin, who was then the owner of the land; that by the terms of the lease, in consideration of his paying the annual taxes and road taxes assessed against the premises, he was to have the use and possession of the land; that, pursuant to this oral lease, he had been in possession of the premises for 20 years; that the lease had never been terminated; and he denied that he ever entered into possession of the premises, or any part thereof, under or by virtue of the contract entered into by and between himself and Frank Day. He admitted the assignment by Frank Day and Mammie Day, his wife, to complainant, but alleged that it was without consideration, and made with intent to hinder, delay, and defraud the creditors of Frank Day. He further admitted that the assignment was recorded in the office of the register of deeds, and that soon thereafter he received notice of the assignment. He further admitted the tender of the deeds by complainant and wife, and Frank Day and wife, as alleged in the bill. He then alleges that Frank Day never owned the premises described in the contract, and that he procured the making of the contract fraudulently and through misrepresentation as to the ownership of the property, and entered into the contract merely as a speculation for the purpose of defrauding the defendant, well knowing at the time that he was and would be unable to procure title to the lands mentioned and described in the contract; that neither Frank Day nor the complainant has ever procured, exhibited and delivered, or caused to be exhibited and delivered, an abstract of title to the premises to defendant, showing clear title to the lands as provided in the terms of the contract; that both the complainant and Frank Day have wholly failed and refused to carry out or perform their part of the terms and conditions of the contract, and never have been, and are not now, willing, ready, or able to perform or carry out their part of the terms and conditions thereof; that in truth and in fact the title to the premises which Frank Day agreed to convey to this defendant by the contract was at the time of the execution of the contract, and ever since has been, and is now, defective and unmarketable, which facts were well known to the complainant and Frank Day. He then alleges that the contract is too indefinite and uncertain to be of any effect.

To this answer the complainant filed a reply, and the case was sent to a master to take and report the evidence.

It is established by the evidence that the defendant entered into the contract, hereinbefore set out, with Frank Day on the day that it bears date; that Frank Day at that time informed the defendant that his brother owned the land; that, on the day the contract was made, James B. Day, a brother of Frank Day, held a deed for the

tate described in the contract, having purchased it from David
in, brother of the defendant; that soon after the execution
contract Frank Day and James B. Day joined in a telegram
defendant advising him that they were ready to carry out the
t, and that on the 23d of March, 1902, James B. Day and
Day called upon the defendant at his home; that he then
to meet them at Mankato on the following day, which he
hat he then and there declined to carry out the contract on
; that on March 26th Frank Day assigned the contract to
mant; that complainant has tendered to defendant deeds
oth Frank Day and from himself; that the defendant at all
refused to perform and carry out the terms of the contract
part; that complainant did not have perfect title to a portion
premises described in the contract.

Circuit Court dismissed the bill on the ground, as we gather
ne opinion attached to the record, that there was, at the time
ntract was made, no mutuality of remedy. Such mutuality
edy did arise, however, on March 26, 1902, when the assign-
was made to James B. Day, and more than 20 days before
1, 1902, when the contract was to be performed.

n this question of mutuality of remedy at the time a con-
s executed, there is some apparent conflict of authority. In
f the text-books statements may be found to the effect that,
there is mutuality of remedy at the time the contract is
specific performance will not be decreed. Fry on Specific
mance of Contracts, 214; Bisp. Eq. 437; Eaton, Eq. 548.
has been so held in several cases. Boucher v. Vanbuskirk,
. Marsh. 345; Hutchinson v. McNutt, 1 Ohio, 14; State v.
6 Ohio, 383; Caheen v. Gordon, 1 Hill, Eq. (S. C.) 51; Norris
(C. C.) 46 Fed. 400; Farrer v. Nash, 55 Beav. 167; Bronson
ll. Fed. Cas. No. 1,926.

reason given for the rule in most of these cases is that such
saction will not be sanctioned by a court of equity because
mere speculation, and one who speculates upon that for which
no contract, or the means of acquiring it, is not a bona fide
ctor. In Eaton's Eq. 548, it is said:

> "If the vendor had no title at the time the contract was executed, equity will interfere to compel specific performance of the contract, even if the vendor subsequently acquires a title. Such a transaction is speculative, and the vendor is not a bona fide contractor."

er courts have seemingly adopted the rule that a contract for
e of real estate which the vendor does not own is enforceable
cific performance whenever, at the time the contract is to be
med, there is a mutuality of remedy. Easton v. Montgom-
Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; Burks v. Davies,
114, 24 Pac. 613, 20 Am. St. Rep. 213; 1 Chitty on Contracts
Am. Ed.) 431; Dresel v. Jordan, 104 Mass. 407; Townshend
dfellow, 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739, 12 Am.
. 736; Smith v. Cansler, 83 Ky. 371; Hepburn v. Auld, 9
32, 3 L. Ed. 96.

An examination of the cases last cited will show that in many if not all of them the vendor's title was defective only, and that he had some interest in the lands sought to be conveyed, either equitable or otherwise, although he had not a good title at the time the contract was executed. Such was the case in Hepburn v. Auld, where the court held that, if the vendor was able to give a good title at the time of the decree, the contract could be specifically enforced. In Easton v. Montgomery, the court said:

"It is not necessary, however, that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in the land or a right to become the owner of the land is as much the subject of sale as is the land itself, and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof. * * * If the agreement is made by him in good faith, and he has at the time such an interest in the land, or is so situated with reference thereto that he can carry into effect the agreement on his part at the time when he has agreed so to do, it will be upheld."

And in Burks v. Davies, 85 Cal., 24 Pac., 20 Am. St. Rep., it is said:

"If, though he be not the absolute owner, it is in his power by the ordinary course of law or equity to make himself such owner, he will be permitted within a reasonable time to do so."

In Smith v. Cansler, 83 Ky., Holt, J., said:

"Mutuality of obligation is, in general, necessary to the validity of a contract; and it is a general rule that, in order to be binding, it must be enforceable by either party. If, however, one is not invested with such a title as he undertakes by his contract to make to a purchaser, yet if time be not of the essence of it, and he is able to make title when the time for performance arrives, and tenders the deed, then it will be enforced, although his title was defective at the date of the contract; and in such a case, if a rescission be asked by the other party, and the vendor is not able at the time of the institution of a suit for this purpose to comply with the contract, yet, if he can perfect the title within a reasonable time, the court will afford him an opportunity to do so."

While it is practically impossible to lay down any definite rule upon this subject because of the varying circumstances which surround each particular case, yet we can see no just reason why a contract by one to sell and another to purchase a piece of property, when the vendor informs the vendee at the time the contract is made that he intends to purchase but does not then own the title to the property, is not as fair, reasonable, and enforceable a contract as one to sell the property to which the vendor has title. A court of equity compels specific performance of contracts because it is the intention of the parties that they shall be performed. The person who demands performance must, it is true, be in a capacity to do substantially all that he has promised before he can entitle himself to the aid of the court. At what time this capacity must exist, whether it must be at the date of the contract, at the time it is to be executed, or at the time of the decree, depends much upon circumstances, which may vary with every case. There is, per-

o class of cases which more require the exercise of a sound
on.

e is, however, another question presented by this record
necessitates the affirmance of the decree made by the Cir-
urt. The contract in this case provides that both parties
urnish a complete abstract showing clear title, and that the
ance from Frank Day to the defendant shall be by deed of
ty. This we construe to mean a fee-simple estate. The
discloses that the title to a portion of the land to be con-
to wit, southwest quarter of section twenty (20), township
nge 27, consisting of one hundred and sixty (160) acres, is
e, in that the legal title thereto has never passed out of
ited States. The evidence shows that John A. Willard,
whom the complainant claims to hold title, made an entry
his land. There is nothing, however, to show the nature
entry, whether it was made under the homestead, pre-emp-
other land laws of the United States. No receiver's receipt,
's certificate, or patent has ever been recorded. And there
ng in the record to show that the entry was ever perfected,
oof made, or that the government has ever been divested of
al title to this tract of land. An entry merely vests the
an with an interest in the land which may ripen into a legal
on final proof and the issuance of a patent. Cornelius v.
128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482; Fenn v. Holme,
. 481, 16 L. Ed. 198. In the case last cited, which was an
n ejectment, the Supreme Court said:

> "gal title to the land in question remains in the government until it is by the government in its grantee. The patent is the superior and e evidence of legal title. That the plaintiff in ejectment must in all ve a legal title to the premises in himself at the time of the demise he declaration, and that evidence of an equitable estate will not be for a recovery, are principles so elementary and so familiar to the n as to render unnecessary the citation of authority in support of he inquiry presents itself as to who holds the legal title to the lands on. The answer to this question is that the legal title remains in the owner, the government, until it is invested by the government in its * * * that Congress has the sole power to declare the dignity t of titles emanating from the United States; and the whole legisla- he government in reference to the public lands declares the patent superior and conclusive evidence of legal title. Until it issues, the the government, which by the patent passes to the grantee, and he is o enforce the possession in ejectment."

ready suggested, the evidence shows an entry or a mere
a portion of the land in question. This, we think, was not
t to authorize a decree for the specific performance of this
. Both upon principle and authority, we think it entirely
at specific performance will not be decreed upon the appli-
f the vendor of real estate, unless his ability to make such
s he has agreed to make be unquestionable; and a court
y will not interpose its extraordinary power to compel the
performance of a contract if the person demanding it can-
he date of the decree, himself do all that it is incumbent
n to do by the terms of the agreement, unless it be a case

where the failure to perform belongs to the category of those in which substantial justice can be done by allowing compensation to the purchaser and decreeing performance with allowances. This, however, is not such a case. Morgan v. Morgan, 2 Wheat. 290, 4 L. Ed. 242; Jeffries v. Jeffries, 117 Mass. 184; Richmond v. Gray, 3 Allen, 25; Hayes v. Harmony Grove Cemetery, 108 Mass. 400.

The decree of the Circuit Court is affirmed.

CROSBY v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. April 27, 1905.)

No. 172.

1. MASTER AND SERVANT—INJURIES TO SERVANTS—RAILROADS—FELLOW SERVANTS.

A fireman on a railroad passenger engine is a fellow servant with the conductor of a passenger train approaching from the opposite direction, for whose negligence, resulting in the fireman's death in a head-on collision, the railroad company was not liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 507.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

2. SAME—EMPLOYER'S LIABILITY ACT—PERSONS ENGAGED IN SUPERINTENDENCE.

Laws N. Y. 1902, p. 1749, c. 600, provides that an employé, his executor or administrator, shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of nor in the service of the employer nor engaged in his work, where personal injury is caused to the employé by reason of the negligence of any person in the employer's service intrusted with or exercising superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority and consent of the employer. *Held*, that where the rules of a railroad company provided that a train must be governed strictly by the terms of orders addressed to it which, once in effect, so continued until fulfilled, superseded, or annulled, and a railroad conductor received and violated an order from his train dispatcher, which violation resulted in a collision in which the fireman of the opposite train was killed, such conductor was not then "acting as superintendent in the absence of the railroad company's superintendent," within the statute, so as to render the latter liable for the fireman's death.

In Error to the Circuit Court of the United States for the Western District of New York.

See 123 Fed. 193.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Western District of New York, upon a verdict directed in favor of defendant in error, who was defendant below. The action was brought to recover damages for the death of Peter W. Putnam, fireman on a passenger train of the defendant, who was killed in a head-on collision with another passenger train near Rochester, N. Y.

lk Gibbons, for plaintiff in error.
es McCormick Mitchell, for defendant in error.

ore LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COMBE, Circuit Judge. There is no conflict of evidence, cts in the case having been stipulated. The complaint al- hat the accident was caused solely by the negligence of one vergne, conductor of the train with which Putnam's train d, who, "as such conductor, and in the absence of the super- ent of said railroad line, was acting as superintendent, with thority and consent of the defendant, of a certain train of and that he was negligent "while acting as such superin- t."

railroad of defendant from Rochester to Honeoye Falls was ed as a single-track road, having at the Rochester terminus, certain other points on the road, switches and sidings to trains to pass each other in safety. The movement of trains general regulated by the time-table, but, when occasion ed a departure from the time-table, the character and extent departure was regulated by telegraphic orders. Such or- r the movement of trains on the division where the accident ed were issued by the train dispatcher from the transmit- ffice at the city of Buffalo under the authority of the super- ent of that division, whose office was located at Buffalo. e day in question De Lavergne was conductor, and Connelly man, of passenger train No. 656, scheduled on the time-table e the station at Rochester (east-bound) at 6:30 p. m. An- passenger train, No. 665, was scheduled on the time-table to Honeoye Falls for Rochester at 5:53 p. m. At 6 p. m. the dispatcher issued a "31" telegraphic train order from his in Buffalo, which directed No. 665 to proceed to Rochester without stopping upon the side track to allow train 656 s it, and directed the latter train to remain at Rochester , and not depart therefrom until after the arrival thereat n No. 665. This order was duly transmitted to Rochester, pies duly delivered both to the conductor and engineman of 56 at 6:19 p. m. By the rules a train "must be governed by the terms of orders addressed to it and must not assume not conferred by such orders," which "once in effect continue il fulfilled, superseded or annulled." The same order was uly transmitted to another station on said line, known as ester Junction," and there duly delivered to the conductor gineman of train 665 at 6:14 p. m. Train 656 left Rochester at 6:30 p. m., prior to the arrival of train 665. Said train arted by conductor De Lavergne giving a hand signal to start fireman, who communicated such signal to the engineman, lly, who thereupon started his engine. No train order, other ne one heretofore specified, was issued or given to either said ctor or engineman, subsequent to its issuance and delivery h of them; each of them, at the time the train was started,

had in his possession his respective copy of said order, and the action of both in starting the train was an inexcusable violation of the rules, and, concededly, negligence. As a result of such negligence the train collided, about a mile east of Rochester station, with train 665, without any fault on the part of the conductor or engineer of the latter train.

It is manifest from this statement of facts that plaintiff could not recover in the federal courts on general principles of law. The case of C., M. & St. P. Railway Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, is substantially overruled by N. E. R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. It had been already shorn of its authority by N. P. Railroad v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; Central R. R. of N. J. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; and Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746. The same court (dividing five to four) has gone still further in Northern Pacific Ry. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006; but even without this last authority it is now settled law in the federal courts that conductor, engineer, and brakemen must be deemed to have been fellow servants. The law is the same in New York. Wooden v. West N. Y. & P. R. R., 147 N. Y. 508, 42 N. E. 199. The plaintiff's sole reliance is the employer's liability act of the state of New York (Laws 1902, p. 1749, c. 600). It provides that "the employé [or executor, or administrator] shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of, nor in the service of the employer, nor engaged in his work," "where * * * personal injury is caused to an employé * * * by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority and consent of such employer."

The sole question presented here is whether the conductor was a person "entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence"? or, if he was not generally such a superintendent, was he on the particular occasion, "in the absence of such superintendent, acting as superintendent with the authority and consent of the employer"? The New York statute is modeled generally upon the English employer's liability act, but differs from it in one important particular. Besides provisions for the negligence of any person who has any superintendence intrusted to him, the protection of the English act is extended to employés injured by reason of the "negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive-engine or train upon a railway." A similar clause is found in the employer's liability acts in Massachusetts, Alabama, Indiana, and Colorado. Reno's Employer's Liability Acts, Appendix. The New York act contains no such clause. It is stated in defendant's brief that such a clause was in the original bill, but was struck out before passage.

r that may be, the failure to include it, although in many spects the English and Massachusetts acts were used as is suggestive; and the decisions in other states as to lia- the negligence of conductors under statutes which include se are unpersuasive to a construction of the New York act, it applies to the operation of railroads. The only author- s state to which our attention has been called bearing upon ich of the case is McHugh v. Manhattan Ry. Co., 119 N. 2 N. E. 312, where a train dispatcher or yardmaster neg- directed the starting of the train while deceased was in a of danger. The train dispatcher had charge of the yard sidings at stations where trains are made up, the move- trains therein, and of the yard force employed at those nd enginemen were directed to obey his orders in regard ng and making up trains and starting from terminals. The complicated by the circumstance that the train dispatcher, , had momentarily (as he had a right to do under the rules) ver his work to his telegraph operator, Flanagan. The ld that, except for the statute, defendant would not have le for the negligence of either Coleman or Flanagan; and nagan was acting as substitute with defendant's authority nt. Defendant conceded that Coleman was a superin- within the terms of the statue, but contended that the par- uty of seeing that the coupling was made and the coupler was not in the nature of superintendence, but merely a the work. Of this contention the court says:

> ess, had the train been started by the engineer without a signal, or nductor or one of the guards improperly given a signal for the train t would have been the act of a fellow servant, and the defendant have been liable therefor. But it does not follow that the act of a atcher in sending out the train is to be regarded in the same light he same character."

hey held the employer liable. This opinion is not par- illuminative of the question presented on this appeal, al- he above quotation seems to indicate that the court were ned to put train dispatchers and conductors in the same . The cause of the accident in the case at bar was the o to regulate the movement of trains on that division as collision. The person who was intrusted with that super- ce was the train dispatcher at Buffalo. Whatever may n the power and duties of the conductor relative to running —and the rules which were put in evidence show them to are ordinarily understood to be such duties—he was, un- circumstances here shown, when the time-table had been d by a "31" order, wholly without any discretion or ini- s to starting, without even any power himself to start the the rule required the engineman with such an order in et to disobey the conductor's signal to start, should the dertake to give one. Plaintiff, no doubt appreciating this , contends that the conductor was a "person acting as su- lent" with the authority and consent of the employer, in

the absence of the superintendent. That is the theory of the complaint; see quotation therefrom, supra. The argument is:

"Now, if it be assumed that the division superintendent would be the person whose sole or principal duty is that of superintendence, it must be admitted that he was absent at the time of the accident. He gave certain orders which the conductor had to carry out. The superintendent cannot be personally present on each train. He is but one man, and the railroad company has many trains. He must therefore, in his absence, intrust some person with his authority on each train. Under the rules of the company, that person is the conductor."

The rules of the company warrant no such conclusion. The authority of the superintendent empowers him to say when the time-table shall be modified, and when a "31" order stopping a train shall be suspended or annulled. No such authority is conferred by the rules on any conductor whose train has been stopped by a "31" order; he must wait, obedient to the order, without initiative or discretion, until the superintendent, or whoever else may be acting as superintendent, shall suspend or annul it. Moreover, we cannot assent to the proposition that the division superintendent was "absent at the time of the accident." Upon the plaintiff's theory that he must be actually within sight of each train, he would always be absent when performing his duties. He sits in his Buffalo office, where he is constantly advised by telegraph of the movements of all trains on his division. Every delay in the advance of a train from point to point, every interference with freedom of movement through some accident, every departure of existing positions of trains at any moment from those which the time-table indicates they should occupy, every derangement of relative movements on the whole or a part of the division due to the introduction of unscheduled trains, is displayed before him, and, as the rules indicate, he is the one to exercise discretion as to the modifications which every varying situation requires in order to insure safety. Moreover, his directions and orders are transmitted by the telegraph to every station or train which it may be necessary to instruct, and, when received, his orders are made controlling upon those to whom the actual operation of the train is confided. His mind is present though his body be absent, and it makes no difference whether his order is handed to them by a telegraph operator at some particular station or by himself. We approve the contention of the defendant that the train dispatcher or division superintendent was legally and constructively present by virtue of his orders, which were duly transmitted and duly delivered to conductor and engineman in charge of the train, inasmuch as, under defendant's rules, the said operatives were under an absolute obligation to carry out these orders.

The judgment is affirmed.

D STATES v. ROESSELER & HASSLACHER CHEMICAL CO.

Circuit Court of Appeals, Second Circuit. March 1, 1905.)

No. 126.

S DUTIES — CLASSIFICATION—FERRO-CHROME—FERRO-MOLYBDENUM—
-TUNGSTEN—FERRO-VANADIUM—FERRO-MANGANESE.
ro-chrome, ferro-molybdenum, ferro-tungsten, and ferro-vanadium,
, like ferro-manganese, are employed as alloys in making steel,
so resemble ferro-manganese that even experts are unable to tell
apart, and which are similar in quality and use to ferro-manganese,
h they produce different results, and are not applied at the same
in the process of making steel, are, by virtue of the similitude
in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S.
St. 1901, p. 1693], dutiable at the rate applicable to ferro-mangan-
nder paragraph 122 of said act, Schedule C, § 1, 30 Stat. 159 [U. S.
St. 1901, p. 1636].

METALS UNWROUGHT.
onstruing the provision in paragraph 183, Tariff Act July 24, 1897,
§ 1, Schedule C, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645], for
ls unwrought," *held*, that "unwrought" implies a metal which is
le of being wrought, and not a substance fit only to be used with
ingredients to produce an entirely different and distinct product,
hat ferro-chrome, ferro-molybdenum, ferro-tungsten, and ferro-vana-
used only in imparting certain qualities to steel, and incapable of
themselves wrought into any useful article, are not within said
ion.

SIMILITUDE.
provision in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205
Comp. St. 1901, p. 1693], that articles not enumerated shall pay
me rate that is applicable to the enumerated article which they
resemble, does not require identity. It is enough if there be a
ntial similitude in any of the particulars mentioned in the statute.
. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties,

l from the Circuit Court of the United States for the South-
rict of New York.

an appeal from a decision of the Circuit Court for the Southern Dis-
ew York, affirming a decision of the Board of General Appraisers,
rruled the action of the Collector in assessing the imported mer-
as metal unwrought, under paragraph 183 of the act of July 24,
, § 1, Schedule C, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645], which
ws: "Metallic mineral substances in a crude state, and metals un-
not specially provided for in this act, twenty per centum ad valo-
e importer protested, insisting that the merchandise, which consist-
ro-chrome, ferro-tungsten, ferro-molybdenum and ferro-vanadium,
ve been assessed directly, or by similitude to ferro-manganese, under
ions of paragraph 122 of the act, 30 Stat. 159 [U. S. Comp. St. 1901,
which is as follows: "Iron in pigs, iron kentledge, spiegeleisen, ferro-
e, ferro-silicon, wrought and cast scrap iron, and scrap steel, four
r ton; but nothing shall be deemed scrap iron or scrap steel except
refuse iron or steel fit only to be remanufactured." Section 7 of the
at. 205 [U. S. Comp. St. 1901, p. 1693] (the similitude clause), so far
ble to the present controversy, is as follows: "That each and every
article, not enumerated in this act, which is similar, either in mate-
ty, texture, or the use to which it may be applied, to any article
ed in this act as chargeable with duty, shall pay the same rate of
h is levied on the enumerated article which it most resembles in any
rticulars before mentioned; * * *" The protest also contains an

alternative provision for assessment of duty under section 6 of the act, which is as follows: "That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem." The decision of the Circuit Court will be found reported in 131 Fed. 576.

Charles D. Baker, Asst. U. S. Atty., and Charles Fuller, Special Asst. U. S. Atty.

Frederick W. Brooks, for appellee.

Before WALLACE and COXE, Circuit Judges.

COXE, Circuit Judge. There is practically no dispute as to the nature and method of production of the merchandise in question. All of the four "ferros" are mixtures of iron and chromium, tungsten, molybdenum and vanadium, respectively, obtained by direct smelting in an electric furnace.

The proper classification of ferro-chrome for tariff purposes has been several times passed upon by the courts and as it is conceded that all of the ferros here in controversy are, in essential particulars, alike it will simplify the discussion if it be confined to ferro-chrome alone. We understand this to be the view of counsel for the appellant, for they say of the other ferros: "Their status will in this instance rest on that of ferro-chrome." And, again: "If similitude be found in the case of ferro-chrome, similitude must of necessity also be found in the other substances involved."

Ferro-chrome is produced, in its most advantageous form, by reducing chrome iron ore with carbon in an electrical furnace; it contains iron, chromium and carbon. One of its principal uses is in the manufacture of armor-piercing projectiles and armor plates. It is also used generally to impart hardness and toughness to steel structures and implements where these qualities are particularly needed, such as burglar-proof safes, crushers, cutting tools and the like. Its principal use is as an alloy for steel. It cannot be hammered or rolled or worked into any commercial article, and this is true of all of the ferros in controversy.

Ferro-manganese, like all the others, is produced by smelting the ore containing iron and manganese; it is added to the steel in the process of manufacture. It is used in making steel for the cheaper class of projectiles and for other purposes where hardness, strength and ductility are necessary.

This, for the present, is a sufficient description of the two materials which are brought into comparison.

There is no conflict here between the ordinary and commercial meaning of tariff nomenclature. No testimony, certainly no competent testimony, has been given tending to prove a commercial or trade meaning of the words in controversy.

It is admitted on all hands that ferro-chrome is not, eo nomine, enumerated in the tariff act of 1897. If, therefore, it be not covered by the general language of paragraph 183 as a "metal unwrought" it becomes a nonenumerated article subject to the provisions of the similitude clause.

ecision that ferro-chrome is not a metal unwrought does not arily involve a decision that it is a manufactured article; it ugh if the collector's classification be erroneous. The ordi- meaning of "wrought" is worked up, elaborated, worked into labored, manufactured, not rough or crude. "Unwrought" ts the reverse of these conditions. When one speaks of an ought material he means one which has not been worked into one which is unlabored, unelaborated, rough and crude. But ord also implies a material which is capable of being trans- d from its crude material to an improved condition, produced e labor to which it may be subjected. To be more specific, rought metal" implies a metal which is capable of being ght and not a substance which is only fit to be thrown into ucible to be melted up with other ingredients to produce an ly different and distinct product.

e principal expert witness for the appellant, Dr. Waldo, tes-

o not recall any case where ferro-chrome is used alone in metallurgy. rse it is used as a mordant and that sort of thing outside."

other witness called by appellant says:

ave never known ferro-chrome to be wrought or manufactured. I have wrought or manufactured nor has my company ever wrought or manu- ed ferro-chrome. I have never known ferro-chrome, by itself, to be into anything for practical use and this applies equally to all of the "

it is said, if the term "metals unwrought" does not cover erchandise in controversy to what does it apply? We do not alled upon to answer this question, especially as the record ins very little data upon which to base a correct conclusion. ps, however, an answer may be suggested and our meaning clearer by reference to an illustration used by Dr. Waldo. ys:

metal aluminum in its pig form is an example of an unwrought metal, has passed through a complicated preparation of ore refining, solution, g by electrical heat and electrolysis itself. It has not been found in as pure metal; yet if at some depth within the earth's crust it should nd pure and ready to be only remelted into pigs, the result would not from the pigs we now use."

ving had occasion recently to examine the complicated process hich aluminum is produced (Electric Smelting & R. Co. v. urg Reduction Co., 125 Fed. 926, 934, 60 C. C. A. 636) we are ed to think that no better example of unwrought metal can ven. And this unwrought aluminum is capable of being ght into innumerable articles both useful and ornamental. In particular the controversy is sui generis and we do not feel led in deciding upon the present record that a metallic sub- e which is only used in imparting certain qualities to steel and is incapable of being wrought into any useful article is a l unwrought."

, therefore, find that the ferros in question are unenumerated es and subject to the operation of the similitude clause.

The question remains, is ferro-chrome similar to ferro-manganese? This question has been passed upon by this court in U. S. v. Dana, 99 Fed. 403, 39 C. C. A. 590, and what is there said is applicable to the present case. The counsel for appellant have taken pains to point out numerous instances wherein the two articles differ, but it must be borne in mind that the statute does not require identity; if that were necessary the statute would have no raison d' être. It is enough if there be a substantial similitude in any one of the particulars mentioned—material, quality, texture or use. Arthur v. Fox, 108 U. S. 125, 2 Sup. Ct. 371, 27 L. Ed. 675.

Ferro-chrome and ferro-manganese look alike: even the experts are unable to tell them apart, and they are similar in quality and in use, notwithstanding the fact that they produce different results and are not applied at the same stage of the process of making steel. We agree with the expert for the appellee when he says:

"The steel that is made by the use of these other ferros is along the same lines as the steel produced by the use of ferro-manganese. There are differences, but the qualities imparted are of the same general family."

The decision of the Circuit Court is affirmed.

BRIGGS v. FOSTER et al.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1905.)

No. 2,107.

DECEIT—CORPORATE STOCK—SALE—REPRESENTATION OF AGENTS.

Where defendants, being in absolute control of a mining corporation, through three of its directors, contracted with another corporation for the sale of a large number of shares of stock held by defendants at the price of 30 cents per share, with the privilege of retaining all that the sellers secured above such price as their commission, and the sellers paid 3 cents of every 30 cents received for a share of the stock to the corporation and the other 27 cents to defendants, the sellers were mere agents for the defendants, who were therefore liable for fraudulent representations made by such sellers in prospecti issued to induce the purchase of such stock.

In Error to the Circuit Court of the United States for the District of Nebraska.

H. C. Brome (A. H. Burnett, A. G. Ellick, and H. B. Shoemaker, on the brief), for plaintiff in error.

F. H. Gaines (E. G. McGilton and John A. Storey, on the brief), for defendants in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

RINER, District Judge. This was an action brought by Joseph E. Briggs against Albert C. Foster and John B. Carmichael to recover the sum of $3,600 damages, together with interest thereon, which the plaintiff alleges he suffered by reason of certain false

sentations made by the defendants, through their agent, where-
was induced to purchase stock of the International Zinc Com-
Limited, between the 1st of January and the 1st of August,

s alleged in the petition that in the month of November, 1899,
efendants, Foster and Carmichael, held options for the pur-
and lease of certain mining property located near the city
plin, in the state of Missouri, known as "The Blue Wing,"
Mayne," and "The Free Coinage"; that defendants had con-
d to purchase the fee respecting a portion of the properties
outstanding leases upon the balance thereof for the sum of
88.88; that these mining properties at that date, as defend-
well knew, were worth less than $10,000; that, having ac-
d this option, the defendants, Foster and Carmichael, con-
d the idea of organizing a corporation to take over and acquire
ining properties above described, and by means of the sale of
tock of such corporation "secure for themselves a large sum
oney on account and for the said operations," and to accom-
this purpose, on the 20th of November, 1899, entered into an
ment with one A. C. Hartwell, by the terms of which it was
ded that Hartwell should organize a company under the laws
est Virginia to be known as the "Colonial Zinc Company,
" the name being subsequently changed to "International Zinc
pany, Ltd.," which should have a capital stock of $1,000,000,
d into 1,000,000 shares of the par value of $1 each, and should
a board of directors consisting of five persons, three of whom
d be selected by the defendants, Foster and Carmichael, and
hould be selected by Hartwell; and that it was further agreed
the defendants should sell and convey the mining properties
e referred to to the corporation, the deeds and releases for the
to be placed in escrow in the Joplin National Bank of Joplin,
to be held until payments provided therein should have been
. It is then alleged that it was further agreed that upon the
ization of the corporation the defendants and Hartwell should
and secure the selection of a board of directors and the offi-
of the company, and should issue and deliver all of the stock
e corporation to the defendants, Foster and Carmichael; that
the issuance of the stock to the defendants they should deposit
ame with the Knickerbocker Trust Company of New York;
t was further agreed that Hartwell should pay the defendants
um of $10,000, and should receive in lieu thereof 33,333 shares
e capital stock of the corporation; that it was further agreed
ectuses should be issued by the corporation at the expense of
well, and the stock should be sold to persons who might be
ed to purchase the same; that the corporation was formed
ovided in the contract; that the defendants, Foster and Car-
ael, D. K. Wenrich, Charles P. Bennett, and Ira B. Cushing
selected as directors; that the defendant Foster was made
dent and the defendant Carmichael secretary and treasurer
e corporation; that the only persons who were members of
oard of directors present at the meeting were Foster, Car-

michael, and Wenrich; that the defendants, as officers and directors of the corporation, forthwith caused 999,500 shares of the capital stock of the corporation to be issued and delivered to them, the remaining 500 shares being issued to certain persons, who, at the instance and request of defendants, and by prior arrangement between the defendants and Hartwell, in contemplation of the making of the contract, they had caused and procured to adopt articles of incorporation and subscribed 500 shares of stock preliminary to and as a part of the scheme for the organization of the corporation under the laws of the state of West Virginia; that the defendants, for the purpose of procuring the sale of stock of the corporation, caused and procured the contract with Hartwell to be assigned to Joshua Brown & Co., a corporation organized under the laws of the state of West Virginia, and doing business in New York, Philadelphia, and Boston; that thereupon the defendants, as officers and directors of the International Zinc Company, Limited, authorized Joshua Brown & Co. to act for and on behalf of the corporation as its fiscal agent, and to carry out on behalf of and for the defendants, in accordance with the terms of their contract with Hartwell, contracts for the sale of shares of stock of the company, and to prepare, issue, and circulate among the public prospectuses for the purpose of inducing third persons to purchase shares of stock; that thereupon the defendants, Foster and Carmichael, as officers and directors of the International Zinc Company, Limited, acting through said Joshua Brown & Co., prepared, issued, and circulated numerous copies of three distinct and separate prospectuses; that all of said prospectuses contained numerous representations of fact which were well known to the defendants, Foster and Carmichael, to be false and untrue, and to have been made for the purpose and with the intent to deceive third persons among whom said prospectuses were circulated, and thereby induce such third persons to purchase shares of stock; that copies of the prospectuses were sent to the plaintiff; and that, believing and relying upon the representations contained in the several prospectuses to be true, he was induced thereby and did purchase at different times shares of stock of the International Zinc Company, Limited, at the rate of 75 cents per share to the amount of $3,000. It is further alleged in the petition that on December 15, 1899, January 18, 1900, and February 19, 1900, dividends of 1 per cent. were declared on all of the outstanding stock of the International Zinc Company, Limited, and at all of the times when dividends were declared there were no profits out of which dividends could be paid; that the dividends, as declared and paid to the stockholders, were paid out of the proceeds from the sale of stock; that the defendants, Foster and Carmichael, well knew at the time the dividends were declared that no profits had been earned by the company out of which dividends were to be paid, and that they knowingly, willfully, and fraudulently declared the dividends with the intent to pay the same out of the proceeds derived from the sale of stock, and for the purpose of deceiving the then holders of stock of the corporation, and thereby induce them to make additional purchases of shares.

contract, attached to the petition as an exhibit, contains the
ing provisions:

parties of the first part further agree that they will give to the party
second part an option to purchase all of the remaining shares of the
stock of the said company at the price of thirty cents per share to
et; in the manner following:
y-seven thousand, six hundred and sixty-seven (67,667) shares at
price of thirty cents per share to the parties of the first part to be paid
the party of the second part on or before thirty days from the date
sferring the property unto the Colonial Zinc Co., Limited.
hundred thousand (100,000) shares at the net price of thirty cents
re to the parties of the first part to be paid for by the party of the
part on or before sixty days from the date of transferring the prop-
erein mentioned to the Colonial Zinc Co., Limited.
hundred thousand (100,000) shares at the net price of thirty cents
re to the parties of the first part to be paid for by the party of the
part on or before ninety days from the date of transferring the prop-
erein mentioned to the Colonial Zinc Co., Limited.
hundred and fifty thousand (150,000) shares at the net price of thirty
er share to the parties of the first part to be paid for by the party of
ond part on or before four months from the date of transferring the
ies herein mentioned to the Colonial Zinc Co., Limited.
hundred and fifty thousand (150,000) shares at the net price of thirty
er share to the parties of the first part to be paid for by the party of
ond part on or before five months from the date of transferring the
ies herein mentioned to the Colonial Zinc Co., Limited.
hundred thousand (200,000) shares at the net price of thirty cents
re to the parties of the first part to be paid for by the party of the
part on or before six months from the date of transferring the prop-
erein mentioned to the Colonial Zinc Co., Limited.
hundred thousand (200,000) shares at the net price of thirty cents
re to the parties of the first part to be paid for by the party of the
part on or before seven months from the date of transferring the prop-
erein mentioned to the Colonial Zinc Co., Limited.
the event of the party of the second part failing to purchase or sell
ount of stock mentioned within the time hereinbefore set forth, then this
t may at the option of the parties of the first part be terminated and the
withdrawn from sale; and the party of the first part shall not be
able for any of the conditions named in this written contract. * * *
s agreed by the parties of the first part that they will donate ten
nd (10,000) shares Colonial Zinc Co., Limited, as consideration for the
rectors, to serve in that capacity, said directors to be nominated and
ctory to the party of the second part. This stock, however, with the
on of one hundred (100) shares for each director, to be pooled with
lance of the stock and to be sold for their benefit pro rata with the
stock, if the directors desire it, otherwise they may retain the same
l when desired, but no stock is to be sold except through the party of
ond part.
s further agreed by the parties of the first part that the nine hundred
nety-nine thousand, five hundred (999,500) shares received as full pay-
for the property, they will donate to the treasury of the company
ndred thousand (100,000) shares, the proceeds from the sale of this
y stock to be devoted to acquiring new properties and the erection of
ills and developing the mines.
the stock of this company is to be deposited with the Knickerbocker
Company of New York, with instructions to deliver the same to the
of the second part upon the payment of thirty cents per share, and for
ten (10) shares sold, one share (1) to be a share of treasury stock and
ceeds to go to the benefit of the treasury."

e defendants filed an answer, admitted the citizenship of the
s as set forth in the petition, and denied each and every other

allegation of the petition. The case came on for trial before the court and a jury, resulting in a verdict in favor of the defendants.

At the close of the evidence the court was requested to instruct the jury to return a verdict for the plaintiff, submitting to the jury only the question of the amount of damages. This request was denied, and the ruling of the court thereon duly excepted to, and is now assigned for error.

While there is a conflict of evidence in relation to some of the transactions of the parties, we think it is clearly established by the evidence: That the defendants desired to exploit these mines, form a corporation, and place its stock upon the market. That this is true is shown by the contract itself, which commenced with the recital, "Whereas, it is deemed advisable to exploit said property by organizing a company to take over such property." That to effect this purpose, they entered into a contract with Hartwell, who was acting for Joshua Brown & Co., and to whom he afterwards assigned the contract. That the corporation was formed and the stock issued as provided in the contract. That Joshua Brown & Co. prepared circulars or prospectuses, and furnished copies thereof to the plaintiff, and that the statements contained in these circulars or prospectuses were materially false. That dividends were declared and paid, as alleged in the petition, when none were earned. That, instead of paying these dividends out of the earnings, they were paid out of money realized from the sale of stock. That the plaintiff relied upon the representations contained in the prospectuses, and was thereby induced to purchase stock. That the stock was utterly worthless. That the shares of stock were issued in blank, and delivered to the Knickerbocker Trust Company under the contract with Joshua Brown & Co. That Joshua Brown & Co. sold a large portion of them, and for every share which they sold they paid to the defendants not 30 cents, but 27 cents per share, under the pooling clause of the contract, or as Mr. Foster, in his testimony, puts it: "All of the stock that was sold was sold to Joshua Brown & Company or Hartwell at twenty-seven cents a share net to us. It was sold at thirty cents, but twenty-seven cents went to us." That the provision of the contract, requiring deeds in fee simple and leases with full covenants of warranty and bills of sale conveying the property free from all debts and liens to be deposited by the defendants with the Joplin National Bank, and then gave to Joshua Brown & Co. an option to purchase 67,667 shares within 30 days, 100,000 shares within 60 days, 100,000 shares within 90 days, 150,000 shares within 4 months, 150,000 shares within 5 months, 200,000 shares within 6 months, and 200,000 shares within 7 months after the deeds were deposited, was never performed. That the defendants never made the deeds, so that the time never arrived when Joshua Brown & Co. was required to exercise the option. That Joshua Brown & Co. never purchased the amount of stock specified in the contract, but, on the contrary, it sold all of the stock it ever disposed of under the pooling clause of the contract, whereby 3 cents out of the proceeds of every 30 cents was the

y of the company, and 27 cents, as testified by Mr. Foster, the defendants. That the defendants did not pay for the y to the vendors as they had agreed, but, on the contrary, in they made another agreement with Joshua Brown & Co., y they conveyed to the International Zinc Company, Limit- Free Coinage mine, subject to a mortgage for $29,550, and back to the company $115,000 of its own stock, instead of cash for the property, and turned over the property subject mortgage for $29,550; all in violation of the provisions of ntract of November 20, 1899.

foregoing facts being, as we think, fully established by the ce, we are of the opinion that the defendants were liable for presentations of Joshua Brown & Co., without reference to estion of their own moral guilt or innocence. This contract e read and interpreted by a consideration of all of its provi- and its obvious design is not to be controlled by the precise f single words. Union Stockyards & Transit Co. et al. v. n Land & Cattle Co., 59 Fed. 53, 7 C. C. A. 660. And when d it constitutes, as we think, an agency contract pure and It is nothing more than an agreement with Joshua Brown o be the agent of defendants and the International Zinc Com- Limited, of which the defendants had absolute control through ee directors, to sell 967,000 shares of stock, share and share at the price of 30 cents per share, with the privilege of re- all that they secured above 30 cents as their commission. f the contract is to be construed as a contract offering two s (a construction of which, in our judgment, it is not sus- e), it is, we think, clear that Joshua Brown & Co. accepted ond, sold the stock as agents of the pool, and accounted for uch. The evidence is undisputed, and Mr. Foster himself d that Joshua Brown & Co. paid 3 cents of every 30 cents eceived for a share to the company and 27 cents to the de- ts, Foster and Carmichael.

second option required the stock of the defendants and the f the company to be pooled, sold together, and the proceeds d pro rata. Joshua Brown & Co. had no option to purchase ck of the company, but sold the stock of the company and defendants, without separation, together, pooled the proceeds, id the defendants their pro rata, 27 cents, and paid to the ational Zinc Company, Limited, its pro rata, 3 cents, upon share sold.

as already indicated, we think the contract before us is a ct of agency. A contract which empowers an agent to sell al property at any price he may see fit, and to pay the own- ixed price when sold, and to retain the balance as his com- n, is, under facts and circumstances, such as are disclosed by cord, an agency contract, and not a sale conditional or other- The money to be paid by Joshua Brown & Co. was not to d upon a sale of the stock to that company, but upon a sale stock by that company. In other words, it was to account

for the proceeds of the sale of the stock as fixed by the contract. There is wanting an essential element of a sale, an agreement to pay a price. Joshua Brown & Co. took upon itself no obligation of this character. It assumed no debt to the defendants or the International Zinc Company, Limited. Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 816; Met. Bank v. Benedict, 74 Fed. 182, 20 C. C. A. 377; Lenz v. Harrison (Ill.) 36 N. E. 567; Monitor Mfg. Co. v. Jones (Wis.) 72 N. W. 44. In Re Galt, 120 Fed. 64, 56 C. C. A. 479, where the contract provided that the second party thereto should account for 60 per cent. of the list prices of goods sold, and would pay cash or give his notes for the goods on hand at the expiration of 12 months, if required by the first party, it was held that the contract was a contract of agency, and not of sale. Weir Plow Co. v. Porter, 82 Mo. 23; Ferd Heim v. Linck, 51 Mo. App. 478. And a contract that the second party might sell, that he should pay a fixed price in Farmer's notes or cash, that he should guaranty the notes, that the goods should be invoiced to him as bought, that the first party had the option to require the second party to pay the stipulated prices of those remaining at the end of the season, was held to constitute the second party an agent, and not a purchaser (Williams Mower & Reaper Co. v. Raynor, 38 Wis. 119); and this was the legal effect of the contract with Joshua Brown & Co.

In the contract under consideration Joshua Brown & Co. had the power to sell, but the property and proceeds of it, to the extent of the fixed price, was the property of the International Zinc Company, Limited, and the defendants, for which Joshua Brown & Co. would have been liable for embezzlement if they had not accounted. Williams Mower & Reaper Co. v. Raynor, 38 Wis. 119; Holleman v. Fertilizer Co. (Ga.) 32 S. E. 83; Nat. Bank of Augusta v. Goodyear (Ga.) 16 S. E. 972; Fleet v. Hertz (Ill.) 66 N. E. 858; Brown v. Billington, 163 Pa. 76, 29 Atl. 904, 43 Am. St. Rep. 780; McCullough v. Porter, 4 Watts & S. 177, 39 Am. Dec. 68; Hunt v. Wyman, 100 Mass. 198; Sturm v. Boker, 150 U. S. 329, 14 Sup. Ct. 99, 37 L. Ed. 1093.

Upon the facts established by the evidence in this case, our conclusion is that the plaintiff was entitled to recover, and the jury should have been so instructed.

The judgment of the Circuit Court must be reversed, and cause remanded, with directions to grant a new trial.

& CHAPMAN DERRICK & WRECKING CO. v. MORRIS & CUMINGS DREDGING CO.

ircuit Court of Appeals, Second Circuit. April 4, 1905.)

No. 199.

E—NATURE OF SERVICE—RAISING SUNKEN VESSEL.

raising of a dredge sunk in shallow water, where there is no danrolved, nor any extraordinary means required or employed, is not ge service.

Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, § 21.]

G—RAISING SUNKEN VESSEL—AWARD.

ward for services in raising a sunken dredge, based on the finding mmissioner, affirmed.

Note.—Salvage awards in federal courts, see note to The Laming-C. C. A. 280.]

NTEREST.

re there was long delay in prosecuting a suit to recover for serv- raising a sunken vessel, and the claim made was excessive, and, to the fact that complainant had a monopoly of such work, it was t for defendant to obtain proof as to the value of the services, neiterest nor costs should be allowed.

from the District Court of the United States for the District of New York.

from final decree of the District Court for the Southern f New York, entered June 28, 1904, awarding the libelant ith interest and costs, for a wrecking service in raising ndent's dredge, No. 12, which sank in 18 or 20 feet of r the Erie Basin breakwater, June 26, 1898, while engaged ng the channel at that place. The opinion of the District cluding the report of the commissioner, who states all of t facts, will be found reported in 132 Fed. 154.

A. Wray, for appellant.

F. Cushman, for appellee.

WALLACE, LACOMBE, and COXE, Circuit Judges.

CURIAM. The work performed by the libelant, though n execution and successful in result, was in no sense a ervice. It had in it no element of danger to person or which is the principal factor relied on in sustaining large salvage cases.

oblem of raising the sunken dredge was an exceedingly simno new or difficult questions were presented for solution. ng occurred in summer, no storm was raging, the water aratively shallow, the bottom was soft mud. The moment ers saw the situation they knew exactly what to do. It is the jamming of the spuds prevented the chains from being der the dredge in the usual manner, but the tunneling prowell known and had been frequently resorted to on prior . In short, the pretense that there was anything extraorout the work cannot be sustained.

We are unable to resist the conclusion that $4,000 is an exceedingly liberal allowance for raising the dredge and yet we are met by the same difficulty which confronted the commissioner—the absence of any proof of the market value of such services and of any satisfactory basis of comparison. This condition is produced by the fact that the libelant holds a substantial monopoly of the wrecking business in the waters surrounding New York and, for heavy work, can make almost any price it desires, without fear of competition. Nevertheless, upon such testimony as was presented to the commissioner we cannot hold that his award was erroneous. It was a fair compromise between the various theories, more or less speculative in character, which were pressed on him for consideration. In view, however, of the long delay in the prosecution of the suit, the unwarranted charge of $401 in the itemized bill as rendered, the deduction by the commissioner of $1,000 from the claim as originally presented, which sum he regarded as improperly charged, the difficulty of obtaining proof by the respondent of the value of libelant's services, and in view of the peculiar circumstances of the case, we are convinced that we are justified in withholding interest on the award. Doyle's Adm'rs v. St. James Ch., 7 Wend. 178. For the same reasons costs should not be allowed in this court. M. & C. Wrecking Co. v. Chubb, 113 Fed. 173, 51 C. C. A. 119.

The decree is reversed and the cause is remanded to the District Court with instructions to deduct the sum of $1,405, being the amount of interest on the recovery, and in other respects to proceed in accordance with this opinion.

BURNES et al. v. BURNES et al.

(Circuit Court of Appeals, Eighth Circuit. May 1, 1905.)

No. 2,137.

1. ESTATES OF DECEASED PERSONS—DISTRIBUTION OF PERSONALTY BEFORE ORDER OF DISTRIBUTION.

The conveyance by administrators to distributees of their respective shares of the personal property of an estate, which is not previously authorized, but which is subsequently approved by the probate court, devests the administrators of all title and interest therein, and vests it in the distributees as of the date of the conveyance.

2. CORPORATIONS—POWER TO PURCHASE THEIR OWN STOCK.

In the absence of constitutional or statutory prohibition, corporations have the inherent power to buy, to retire, and to sell their own stock.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1530.]

3. SAME—PAYMENT IN ANNUITIES.

A corporation which is not organized to grant, purchase, or dispose of annuities may legally contract to pay in annual installments during the lives of the vendors for property which it has corporate authority to buy, although corporations not organized to deal in annuities are expressly forbidden to do so. The power to pay on such terms as the vendor and purchaser agree is an indispensable incident to the power

y and inheres in it. Such a transaction is not a dealing in annu- within the meaning of the prohibition.

ARY RELATIONS—USE FOR PERSONAL BENEFIT.

ties in fiduciary relations are prohibited by the law from using knowledge or power to the detriment of their correlates. No such an avail them when challenged.

. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, 01–1415.]

ATIONS—DIRECTORS MAY NOT USE POWER FOR THEIR OWN BENEFIT.

ntracts and transactions between individuals and corporations of they are controlling directors or officers, which are unfair, in the individuals secure an undue or unjust advantage, in which tagonism between the interest of the individuals and the duty of the ls results in the triumph of the former, are voidable at the option e corporation or its creditors or stockholders.

. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, 3, 1414.]

TRANSFER OF STOCK BY VOTE OF MAJORITY FOR THEIR OWN BENEFIT ABLE.

e transfer of stock from a corporation to a trustee for a majority of rectors and others by the controlling votes of that majority is voida- the instance of stockholders who are injured thereby.

—CONSTRUCTION—INTENT OF TESTATOR TO PREVAIL.

e true end of the construction of wills is to ascertain the intention e testator and to carry it into effect.

s intention must be deduced from the entire will, because the in- ent without any part of it fails to clearly express the intention.

e court should put itself as far as possible in the place of the testa- nd then, from a consideration of the instrument itself, of the rela- of the testator to the parties affected by it, and of the situation of estator and of the parties in interest when he made it, endeavor certain and give effect to his intention.

. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 955, 956, 966.]

WHEN WORDS OF DESIRE, REQUEST, OR RECOMMENDATION RAISE T—WHEN THEY DO NOT.

rds of desire, request, recommendation, or confidence in a will, ad- ed by a testator to a legatee whom he has the power to command, e no trust in favor of the parties recommended, unless (1) the in- n of the testator to make the desire, request, recommendation, or lence imperative upon the legatee, so that he should have no option mply or to refuse to comply with it, clearly appears from the whole nd the relation and circumstances of the testator when it was made, nless the subject-matter is certain, and (3) unless the beneficiaries learly designated.

en these three conditions exist, a precatory trust may be created in of the parties recommended.

. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1587–

PRECATORY TRUST—TEST OF FIRST CONDITION.

e test of the first condition of a precatory trust is the clear inten- f the testator to imperatively control the conduct of the party to n the language of the will is addressed by the expression of the wish sire, and not to commit to his discretion the exercise of the option mply or to refuse to comply with the wish or suggestion expressed.

. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1587–

10. Same—Facts—Words of Desire with Declaration That They shall Create No Charge Raise No Trust.

B. devised his property to his two brothers, "to be held and disposed of by them absolutely as their own property." He expressed a desire in his will that these brothers should adopt his six children as their heirs and devisees, so that they would share equally with their own children in their advancements and estates, and he declared that nothing in the will, and no request, direction, or bequest made therein, should be construed to create a charge or incumbrance upon any of the property bequeathed to his brothers. *Held*, the will did not create a trust in favor of the six children, either in the estate of the testator or in the property of his brothers.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1587–1589.]

11. Parent and Child—Adoption—Parent's Power to Dispose of Property.

One who adopts a minor as his child and heir has, while living, the same unlimited power of disposition of his property that a natural father has. There can be no heir of the living.

12. Contract—Option to Rescind for Fraud Lost by Delay.

One who is induced by fraud to execute a contract has the option to rescind or to affirm it.

Delay, silence, acquiescence, or a retention of the fruits of the agreement for a considerable length of time after a discovery of the fraud is an exercise of the option to affirm, and irrevocably ratifies the agreement.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 444–446.]

13. Same—Modification—Absence of Fraud or Mistake.

A contract made without fraud or mistake may not be modified by a court of equity, to give either party a better bargain, while he retains all the benefits of the original trade.

14. Family Settlements—Not Void for Inadequacy of Consideration.

Family settlements and compromises of conflicting claims to property are encouraged by the courts. They will not be avoided for inadequacy of consideration, nor without clear proof of fraud or mistake.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, §§ 319, 320.]

15. Same—Relief in Equity—Evidence.

Four adopted children, who were entitled to an interest in property derived from their adopted fathers of the possible value of $275,000, made a family settlement with one of their adopted fathers and the sons of the other, whereby they accepted 177 shares of stock, then worth $115,000, in a certain corporation, in satisfaction of their interest. Their just proportion of this stock was about 243 shares more. Eleven years later, and after, by another agreement made four years before, they had affirmed the settlement, they wrongfully took from the heirs of the parties who made the settlement with them their interest in certain shares of stock in this corporation, and when the latter brought a suit in equity for the restoration of this interest the adopted children prayed the court to make an equitable redistribution of the stock, or to permit them to retain what they had taken for the purpose of righting the wrong which they had suffered by the family settlement. The adopted father and the sons who participated in that settlement were dead. The stock in the corporation, which was worth $650 per share when the settlement was made, had become worth $4,000 per share. The adopted children had not restored the shares they obtained by the settlement. *Held*, there was no equity in their claim, and a decree for the restoration of the stock they had taken was rightly rendered.

(Syllabus by the Court.)

peal from the Circuit Court of the United States for the West-
istrict of Missouri.

opinion below, see 132 Fed. 485.

se suits present the question whether four of the children of Daniel
rnes, deceased, or all the stockholders of the Burnes Estate, a corpo-
are the beneficial owners of 300 shares of the capital stock of that
ation, which was the property of Calvin F. Burnes, a brother of Daniel
rnes, when he died intestate on July 29, 1896. The capital stock of the
ation is divided into 1,000 shares. Each share of this stock is worth
so that the amount involved in this litigation exceeds $1,000,000.
F. Burnes owned 375 shares of this stock when he died. Mrs. Win-
m, one of the children of Daniel D. Burnes, who, if the appellants are
became the beneficial owner of 75 shares of this stock, sold it to Lewis
rnes, in trust for the corporation, on March 10, 1902, so that the con-
sy is really narrowed to the ownership of the remaining 300 shares.
D. Burnes died in 1867, and left surviving him six children. In 1889,
Moore, another of these children, sold her interest in the property
is the subject of the controversy, so that only four of the children of
D. Burnes are interested in the litigation before us. These four chil-
of Daniel are James N. Burnes, 2d, Lewis C. Burnes, Katherine B.
and Virginia D. Burnes. These children are the only parties in in-
on the side of the appellants. Marjorie Burnes and Kennett Burnes,
andchildren of James N. Burnes, a brother of Daniel, and Frances B.
s, the widow of Calvin C. Burnes, one of the sons of James N. Burnes,
e father of Marjorie, are the parties in interest upon the side of the
ees. Kate H. Burnes, the widow, and Mary V. Burnes, the daughter,
vin F. Burnes, although appellants, had no pecuniary interest in these
because their claims constitute a charge upon the 375 shares of stock
is conceded to be valid by all the parties to the litigation. For con-
ce and brevity the parties in interest upon the side of the appellants
867 to the decree will be termed the children of Daniel, although this
ation may at some times include one or both of the two children who
that time parted with their interest in the property. The parties in
t upon the side of the appellees will be called the descendants of James,
e widow and daughter of Calvin F., who were without pecuniary in-
in the controversy, will be styled the descendants of Calvin. The
controversy is between the children of Daniel and the descendants of

in F. Burnes died the owner of 375 shares of the stock of the Burnes
, and left surviving him his widow and daughter. He died intestate,
ft an unexecuted will. After his death an agreement was made to
out the provisions of this will between the descendants of Calvin, the
n of Daniel, the descendants of James, the Burnes Estate, and the
awn Company, a corporation whose stock was owned by the Burnes
, under which the 375 shares of stock were transferred to Ayr Lawn
ny in August, 1896, and that corporation contracted to pay to the
and daughter of Calvin, or the survivor of them, $1,000 per month as
s either of them should live. The result of this transaction was that
r Lawn Company nominally, and the Burnes Estate really, held this
subject to the life estate of the descendants of Calvin, in trust for
e stockholders of the Burnes Estate. In June, 1900, the beneficial
ship of this stock was taken from the stockholders of the corporation
ested in the children of Daniel without notice to the descendants of
. The transaction of 1896 was rescinded. The stock was again vested
descendants of Calvin, and they conveyed it to Lewis C. Burnes, one
children of Daniel, in trust for those children, so that each of the five
n who were then interested in the property should have the beneficial
ship of 75 shares of it. The children of Daniel agreed to return to the
s Estate $52,039.44, which that corporation had paid to the widow and
ter of Calvin in satisfaction of the monthly charge upon the stock, and
ndertook to pay to them, or to the survivor of them, $1,000 per month
g as either of them should live. At the time of this rescission the

descendants of James owned 298 shares of the stock of the Burnes Estate and the children of Daniel owned 227 shares. The property of the corporation was then worth more than $3,000,000, and the effect of the rescission was to take property of the value of at least $750,000 from the descendants of James and transfer it to the children of Daniel. When this rescission took place the descendants of James supposed that it merely effected a change of trustees, and that the beneficial ownership of the 375 shares continued in the holders of the other stock of the corporation in proportion to the number of shares they owned. In the latter part of 1902 or the first part of 1903 they first learned that the effect of this transaction had been to divest them of all interest in the 375 shares and to vest their beneficial ownership in the children of Daniel.

Thereupon Frances B. Burnes and Marjorie Burnes exhibited their bill against all the parties in interest to avoid the rescission and to restore the 375 shares to the corporation, subject to the payment of the $1,000 per month to the widow and daughter of Calvin. Answers, cross-bills, and many other pleadings followed; but the effect of all the proceedings and testimony in the court below was that the descendants of James insisted that the 375 shares should be restored to the corporation because they had been taken from it by fraud, while, on the other hand, the children of Daniel maintained that they were entitled to their beneficial ownership and to receive a still larger share of the stock of the corporation under the will of their father and under a deed of adoption made by his brothers James and Calvin in the year 1867. Their father, Daniel D. Burnes, died testate, the owner of property worth $40,000 in that year. He left surviving him six children. By his will he bequeathed all his property to his brothers, James N. and Calvin F., desired them to so adopt his children as their heirs and devisees that they would share equally with their own children in any distribution of their estates that might be made, and provided that nothing in the will should create any charge or incumbrance upon any of the property devised. On May 10, 1867, James N. Burnes and Calvin F. Burnes adopted by deed the six children of Daniel as their lawful heirs, but provided in the deed that it was not their intention that, in case of their intestacy, these children should receive a double inheritance, but that they should each have such a share of their joint and separate estates as would result to them from a division of the sum of the estates among the whole number of their heirs, both lineal and adopted. In the year 1889 James N. Burnes died intestate, and left surviving him his widow, Mary S. Burnes, and his two sons, Calvin C. and Daniel D. Burnes, the second, and the six adopted children of Daniel, all of whom were then of age. At the time of the death of James he and Calvin were copartners, and the title to all their property vested in the latter as the surviving partner. On June 25, 1889, after the death of James, the children of Daniel made a written contract with Calvin F. Burnes and his wife, in which the will of their father and the deed of adoption were recited at length, whereby they released Calvin and his wife from all present and future claims to any part of their estates, and Calvin agreed to convey all his property and all property left by Daniel to the Burnes Estate, a corporation which they were then to form, and that he would vest in the four children of Daniel, who are parties in interest in these suits, the title to $^{177}/_{1000}$ of the stock of that corporation and would join in an agreement that a dividend of 40 per cent. should be paid upon the stock of the corporation annually during its existence. The four children of Daniel made an agreement with the widow and sons of James at the same time, but this contract was lost and the contents of it are unknown. The corporation was formed. All the property of Calvin F. and all the property of the estates of Daniel and of James was conveyed to it, and 177 of the 1,000 shares of its capital stock were issued to the four children of Daniel. James and Calvin had theretofore advanced out of the property to the sons of James about $100,000 more than they had furnished to the children of Daniel. But the latter were ignorant of this fact until some time in the year 1899, after the death of Daniel D. Burnes, 2d, one of these sons.

The property of these brothers which went to the corporation in this transaction was in the year 1889 worth $650,000. If the sons of James had been

with the advances they had received, and this property had been ided between the widow of James, the wife of Calvin, and the chil- the three brothers, and a child's share had been given to the widow ild's share to the wife (Rev. St. Mo. 1899, § 2937), a proper appor- of the stock, so that each of the four children of Daniel would elved a share of the property equal to that which would have been in this way by each of the children of James and Calvin, would en to the four children of Daniel about 420, instead of 177, shares tock of the corporation, and would have increased their interest in erty about $160,000. They urge that the contract of settlement of the division of the stock which was based upon it violated the trust ich the property was charged, that the agreement of settlement was by fraud and by an unjustifiable concealment of the advances to the James, and that the court should redistribute the stock of the corpo- n accordance with the will of Daniel, with the deed of adoption, and rules and principles of equity.

urt below granted the relief sought by the complainants, restored the es to the Burnes Estate, and refused all relief to the children of Burnes v. Burnes, 132 Fed. 485.

nen S. Brown, F. W. Lehmann, and M. A. Low (John E. n and Lewis N. Gatch, on the brief), for appellants.

. Spencer and Frank Hagerman (Culver, Phillip & Spencer, B. Judah, and Vinton Pike, on the brief), for appellees.

re SANBORN and VAN DEVANTER, Circuit Judges, and R, District Judge.

BORN, Circuit Judge, after stating the case as above, de- the opinion of the court.

children of Daniel assail the decree, which restores the own- of the 375 shares, subject to the monthly charge of $1,000, Burnes Estate, upon the grounds (1) that this ownership ver legally vested in that corporation; (2) that, if it was, poration was lawfully divested of all interest in it in June, and (3) that if the transfer from the Burnes Estate to Lewis nes, in trust for the children of Daniel, in 1900, was illegal able, yet the rule that he who seeks equity must do equity, e concealment and injustice inflicted upon them at the time settlement of 1889 and at the time of the contract of 1896, the transfer, and require a court of chancery either to sus- or to condition its avoidance with an equitable redistribu- all the stock of the corporation. It is said that the title to 5 shares of stock was in the administrators of the estate of when its transfer to the Burnes Estate was made, and that r passed from these administrators to that corporation. The r under consideration was actually made to the Ayr Lawn ny; but, as the Burnes Estate owned the stock of that cor- n, it will be termed a transfer to the Burnes Estate, and the awn Company will thus be eliminated from the discussion. F. Burnes died on July 29, 1896. On August 21st in that s widow filed in the probate court a waiver of her right to ster upon his estate. Lewis C. Burnes, James N. Burnes, d Daniel D. Burnes, 2d, were appointed administrators of ate, upon an application in which they alleged that the heirs

of Calvin were his widow, his daughter, and the Burnes Estate. They then filed an inventory, in which they declared that the only property of this estate was the 375 shares of stock and that Calvin owed no debts or obligations when he died. On August 22, 1896, they delivered the certificate of these shares of stock to the descendants of Calvin and the Burnes Estate and took their receipt for it. On November 10, 1897, they filed their annual account and settlement in the probate court, in which they charged themselves with the receipt, and credited themselves with the delivery of this certificate to the descendants of Calvin and the Burnes Estate. On November 14, 1898, upon due notice, their final account and settlement, which contained no other charges or credits, was approved, and they were finally discharged by an order of the probate court which recited that the estate of Calvin had been fully administered and finally distributed. On August 24, 1896, the children of Daniel, the descendants of James, the descendants of Calvin, and the Burnes Estate made the contract that these 375 shares should become the property of the Burnes Estate, and that the latter would pay to the descendants of Calvin, or to the survivor of them, $1,000 per month as long as either of them should live. The 375 shares were thereupon transferred, pursuant to this agreement, to the Ayr Lawn Company.

Upon the death of the owner the title to his personal property vests in the administrators of his estate, and not in its distributees, under the laws of the state of Missouri, and in a controversy between them over its title or possession the former prevail. Smith v. Denny, 37 Mo. 20; Hanenkamp v. Borgmier, 32 Mo. 569; Green v. Tittman, 124 Mo. 372, 27 S. W. 391; Becraft v. Lewis, 41 Mo. App. 546; State v. Moore, 18 Mo. App. 406; Adey v. Adey, 58 Mo. App. 408. The Supreme Court of that state has decided that distributees may, and that distributees may not, maintain an action to enforce an obligation to an estate while an administrator of it remains in office. State v. Stephenson, 12 Mo. 179, 183; Green v. Tittman, 124 Mo. 372, 27 S. W. 391. But administrators may vest in the distributees of an estate both title and possession of their respective shares of its property before an order of distribution is made by the probate court. They are but trustees, who hold the legal title and possession for the benefit of the distributees, and their conveyance to those who must ultimately be entitled to it estops them from again claiming it, and vests the legal as well as the beneficial ownership in the grantees. There were no creditors of the estate of Calvin. His descendants and the Burnes Estate alone claimed to be his heirs throughout the proceedings in the probate court. In August, 1896, the administrators conveyed all the personal property of the estate to these claimants. This distribution of it was reported to and approved by the probate court upon the settlement of their final account in November, 1898. That approval related back to and confirmed the conveyance of the stock, as of the date of its delivery, to the distributees, and no title to or interest in it remained in the administrators after that date. The

nce by administrators to distributees of their respective
f the personal property of an estate, which is not previous-
rized, but which is subsequently approved, by the proper
court, divests all title and interest therein from the ad-
tors, and vests it in the distributees as of the date of the
nce. Young v. Thrasher, 48 Mo. App. 327, 334-335;
r's American Law of Administration (2d Ed.) § 519. More-
the absence of fraud, the judgment of the probate court,
all persons interested in the estate of Calvin were legally
whether they were named in the proceeding or not, and
ten contract of 1896, which they executed, estopped the
of Daniel and all other parties to that agreement from
that the title to this stock did not vest in the Burnes Es-
ven fraud could not restore that title to the administra-
he estate of Calvin. Its utmost effect would be to charge
in the hands of those who received it with a trust in favor
ctims. The administrators of the estate of Calvin, there-
ained no right, title, or interest in the 375 shares of stock
ey delivered it to the descendants of Calvin and the Burnes
n August 22, 1896.

er argument is presented in support of the claim that the
Estate never acquired any title or interest in the 375 shares
. It is that the statutes of Missouri under which it was
d gave it no power to grant annuities, that the Constitu-
l the statutes prohibited it from dealing in them, and that
is account its contract to pay the $1,000 a month to the
ants of Calvin was beyond the powers of the corporation
l. Const. Mo. art. 12, § 7; Rev. St. Mo. 1899, §§ 1319, 7852,
But these provisions of the Constitution and of the stat-
no farther than to prohibit corporations, like the Burnes
which are organized for pecuniary profit, but not for the
purpose of granting, purchasing, and disposing of annuities,
doing. It is conceded that, if the main purpose of the
ion under consideration had been to grant or to sell an
or to engage in the business of dealing in annuities, it might
len under the ban of these inhibitions. But it was not the
f the people or of the Legislature, and it is not the legal
r meaning of the prohibitions here under consideration, to
corporation organized for pecuniary gain to make or dis-
obligations which it is authorized to incur in the transac-
its legitimate business. A corporation of this nature is
zed to pay for property, which it has the power to pur-
n cash and in monthly or yearly installments, either during
eriods or during the lives of the payees. Such payments
fact constitute annuities; but they are the means or inci-
the accomplishment of the purpose or business which the
tion is authorized to transact, and hence they are within
ted powers. While the powers of a corporation are limited
expressly granted and those fairly incidental thereto, they
the latter as completely as the former, and they always in-

clude the indispensable and the suitable means to exercise the granted powers. In the absence of constitutional or statutory prohibition, corporations have inherent power to buy, to sell, and to retire their own stock. Commissioners v. Thayer, 94 U. S. 631, 643, 24 L. Ed. 135; City Bank v. Bruce, 17 N. Y. 507, 511; First National Bank v. Salem Capitol Flour Mills Co. (C. C.) 39 Fed. 89, 95; Lowe v. Pioneer Threshing Co. (C. C.) 70 Fed. 646, 647; In re S. P. Smith Lumber Co. (D. C.) 132 Fed. 618, 619; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271. There is no such inhibition in the state of Missouri. The purchase of the 375 shares by the Burnes Estate was, therefore, within its corporate powers, and, as it had authority to buy these shares of stock, it had the corporate power to pay for them either in cash or by its promise to pay the agreed price in monthly or yearly installments during such periods of time as should be fixed by the meeting of the minds of the parties. The title to the 375 shares of stock was therefore legally vested in the Burnes Estate in 1896, although that corporation agreed to pay for it in monthly installments during the lives of the descendants of Calvin or their survivor.

Was the title to those shares lawfully taken from the corporation and vested in Lewis C. Burnes, in trust for the children of Daniel, in June, 1900, after the death of Daniel D. Burnes, 2d? At that time the children of Daniel owned 227 shares, and the descendants of James 326 shares, of the stock of this corporation. The transfer of the 375 shares from the Burnes Estate to Lewis C. Burnes, in trust for the children of Daniel, took property of the value of at least $150,000 from the descendants of James and vested it in the children of Daniel. It did more than this. It took the control of the corporation from the former and transferred it to the latter; for the 375 shares, together with the 227 shares owned by the children of Daniel, constituted a majority of all the stock of the corporation. Lewis C. Burnes, one of the children of Daniel, procured this transfer. He persuaded the descendants of Calvin to demand a rescission of the sale and settlement of 1896. He was the president of the corporation. Its board of directors consisted of himself and two other children of Daniel and two of the descendants of James. The resolutions of that board, which authorized the rescission of the transaction of 1896 and the retransfer of the shares to the descendants of Calvin, were adopted by the votes of the three children of Daniel for whose benefit this action was had. Only one of the descendants of James, Frances B. Burnes, was present when these resolutions were adopted, and she cast no vote. Lewis C. Burnes was the manager of the property, the agent and the confidential adviser of the descendants of James. He failed to tell them, and they did not know, that the purpose and effect of this transaction were to divest them of all interest in the 375 shares and to vest it in the children of Daniel. It is true that he testified that he fully informed Frances B. Burnes of its purpose and result at the time of the transaction. But she denied this statement, and testified that he assured her that its only purpose was to

secure the payment of the $1,000 per month to the descend-
of Calvin, and that it did not and would not in any way affect
terests of the descendants of James. Her testimony upon this
and the undisputed facts that he did not inform Marjorie
es or Kennett Burnes that they were deprived of their interest
is stock by this transfer; that none of the descendants of
s knew of the agreement which he executed to hold this stock
ıst for the children of Daniel until one of their number acci-
lly discovered it more than two years later, while reading
onveyance of Mrs. Winningham which recited it; that Lewis
after refused to permit their representative to examine this
act; and that as soon as they were aware of it they took steps
cover this property—convince that none of them had either
e or knowledge that they were deprived of their interest in the
ıares by the transaction of June, 1900, until more than two years
it was consummated. The result is that by authority of resolu-
of the board of directors of the Burnes Estate passed by the
of a majority of the board which consisted of three of the chil-
of Daniel, one of whom was the president of the corporation,
gent and confidential adviser of the descendants of James,
rty of the value of $750,000 was taken from the latter without
knowledge and transferred to the children of Daniel. The
children of Daniel who constituted the majority of the board
ı passed these resolutions were individually interested in their
ion to the extent of hundreds of thousands of dollars, and their
est was diametrically opposed to that of the corporation. Par-
ı fiduciary relations are imperatively forbidden by the law to
ıeir knowledge or their power to the detriment of their cor-
s, and no such use can ever avail them when challenged in a
of equity. Trice v. Comstock, 57 C. C. A. 647, 651–653, 121
620, 624–626, 61 L. R. A. 176; McKinley v. Williams, 20 C. C.
2, 313, 74 Fed. 94, 95.

ıtracts and transactions between individuals and corporations
ich they are controlling directors or officers, which are unfair,
ich the individuals secure any undue or unjust advantage, in
ı an antagonism between the interest of the individuals and
ıty of the officials has resulted in the triumph of the former, are
ble at the option of the corporation or its creditors or stock-
rs. Wyman v. Bowman, 62 C. C. A. 189, 191, 206, 127 Fed.
59, 274; Bradley v. Farwell, 3 Fed. Cas. 1146, 1151, No. 1,779;
ler v. Black River Falls Iron Co., 2 Black, 715, 719, 17 L. Ed.
Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; Davis v.
Creek, etc., Co., 55 Cal. 359, 36 Am. Rep. 40; Kankakee
en Mill Co. v. Kampe, 38 Mo. App. 229, 234; Union National
v. Douglass, Fed. Cas. No. 14,375; Haywood v. Lincoln
ber Co., 64 Wis. 639, 647, 26 N. W. 184. The transaction
eby the 375 shares of stock were taken from the corporation
ransferred to Lewis C. Burnes, in trust for the children of
el, was upon its face unfair and without justification either at
r in equity, and it was rightly avoided by the court below, un-

less it was in fact just and fair, unless the descendants of James were thereby deprived of no right or interest which really belonged to them, and the children of Daniel secured no property or advantage to which they were not equitably entitled. But a court of chancery may, in a case in which the rules and principles of equity demand it, compel those who seek equity to do equity, may condition its grant of the relief they seek with the enforcement of claims or equities held by their opponents, and may do complete justice between the parties. Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co., 60 C. C. A. 588, 593, 126 Fed. 46, 51, and cases there cited; Lynch v. Burt (C. C. A.) 132 Fed. 417, 432.

Counsel for the children of Daniel maintain that the transfer of the 375 shares of stock to them in 1900 only partially righted the frauds perpetrated and the wrongs inflicted upon them in 1889 and 1896, and that in equity and good conscience they are entitled to a still larger share of the stock of the corporation than they secured. They base this contention on the will of their father, on the deed of adoption, and on the claim that they were induced by fraud and concealment to make the contracts of 1889 and 1896. They insist that from the time of the acceptance of the property of their father by James and Calvin under his will in 1867 all of the property of the three brothers was charged with a trust for the benefit of the children of each of them in equal shares, that property of the value of $100,000 was diverted from this trust and advanced to the descendants of James prior to 1889, and that in ignorance of this fact they were fraudulently induced to make the contracts of that year and of 1896, under which they consented to accept less than their just share of the stock of the Burnes Estate.

The first question for consideration under this contention is: Did the will of Daniel charge his estate or the property of his brothers with such a trust? The material provisions of that will are:

"First. I devise and bequeath unto James N. Burnes and Calvin F. Burnes, my brothers, all my real and personal estate, wherever situated, all rights in action, and all property in reversion, expectancy, and of inheritance, to be held and disposed of by them absolutely as their own property."

"Third. It is my desire that my two said brothers shall, according to the laws of the state of Missouri, adopt my six children, James N., Mary, Emma, Katie, Lewis, and Virginia, as their heirs and devisees, to share equally with their own children in any distribution of their estate or estates which may be made, and I desire that they shall have the care, custody, and control of my said children, and provide for, educate, and maintain them until they arrive at the age of twenty-one years, and longer if necessary, that they make to them the same advancements as they make to their own children, and in every respect deal with them as with their own."

"Fifth. Nothing in this will, and no request, direction, or bequest made herein, shall be so construed as to create a charge or incumbrance upon any of the property bequeathed to my brothers, James N. Burnes and Calvin F. Burnes."

Reduced to its lowest terms, this instrument expresses three things—a devise of the property of the testator absolutely to the two brothers; a desire that they shall adopt his children as their heirs, so that they will share in their estates and in their advance-

qually with their own children; and a mandate that nothing
ill shall create any charge upon any of the property be-
l to them. A will is "the legal declaration of a man's in-
, which he wills to be performed after his death." 2 Black-
Com. 499. It is his will, his purpose, his intention, legally
ctively expressed. Hence the true end of all construction
is to ascertain the intention of the testator, and, when that
discovered, it prevails, regardless of inapt expressions and
words of the testament, unless prohibited by established
law. This intention must be deduced, not from specific
ns or fragmentary parts of the instrument, but from its
ontext, from all its provisions taken together, because the
n is not evidenced by any part or provision of it, or by the
hout any part or provision, but by every part and term so
d as to be consonant with every other and with the entire
nt. The court may, and it should as far as possible, put
the place of the testator when he made his will, and then,
consideration of the instrument itself, of the relation of the
to the parties affected by it, and of the circumstances and
n of the testator, and of the parties in interest at the time of
ition, endeavor to ascertain his actual intention and to carry
ffect. Smith v. Bell, 6 Pet. 68, 74, 8 L. Ed. 322; Colton v.
127 U. S. 300, 314, 8 Sup. Ct. 1164, 32 L. Ed. 138; Pressed
r Co. v. Eastern Ry. Co., 57 C. C. A. 635, 637, 121 Fed. 609,
v. St. Mo. 1899, § 4650.

rucial question in the interpretation of this will is, did the
intend to impose an imperative obligation upon his broth-
pply his estate, or their property, to the equal benefit of
children of each of them, or to express a desire that they
lo so, and to intrust to their discretion the exercise of the
o comply or to refuse to comply with his wish? In Knight
ht, 3 Beav. 148, 172–174, Lord Langdale declared the law
is subject in language which has rarely, if ever, been ex-
strength and clearness. He said:

> general rule, it has been laid down that when property is given
> to any person, and the same person is by the giver, who has pow-
> mand, recommended or entreated or wished to dispose of that prop-
> vor of another, the recommendation, entreaty, or wish shall be held
> a trust: First, if the words are so used that, upon the whole, they
> be construed as imperative; secondly, if the subject of the recom-
> n or wish be certain; and, thirdly, if the objects or persons intend-
> e the benefit of the recommendation or wish be also certain. * * *
> her hand, if the giver accompanies his expression of wish or request
> words, from which it is to be collected that he did not intend the
> e imperative, or if it appears from the context that the first taker
> nded to have a discretionary power to withdraw any part of the
> om the object of the wish or request, or if the objects are not such
> e ascertained with sufficient certainty, it has been held that no
> reated."

lear that under this general rule two classes of cases arise:
which there is a devise to a legatee absolutely, and the
on of a desire, recommendation, or confidence, without
at the devisee will provide for others out of a certain sub-

ject-matter or property; and another class in which such a devise and expression are accompanied by other terms from which the conclusion may be deduced that the testator did not intend the wish to be imperative or in which the subject of it is uncertain. The authorities cited by counsel for the children of Daniel in support of their claim that his will created a precatory trust are of the first class.

In Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, the will read:

"I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seised or possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best."

In Noe v. Kern, 93 Mo. 367, 369, 6 S. W. 239, 3 Am. St. Rep. 544, the provisions were:

"I give, devise, bequeath unto my husband, William Ferguson, all of my real and personal estate, absolutely. * * * I make this bequest in the full faith that my husband will properly provide for the two children of my deceased brother, Simeon, whom we have undertaken to raise and educate."

In Murphy v. Carlin, 113 Mo. 112, 20 S. W. 786, 35 Am. St. Rep. 699, there was a devise of the remainder of the property of the testator, after the payment of certain legacies, to his wife, and to her heirs and assigns, forever, accompanied with this provision:

"It is my will and desire that my wife continue to provide for the care, comfort, and education of Thomas Joseph Murphy now aged nearly five years, * * * and to make suitable provision for him in case of her death."

In Bakert v. Bakert, 86 Mo. App. 83, 86, the provisions were:

"It is my will that my sons Caldwell Bakert and Barnett Bakert have all of my real estate. * * * It is my will that my sons Barnett Bakert and Caldwell Bakert support their mother and single sister off of the proceeds of the farm I bequeath to them so long as they may see fit and proper to live with my sons."

In none of these cases, or of any of the other cases cited by counsel for the appellants which sustain precatory trusts, did the wills contain other terms which declared or indicated that the expression of the will, desire, or confidence was not intended to create any trust upon the property devised. The will here under consideration differs from those which were the subjects of the decisions cited in this: that it contains a distinct paragraph which commands that:

"Nothing in this will, and no request, direction, or bequest made herein, shall be so construed as to create a charge or incumbrance upon any of the property bequeathed to my brothers."

In Briggs v. Penny, 3 Macn. & Gord. 546, 554, the Lord Chancellor, in discussing this subject, said:

"I conceive the rule of construction to be that words accompanying a gift or bequest, expressive of confidence, or belief, or desire, or hope that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: First, that they are so used as to exclude all

liscretion in the party who is to act, as to his acting according to
t; secondly, the subject must be certain; and, thirdly, the objects
nust not be too vague or indefinite to be enforced."

iams v. Williams, 1 Simons, N. S. 358, 369, Vice Chancel-
vorth declared that:

nt really to be decided in all these cases is whether, looking at the
ext of the will, the testator has meant to impose an obligation on
to carry his express wishes into effect, or whether, having ex-
wishes, he has meant to leave it to the legatee to act on them
his discretion."

y's Eq. Jur. § 1070, the author thus states the result of the
s:

er, therefore, the objects of the supposed recommendatory trusts
tain or definite; wherever the property to which it is to attach
in or definite; wherever a clear discretion and choice to act or
is given; wherever the prior dispositions of the property import
nd uncontrollable ownership—in all such cases, courts of equity
eate a trust from words of this character."

ner v. Bates, 98 Mass. 274, 277, Chief Justice Bigelow
hat the test of a precatory trust was:

create a trust it must clearly appear that the testator intended
nd control the conduct of the party to whom the language of the
essed, and did not design it as an expression or indication of that
testator thought would be a reasonable exercise of a discretion
tended to repose in the legatee or devisee."

claration was approved by the Supreme Court in Colton
127 U. S. 300, at page 314, 8 Sup. Ct. 1164, at page 1170,
138.

s v. Singler, 114 Mass. 56, 59, 60, there was a devise of the
the estate to the son of the testator, his heirs and assigns,
nd a further clause in the will in these words:

signify to my said son my desire and hope that he will so pro-
l or otherwise that, in case he shall die leaving no lawful issue
property which he will take under this will shall go in equal
certain persons therein named.

. J., afterwards Mr. Justice Gray of the Supreme Court,
the opinion of the court, which denied the creation of a
trust, and said:

to create a trust, it must appear that the words were intended
ator to be imperative; and, when property is given absolutely
t restriction, a trust is not to be lightly imposed upon mere words
ndation and confidence."

dency of the modern decisions, both in England and in
ry, is to restrict the practice which deduces a trust from
ssion by a testator of a wish, desire, or recommendation
the disposition of property absolutely bequeathed. 2
q. Jur. § 1069; Lambe v. Eames, L. R. 10 Eq. Cas. 267;
chinson and Tenant, L. R. 8 Ch. Div. 540; Pomeroy's Eq.
Ed.) § 1015; Foose v. Whitmore, 82 N. Y. 405, 406, 37
572.

ase of In re Hutchinson and Tenant, supra, a testator gave
perty to his wife "absolutely, with full power for her to

dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so"; and the court said:

"Both on principle and in consonance with the most modern authorities, I decide that the widow took absolutely."

In Corby v. Corby, 85 Mo. 371, 395, after reviewing many cases, the Supreme Court of Missouri says:

"These cases and the case referred to in the opinions of the judges, and the entire current of modern authorities, too numerous for citation, have established the rule that trusts are not to be created for the purpose of carrying out the declared wishes or confidences of a testator until he himself by his will has manifested a clear intention of creating a trust."

Pomeroy in his work on Equity Jurisprudence, § 1016, says:

"Upon the authority of the more modern decisions the whole doctrine may be summed up in a single proposition: In order that a trust may arise from the use of precatory words, the court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner. Unless a gift to A., with precatory words in favor of B., is in fact equivalent in its meaning, intention, and effect to a gift to A. 'in trust for B.,' then certainly no trust should be inferred."

From the authorities to which reference has now been made, and from others too numerous for review, which treat of this subject, these rules are fairly deducible: There is a simple, sure, and familiar form of bequest to raise a trust, which consists of a devise to the legatee in trust for the beneficiary, and a failure to use it indicates an intention to avoid the creation of a trust. Words of desire, request, recommendation, or confidence in a will, addressed by a testator to a legatee whom he has the power to command, create no trust in favor of the parties recommended, unless (1) the intention of the testator to make the desire, request, recommendation, or confidence imperative upon the legatee, so that he shall have no option to comply or to refuse to comply with it, clearly appears from the whole will and the relation and circumstances of the testator when it was made, (2) unless the subject-matter of the wish or recommendation is certain, and (3) unless the beneficiaries are clearly designated. When these three conditions exist, a precatory trust may be raised. The test of the creation of the trust is the clear intention of the testator to imperatively control the conduct of the party to whom the language of the will is addressed by the expression of the wish or desire, and not to commit to his discretion the exercise of the option to comply or to refuse to comply with the wish or suggestion expressed.

It is not now difficult, in the light of the decisions to which reference has been made and the rules of law deducible from them, to determine the question whether or not a trust was raised by the will of Daniel D. Burnes. At the time he executed it he was a widower with six children, the oldest of whom was 14 years and the youngest but a few months of age. He had two brothers, who were active business men. He was a lawyer. He knew that a devise to his two brothers in trust for his six children would

stablish an impregnable trust. He knew that a bequest to the vo brothers on condition that they adopt the six children in such way that they should share equally with their own in their ad- ancements and estates would, if accepted by the legatees, create valid trust. He made no such devises, and from this fact the resumption unavoidably arises that he intended to create no such rusts. He bequeathed all his property to his brothers, "to be held nd disposed of by them absolutely as their own property." He xpressed a desire that they should so adopt his children that they vould share equally with their own in their advancements and es- ates. If he had left this subject here, and the two brothers had ccepted the bequest as they did, the question might have been ebatable whether or not he intended to charge his estate with a rust or to condition their acceptance of it with the creation of a rust in their property. This fact evidently did not escape the tes- ator, and he removed the doubt. He added to his will another lause, wherein he declared his intention upon this subject in un- nistakable terms. He willed that:

"Nothing in this will, and no request, direction, or bequest made herein, hall be so construed as to create a charge or incumbrance upon any of the roperty bequeathed to my brothers James N. Burnes and Calvin F. Burnes."

The legal knowledge and character of the testator, his intimate cquaintance with the ability and dispositions of his brothers, his ailure to devise his property in trust, or to condition its acceptance vith the charge of a trust upon the property of his brothers by the se of any of the customary and simple forms of devise for such urposes, and his clear declaration in the fifth paragraph of his will f his intention that there should be no such charge, converge upon he mind with compelling power, and leave it no other rational con- lusion than that he neither intended to, nor did, create any trust in avor of his children, either in the estate which he left or in the roperty of his brothers. Trusting, and, as the event proved, wisely rusting, in the ability, industry, frugality, and affection of his rothers, he intended to, and he did, devise his property to them vithout charge or incumbrance. He intended to confide and he did onfide to their discretion the exercise of the option to fulfill or to efuse to gratify the desire he expressed in the third paragraph of is will, and no trust in favor of his children arose under that in- trument.

The conclusion that the will of Daniel created no trust strikes own the chief proposition upon which the claim of his children o secure an avoidance or disregard of the contracts of 1889 and 896 and a redistribution of the stock of the Burnes Estate is ounded. That proposition is that they were induced to make these greements by the fraudulent concealment of the fact that Calvin nd James had advanced to the descendants of the latter about 100,000 more than they had furnished to the children of Daniel. f the property derived from the three brothers had been charged vith a trust, or if any obligation or duty had been imposed upon ames and Calvin to make equal advances while they lived to their

adopted and their natural children, this fact would have been material to the rights of the parties in 1889, and might well have influenced the terms of the settlement. We have seen that no such trust, obligation, or duty was imposed by the will. Neither was it by the deed of adoption which followed the will. That instrument went no farther than to make the six children of Daniel equal heirs of James and Calvin in case of their intestacy. But one who adopts a minor as his child and heir has, while living, the same unlimited power of disposition of his property that a natural father has. Steele v. Steele, 161 Mo. 566, 573, 574, 61 S. W. 815. Hence the fact that a gift or advancement of $100,000 had been made to the descendants of James prior to his death was entirely immaterial to the rights of the parties after his decease, and to the contracts of 1889 and 1896, and the ignorance of the children of Daniel concerning it, or its concealment from them, presents no substantial ground for the avoidance or repudiation of the settlement they made.

It is, however, earnestly argued that the distribution of the stock under these contracts was violative of the legal rights of the children of Daniel, that it was inequitable, that in 1889 Calvin was the father by adoption of the children of Daniel, and, as surviving partner of his brother, the trustee of all the property, and that by the use of his fiduciary relation, of his power as trustee, and of a threat that, if the children refused to execute the contract of that year, they must enforce their rights in the courts, he induced them to make the agreement under which the stock was divided, and that on account of these facts the court should make an equitable redistribution of it. The contract of 1889 was obviously intended to constitute a final settlement of the claims of all parties to it to any share in the estate of James, in the property of Calvin, or in the stock of the new corporation then to be formed. The unsigned will of Calvin and the agreement of 1896 were but the execution of that settlement. It may be, as counsel insist, that the agreement of 1889 did not legally deprive the children of Daniel of their expectancy in the estate of Calvin, and that upon his death they were legally entitled to their shares of his estate as his heirs, notwithstanding the contract of 1889. Nevertheless the evidence, the acts, and the silence of the parties, whereby they affirmed and preserved the distribution of 1889 throughout the administration of the estate of Calvin and for 11 years after it was made, until Calvin and every one who was an active party to it in the interest of the descendants of James, were dead, demonstrate the fact that the minds of all the parties to that settlement met in 1889 upon the proposition that the contract of that year finally fixed and determined the interests of all in all of the property derived from the three brothers, and that from this conclusion their minds never parted until after the death of the last active male member of the descendants of James. The contract of 1889 and the equity of disregarding it must accordingly be considered upon the theory that it was a final settlement of the interests of the parties to it in the estate of James, in the property of Calvin, and in the corporation that was to be formed.

An exact statement of the interests of the various parties in the

which is the subject of this controversy is not material
termination of the questions presented, and it is not at-
The statement of facts in this regard is only intended
lly portray the situation of the parties and their interests.
e settlement was made an equitable distribution of the
uld have assigned to the four children of Daniel, who
redistribution, about 243 more shares than they actually
and would have increased their interest in the property
rporation about $160,000. But they had no legal right
ares of this stock, to any interest in this corporation, or
are in the property of Calvin. The limit of their legal
en the settlement was made was to receive four-ninths
ate of James, which would have been a share of the prop-
at estate worth $145,000. They received by the settle-
shares of the stock of the Burnes Estate, which was then
out $115,000. They received less than their share; but
not alone in this situation. Calvin himself received only
s, when he was legally entitled to 500. The interest he
n the corporation was worth $79,000 less than his legal
he fact undoubtedly is that the contract and distribution
a compromise of conflicting claims to the property, under
e descendants of James secured more, while Calvin and
en of Daniel obtained less, than their just shares, perhaps
eration that the entire property should be preserved intact
under the successful management of Calvin and the sons
Whatever the consideration was, the effect of the set-
stated in the most favorable light for the four children of
vas this: They paid a possible $275,000 in property, of
ey were then legally entitled to only $145,000, for stock
rnes Estate which was worth only $115,000. But the fact
pays too much for property which he buys, or that he sur-
part of his property or of his rights to secure a compro-
conflicting claims to it, furnishes no sound reason for a
of the sale, or for a repudiation or modification of the
ise. Smith v. Smith, 36 Ga. 184, 191, 193, 91 Am. Dec. 761.
indeed, held all the property as trustee for the parties in
He was the adopted father of the children of Daniel
ied a fiduciary relation to them which imposed upon him
of fair dealing, of a full disclosure of all material facts,
ne utmost good faith, and prohibited him from securing
ntage to himself or to others by the use of his relation
on. But did he fail to discharge this duty or violate this
? The advances to the sons of James and the value of
e of Daniel in 1867, of which much is said in argument,
s which did not condition and were not material to the
the parties or to the terms of the contract in the year 1889,
failure to disclose them was no breach of his duty. He
ne will and the deed of adoption before the children of
nd embodied them in the contract of settlement. He and
d taken these children into their families, provided them
ome, maintained, cared for, and educated them with their

own children from the death of their father in 1867 until they arrived at years of maturity. When the boys became of age they were employed at small salaries in the operation of the property. When the agreement of settlement was made all the children of Daniel were of age. Those who caused this controversy had enjoyed a business experience of some years. James N., the younger, was 35 years, and Lewis C. Burnes was 28 years, old. One of the daughters was married to a lawyer, who considered, discussed, and refused the settlement, and she then sold her interest in the property. These children were not ignorant that much more money had been advanced to and spent by the descendants of James than they had received. They had not known of the will of their father or of the deed of adoption until the year 1889, but they were aware of them and the advisability of accepting the proposition embodied in the contract as a final settlement of their rights in the property under them had been the subject of consideration, discussion, and conference among them for at least four months before the contract was finally executed. They had once agreed to refuse to make it. Wiser counsels, however, subsequently prevailed, and all signed it but Mrs. Moore. This is not a case where a trustee took advantage of his relation to his cestuis que trust to conceal material facts and to secure an advantage for himself. He, like the children of Daniel, received less than his lawful share.

It is, however, insisted that he used his power and relation unjustly to the advantage of the descendants of James, and that this is equally fatal to the settlement as his use of them for his own benefit. But does the record sustain this charge? While it is true that the descendants of James obtained more than their just share of the stock, a careful perusal of the evidence fails to satisfy that they secured it through any unjust influence or censurable act of the trustee. His threat to the children of Daniel that they must accept the compromise offered by the agreement or secure their rights from the courts can hardly be said to be reprehensible, in view of the fact that such must have been the result of his failure to induce the conflicting claimants to agree, and that courts are established for the express purpose of protecting and enforcing such rights. What controversy he had with the descendants of James, how strenuous were his efforts to secure their approval of the settlement before they consented to the compromise, we cannot know, because the mouths of Calvin and of the sons of James had been closed in death before these suits were instituted. The evidence does not present a case where the trustee wrongfully used his fiduciary relation to deprive any of his cestuis que trust of their just rights. It discloses a case, rather, where the trustee, standing between two contending factions, sacrificed $79,000 of his own property to preserve peace in his family, to effect a settlement of conflicting claims, and to keep the property of the children of Daniel, as well as that of all the other members of his family, under the management of those who had raised and educated the former and had so cared for their financial interests that their property, which was not worth more than $40,000 in 1867, had become of

value of at least $200,000 when the settlement of 1889 was
e. When this settlement was made the children of Daniel
of age and the sons had experienced the benefit of many years
usiness activity. They knew all the material facts which con-
ned their rights. They were not induced to execute the agree-
t of compromise by fraud, and there is no sound reason why
urt of equity should now interfere to avoid it, or to assist them
udiate it. On the other hand, there are insuperable objections
ich a course.

ne descendants of James have relied and acted upon the con-
of settlement for 12 years without notice of objection to it,
the children of Daniel by their assent to it are estopped from
ling or repudiating it and the courts from assisting them to
o. Even if the fiduciary relation and power of the trustee,
in, had obscured their mental vision and fraudulently induced
to assent to the settlement in 1889, they must have discovered
fact when all this power and influence were removed by his
n in 1896, and their silence for four years thereafter, much
e their execution of the contract of 1896, in performance of that
89, irrevocably ratified the settlement. The law gives one who
luced by fraud to make a contract the option to rescind it. But
poses upon him the duty to exercise that option with all con-
nt speed after his discovery of the fraud. He may not specu-
upon it. He may not lie in wait until time and change make
nterest plain, and then make his choice. Silence, delay, ac-
scence, or the retention of the fruits of the agreement for any
iderable length of time after the discovery of the fraud, consti-
s a complete and irrevocable ratification of the transaction.
an v. Sabin, 3 C. C. A. 578, 580, 53 Fed. 415, 418; Kinne v.
b, 4 C. C. A. 170, 174, 54 Fed. 34, 38; Wheeler v. McNeil, 41
. A. 604, 607, 608, 101 Fed. 685, 688, 689.

ne restoration of the status quo as far as possible, and hence
return of the fruits of the contract, if that may be done, is in-
nsable to its rescission or repudiation. One may not retain
benefits and renounce the burdens of his agreement. Nor can
tain the fruits of a bad bargain and maintain a suit for enough
to make it a good one. The four children of Daniel still
the 177 shares of the stock of the Burnes Estate, which were
h $115,000 in 1889, and which are now, with the 375 shares
rned to the corporation and retired, worth $1,100,000, and ask
urt of equity to sweeten their trade by transferring to them
r shares worth many hundred thousand dollars more. They
hased the 177 shares, now worth $1,100,000, with property
h no more than $275,000 in 1889. Their retention of the fruits
eir bargain through all these years is alike fatal to a claim for
escission of their agreement and to their prayer to the chancel-
o make for them a better bargain. McLean v. Clapp, 141 U. S.
12 Sup. Ct. 29, 35 L. Ed. 804; The Ernest M. Munn, 13 C. C.
10, 511, 66 Fed. 356, 357; Grymes v. Sanders, 93 U. S. 55, 62,
. Ed. 798; Breyfogle v. Walsh, 80 Fed. 172, 176, 177, 25 C. C.
57, 362.

For obvious reasons of public policy, compromises of conflicting claims by family settlements are encouraged by the courts, and they may not be avoided or disregarded for mere inadequacy of consideration, or except upon clear and convincing proof of grave fraud or mistake. Stapilton v. Stapilton, 1 Atk. 2, 2 White & Tudor's Lead. Cas. in Equity, pt. 2, p. 730; Supreme Assembly v. Campbell, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601; In re Palethorp's Estate, 168 Pa. 101, 31 Atl. 885.

A court of equity may condition its grant of relief to those who seek its aid by the requirement that they shall do equity to their opponents, although the latter have been barred by limitation or by laches from successfully seeking that equity by an independent suit. But it may not require them to do inequity, and it must be satisfied that its condition is just and equitable before it imposes it. All the active participants on the part of the descendants of James in the settlement of 1889 died before the claim of the children of Daniel to repudiate it was made. Marvelous changes of conditions and values have occurred since that date. A share of stock in the Burnes Estate, which was worth $650 in 1889, now has a value of $4,000. Before the contract of 1889 the four children of Daniel were entitled to no stock in the Burnes Estate, and without it they would probably never have secured any. For a possible $275,000 they have secured stock now worth more than $1,000,000. Rescind this settlement, restore their stock to the corporation, and grant them their $275,000 and interest, and they lose far more than they gain. Hence they do not seek this relief. But they may not at the same time approbate and reprobate. The contract must either be affirmed or rescinded. Affirm it, and they are conclusively estopped from claiming a larger share in the corporation than they agreed to accept for their interest in the property. Turn it as we may, view it from whatever point, there is no foundation at law, and no equity, in the claim of the four children of Daniel that to the 177 shares which they bought, and which they still retain, hundreds of thousands of dollars should be added, either by a redistribution of all the stock of the corporation, or by their retention of the 300 shares which they wrongfully took from the Burnes Estate; and there was no error in the refusal of the Circuit Court to grant them any relief of this nature.

The decree below is sustained by the evidence, it is in accordance with established rules and principles of equity, and it must be affirmed. It is so ordered.

JOHN DEERE PLOW CO. v. McDAVID.

In re JOHN DEERE PLOW CO.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1905.)

No. 2,117, 43.

ONTRACTS—CONSTRUCTION—CONDITIONAL SALES—AGENCY.

Claimant contracted to consign goods to a bankrupt according to schedules and certain requests of the bankrupt, which agreed to pay transportation charges, furnish warehouse room, pay taxes, licenses, and rents, keep the goods insured, and be personally liable for any damage to goods while in its custody, to make all reasonable efforts to sell the goods, not to sell other makes to the exclusion of goods consigned under the contract, and to sell for enough more than the net schedule prices to pay freight, taxes, expenses, charges, and commission for handling and selling the goods, which should be the difference between the net amounts and the gross amounts received from the sales. The contract expressly provided as to what warranties should be given, and entitled claimant to require the goods to be returned. The bankrupt ordered goods under this contract, agreeing to pay therefor in par funds or give notes, and agreed that the title and ownership of all goods should remain in the claimant, which should be subject to its order until paid for. *Held*, that the contract was one of agency, and not a contract of conditional sale.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1335.]

AME—PREFERRED CLAIMS—TRUST FUNDS.

Where a bankrupt improperly mingled funds belonging to its principal with its own funds, and it was not shown that the trust funds, either in their original or a substituted form, came into the hands of the bankrupt's trustee, the principal was not entitled to a preference therefor.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 539.]

EDERAL COURTS—RULE OF DECISION.

Whether a creditor of a bankrupt is entitled to a preference on the ground that the claim is based on the bankrupt's misappropriation of a trust fund, does not depend on the construction of the contract between the parties, but on a rule of preference in equity, as to which the federal decisions, and not those of the state where the contract was made, must control.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

Appeal from the District Court of the United States for the West- District of Missouri.

The following is the opinion of the court below (Philips, District lge):

he statute of this state (section 3412, Rev. St. 1899) provides that: "In cases where any personal property shall be sold to any person, to be l for in whole or in part in installments, or shall be leased, rented, hired delivered to another on condition that the same shall belong to the per- purchasing, leasing, renting, hiring or receiving the same whenever the ount paid shall be a certain sum, or the value of such property, the title he same to remain in the vendor, lessor, renter, hirer or deliverer of the he, until such sum, or the value of such property, or any part thereof, ll have been paid, such condition, in regard to the title so remaining il such payment, shall be void as to all subsequent purchasers in good h, and creditors, unless such condition shall be evidenced by writing exe- ed, acknowledged and recorded as provided in cases of mortgages of per- al property." This statute was enacted to put an end to the abuses in ent to what is known in this state as "conditional sales of personal prop-

erty," whereby, under agreements between the vendor and vendee, undisclosed to the public, the title to the property should remain in the vendor in the nature of a lien until the purchase money should be paid. Upon the faith of the ostensible ownership of the party in possession, credit would be extended to him by third parties, and when they sought to subject the property to attachment or execution such vendor would interpose, and claim the property under the assertion that the title had never passed from him. To effectuate the declared public policy of the state in this statute, the courts of this state have given to it a broad and rigid construction, to the effect that its policy was for "inspiring confidence that in all sales of personal property, when possession was delivered to the vendee, as to creditors and purchasers the vendor's title must be held to have been absolutely passed, unless upon the public registry books of the land there appear in the manner provided by law some reservation of a right therein." Straus v. Rothan, 102 Mo. 266, 14 S. W. 940. Or, as stated in Johnson-Brinkman Co. v. Central Bank, 116 Mo. 571, 22 S. W. 813, 38 Am. St. Rep. 615, it "was manifestly intended to invalidate numerous devices which had sprung up for the evasion of the statute." This court's observation is that no class of business concerns so assiduously and persistently seek to circumvent and get around this statute as manufacturers and vendors of machinery, and the like, who seek to exploit their products in the country districts through local agents. Unwilling, for trade reasons, to sell outright on credit, or to not have it known to the public the terms upon which the goods are committed to the given party for sale, they call to their assistance the most astute counsel to construct contracts after such a fashion that, while imposing upon the retailer all the burdens of a purchaser, if insolvency or bankruptcy overtake him he may be held technically to be a mere factor. This court is constantly plagued with these controversies, when it is within the power of such merchants by a plain and unambiguous contract to place its relationship to such goods beyond reasonable debate. And it is a wholesome rule that where such contracts, drawn by such claimants, are ambiguous or uncertain, to construe them most strongly against the claimant. Gillet v. Bank, 160 N. Y. 549, 55 N. E. 292.

In re Rabenau, 118 Fed. 471, this court took the pains to discuss in detail a contract quite germane in many important respects to the one under review. In recognition of the principles of law therein announced this court thought, in affirming the action of the referee, that was decisive of this case. The propositions there asserted, supported by controlling authorities, may be summarized as follows: If the goods are consigned to be sold for the consignor, who is to regulate the price and terms of sale, the factor is an agent, and the contract is one of bailment. But if the consignee is to sell upon terms fixed by himself, and is bound to pay to the consignor a fixed price, the contract is one of sale. If the consignor may sell at any price he likes, and receive payment, though he is bound if he sells the goods to pay the consignor for them at a fixed price and a fixed time, it is a sale. When the identical thing delivered is to be restored, or in its altered form of money, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value or the money value, he becomes a debtor to make a return, and the title to the property is changed; it is a sale. And, further, it is of no consequence how often or positively it may be asseverated, in the form of the contract, that the party of the first part, as principal, consigns to the party of the second part, as agent, on commission, and the like. This will be treated by the courts as mere words without controlling effect, if, taking the whole instrument by its four or eight corners, and all the collateral facts, in pari materia, it appears in its essence to be that the consignee is at liberty to sell at a price and on terms fixed by himself, being answerable to the owner for a fixed price, it is none the less a sale.

Stripped of mere formalism, it is apparent from the contract in question that the burdens cast upon the Hymes Buggy & Implement Company are what would be imposed upon and assumed by any vendee. It was to pay freightage, the taxes, the insurance, to house and care for the goods, pay all expenses of their sale, and to bear any and all loss of their destruction or de-

ation, while answerable to the party of the first part for the fixed price. unable to find in this contract any express provision fixing a time the consignee could, of his own motion, return the goods. The only sion touching this aspect of the case is the following: "It is further l that this contract is to remain in force unless cancelled and annulled d first party until Oct. 1st, 1904, at which time said second party agrees uired by said first party, to return all goods remaining on hand unsold expiration of this contract to them at their warehouse in Kansas City, od order and free of all freights and charges." From which it appears he return of any unsold goods depended solely upon whether it be "re- l by said first party." If the party of the first part does not require the , the party of the second part cannot compel it. The contract in this t is wholly unilateral.

ning to the testimony of the managing representative of the claimant, pears that at the end of each year the agent of the company visited the of Hymes Buggy & Implement Company and took an inventory of the on hand, and left them there. In its practical effect, this was nothing than means of ascertaining whether or not the house had sold more goods it had accounted and paid for. There was no time fixed when this ss or course might end, except that, "should the second party hereto sell r otherwise dispose of his business at any time prior to the expiration is contract, the right to declare this contract cancelled and annulled and after the date of such sale or transfer is reserved to party of first without prejudice." Aside from this provision, bearing the earmarks of ditional sale, its evident purpose was to safeguard the vendor against n such contingency. If the Hymes Buggy & Implement Company sold oods on time, it was required to take good notes, guarantied by its in- ment thereon. The object of this clearly was to better the security of endor for the purchase money. The balance, after satisfying the ven- claim, was to be returned to the vendee. Just as in the case of other tional sales, the goods were to be paid for when sold by the vendee for The so-called consignee, like any other vendee, was left at full liberty l the goods at any price he might obtain, and pocket the profits; and, saw fit to sell at a less sum than that for which he was to respond to endor, he must pocket the loss. The fact that the consignee was to t monthly his sales, and make payments thereon, does not alter the s of the vendor and vendee. In re Rabenau, 118 Fed., loc. cit. 475.

e Court of Appeals of this state (which has most to do with these trans- as because the amount in controversy usually makes that the court of last t) gives to such contracts under the state statute the construction in ony herewith. In Bicking v. Stevens, 69 Mo. App. 168, it is held that, e the consignee is to sell the consigned goods upon terms fixed by him- and is bound to pay the consignor a fixed price at stated times, the act is one of sale; "and the fact that the payment is to be made on the gency of the consignee's selling does not affect the character of the action as a sale." The contract there provided that the consignor should out the goods on consignments, to be sold on the consignor's account. consignee was, on the 1st of each month, to render an account of the nt of sales made during the previous month; and, just as in the case r, he was to itemize the goods remaining unsold in stock. The accounts les were rendered, accompanied with note or cash for goods sold during revious month. The court held that "the time in which the purchase y was to be paid—whether in so many days or months, or upon the ening of some contingent event, as a resale—did not affect the charac- f the transaction as a sale. The provision in relation to payment did uspend the transfer of title. The sale was complete and the title passed the goods were delivered and the purchaser put in full possession and ol of them." The court cited and reviewed the authorities on this ques- fully sustaining the proposition.

ere is another fact in this case. In the Exhibit C, which is an account rt of the goods in controversy, shipped on the 15th day of September, is set out on its face the contract of sale, with terms and prices differ- rom the contract in question. These stipulations are as follows: "The

goods as below enumerated to be well made, of good material, and to work when properly managed, according to the Manufacturer's Printed Warranty. I, or we, hereby agree to make you payment for same in Kansas City par funds. (Exchange and Express charges prepaid.) If account is not paid when due, to draw interest at ten per cent from maturity. I, or we, hereby agree to give notes or acceptances for the amount of goods, as per terms of payment, when called upon to do so, and to make no claim for shortage or damage after ten days from receipt of goods. No interpretation or verbal understanding of this contract not mentioned herein, will be recognized. All orders taken subject to approval of John Deere Plow Co., and also agree that the title to and ownership of all goods which may be shipped as herein provided, shall remain in, and their proceeds in case of sale, shall be the property of John Deere Plow Co., and subject to their order until full payment shall have been made. If owing to the large lines you carry, you find it necessary to ship sort a portion of the orders, you may do so and we will make no claims for any allowance therefrom. Prices subject to change without notice." This falls exactly within the inhibition of the statute respecting conditional sales. It also appears from the findings of the referee that the bills rendered by the claimant, on which the goods were shipped, contained the following: "Sold to the Hymes Buggy & Implement Company." In Cooper Wagon & Buggy Co. v. Woodbridge, 98 Mo. App. 648, 73 S. W. 724, it is held that, where the application of the purchaser for goods expressed a conditional sale, the vendor wrote on the bill of sale the words, "Terms: Comm. Con.," indicating commission consignment, it was held that, notwithstanding the words "Terms: Comm. Con." the contract was a sale, and not on commission. It is true that in Sturm v. Baker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093, it was held that, where the contract of sale was clearly expressed in a written contract between the parties, it could not be varied by the terms of the printed billhead of the invoice. But it does not control this case, in so far as the bill of sale above referred to is concerned, for the reason that the bill of sale on its face shows that the Hymes Buggy & Implement Company, in its written application for the goods, specified that they should be sold upon the conditions and terms therein specified; and when the goods were shipped thereon, it was an acceptance of the offer, and made a specific contract. Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451], defines the title which the trustee in bankruptcy acquires. Subdivision 5, in specifying the property which passes to the trustee, says: "Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Under this contract the Hymes Buggy & Implement Company had the right to sell the goods to whom and at what prices it pleased, being answerable only to the claimant for a fixed sum; and beyond question the purchaser would have acquired a good title as against the claimant. As held in Re Pekin Plow Company, 112 Fed. 308, 50 C. C. A. 257, and in Moline Plow Company v. Spilman (D. C.) 117 Fed. 746, the trustee in bankruptcy stands in the same position as the creditors of the estate pursuing goods under legal process. Therefore the trustee is entitled to claim the goods as against the vendor under a conditional sale. This view of the law is affirmed in McFarlan Carriage Co. v. Well, 89 Mo. App. 642, 74 S. W. 878.

In respect of the case of In re Galt, 120 Fed. 64, 56 C. C. A. 470, without conceding its controlling effect upon the statute of this state as construed and applied by its courts, it is sufficient to say that the contract in that case was materially different in important particulars from the one at bar. In that case the contract specifically fixed "the sum of 5 per cent. on all cash sales." It is also provided that the consignee was "to settle for all wagons sold by him as agent, make all sales and take all evidence of indebtedness therefor for and in the name of said party of the first part, upon such blanks as the party of the first part shall furnish, and remit the cash and notes received for said wagons to the party of the first part in the following manner: the cash to be remitted as early as the day following the date of sale, by draft, etc., payable to the order" of the consignor, "and the notes to be transmitted every thirty days, or as much oftener as said second party may de-

." The contract also specifically provided that "the party of the second
: further agrees to sell all wagons shipped him under the within agree-
t within twelve months from the date of shipment, and in case of any
ure or neglect to do so agrees to settle at the expiration of that time,
at any time thereafter when called upon to do so, for all wagons and
s of wagons remaining on hand unsold, [at] prices hereinbefore stated."
certain manner. From which it is apparent that the contract not only
l the price at which the property should be sold, but the amount of the
signee's commission, and it fixed a time when, and the conditions on
ch, the property consigned might be returned.

ounsel for claimant calls special attention to the case of Metropolitan
ional Bank v. Benedict Company, 74 Fed. 182, 20 C. C. A. 377. That case,
ts controlling facts, is essentially different from the one under considera-
. The Benedict Company, owner of the goods, by correspondence with
rn Auction & Commission Company, consummated an agreement between
n by which the latter company consented to take the goods by an accept-
e in writing, which specified on its face that they took them under consign-
t, to be sold at the prices submitted in the letter from the Benedict Company,
n an express agreement that it would sell "without any charges of com-
sion." The memorandum acceptance furthermore provided for a specific
e when the agreement should expire, "that no part of the assignment (con-
ment) shall remain unsold or unpaid for by February 1st, 1895." Unques-
ably, if at the end of that time the goods remained unsold and unpaid for,
itution belonged to the assignor. And therefore, when the Metropolitan Na-
al Bank, with notice of this agreement, took an assignment in the nature
mortgage on the goods to secure a debt of Stern Auction & Commission
npany to the bank, it was properly held that as between the parties it
a consignment on bailment. Judge Caldwell, who wrote the opinion,
much stress upon the construction given to this agreement by the parties
reto. But surely he did not mean to say that any unknown construction
ed upon the contract by the parties thereto could affect the rights of
d parties who had dealt with the consignee as the apparent owner, in ig-
ance of such private interpretation. Throughout the examination of the
naging agent of the claimant in the case at bar, its counsel, by leading
stions pregnant with suggestive answers had this agent state that the
ract in question was simply a consignment on commission; but when this
stion was put to Mr. Hymes, the managing party of the Hymes Buggy &
plement Company, he answered, in effect, that the contract would have to
lk for itself.

ther reported cases are pressed upon the consideration of the court by
mant's counsel, which are not deemed in point, or of controlling effect,
hey depend upon states of fact easily differentiated from the contract in
stion.

n conclusion, it does seem to me that, if wholesale dealers can set up a
il merchant, as in this case, in a large establishment, with no outward
visible sign of the bailment or agency, enabling him to obtain credit on
faith of his apparent ownership, and then, when attachments or bank-
tcy overtake the debtor, come forward with concealed contracts of so
biguous and double aspect as this contract presents, and maintain a spe-
ownership in the remnant of the debtor's goods, the state statute, de-
ed to put an end to secret liens or ownership, is of no avail.

ndependent of the foregoing considerations, there is a fatal objection to
claim as a preferred creditor to the extent of the $1,442.25 on account of
ls sold, and not paid for by the bankrupt. There is no evidence in this
ord tending to show that this money was on hand at the time of the ad-
ication in bankruptcy, or that it went into or was mingled with the mass
ssets that passed to the control of the trustee in bankruptcy. Metropolitan
ional Bank v. Campbell Com. Co. (C. C.) 77 Fed. 705; Bircher v. Walther,
Mo. 461, 63 S. W. 691. So far from the claimant's evidence bringing
claim within the rule laid down in the foregoing cases, the testimony of the
ness Hymes, introduced by the claimant, is that the money realized on
e of the goods "was deposited in bank, used in the business, or sent to the

John Deere Plow Company." This is far short of the proof required under the equity rule.

It results that the motion for rehearing is denied.

Tom H. Reynolds (Thomas R. Morrow and James P. Gilmore, on the brief), for appellant.

John S. Farrington and W. A. Rathbun, for respondent.

Before SANBORN, Circuit Judge, and RINER, District Judge.

RINER, District Judge. This was a case brought here on appeal from a decision of the District Court affirming an order of a referee in bankruptcy refusing to direct the return of certain personal property in the hands of a trustee, and to allow certain claims as preferred claims against the estate in favor of appellant and petitioner, John Deere Plow Company (hereinafter called the "Plow Company"), and also upon a petition for review. Under a stipulation of the parties, both cases are to be considered upon the same record.

In May, 1904, the Hymes Buggy & Implement Company (hereinafter called the "Implement Company"), a copartnership, was declared a bankrupt upon a petition in involuntary bankruptcy brought by the creditors of that firm, and the case was sent to a referee. The plow company presented a petition to the referee, in which it set forth that on the 15th day of September, 1903, it entered into a written contract with the implement company for the consignment of goods to be sold on commission; that under the contract certain goods, wares, and merchandise were consigned to the implement company for sale on commission and at the time of the filing of the petition in bankruptcy the implement company had on hand goods consigned to it under the contract of the value of $1,390. It was also alleged that the implement company had sold, but had not accounted for to the plow company, certain other goods received and held under the contract to the amount of $1,442.25, and which sum the implement company had retained and placed in its own business, in violation of the terms and provisions of the contract and without the knowledge or consent of the plow company. The petition prayed for an order for the delivery of the goods unsold and for the allowance of the claim of the plow company for $1,442.25 as a preferred claim. The prayer of the petition was denied by the referee, and the case certified to the District Court, where the finding of the referee was affirmed.

The contract between the plow company and the implement company is in the following words:

"This agreement, made and entered into this 15th day of September, 1903, by and between John Deere Plow Co., of Kansas City, Missouri, incorporated under the laws of the State of Missouri, party of the first part, and Hymes Buggy & Impl. Co., of Springfield, County of Greene, State of Missouri, party of the second part.

"Witnesseth, That said first party, for and in consideration of the stipulations and agreements herein contained, have this day appointed and by these presents do hereby appoint the second party as their authorized agent at Springfield, Mo., for the sale, on commission, of the consigned goods and articles of merchandise designated hereon or enumerated and described on schedules of said second party, to be attached hereto as hereinafter provided.

The party of the first part agrees to consign to and upon the written re-
st of the said second party, so long as said party of the first part has the
ds in stock to enable it so to do, during the continuance of this contract,
goods and articles of merchandise designated hereon, or on schedules or
ten requests of said second party hereafter made; said schedules or writ-
requests to set forth the net amount to be received for the goods by the
y of the first part after the goods shall have been sold by said party of the
nd part as such agent, and the place to which to be consigned, and when
written requests or schedules properly signed by said second party are
pted by John Deere Plow Co., they shall be attached and made a part
his contract, reference being made to same on the face thereof, subject to
following conditions, agreements and obligations:

The party of the second part agrees as follows:

st. To receive from the Transportation Companies, and pay all trans-
ation charges on same, the goods and articles of merchandise consigned
er terms of this contract.

nd. To furnish proper warehouse room for all goods and articles of mer-
ndise consigned under terms of this contract.

3rd. To pay all Taxes, License, Rents and all other expenses incidental
he safe keeping and sale of the goods and articles of merchandise, and
raive all claims against John Deere Plow Co., for such expense.

4th. To keep said goods and articles of merchandise insured for their
value, at expense of said second party, in the name and for the benefit
John Deere Plow Co., in Companies approved by them, and to turn over
policies to them, the said John Deere Plow Co., and in case of any neglect
ailure to insure as herein provided, to become personally responsible for
loss or damage that may occur to said goods while in the custody of said
nd party.

5th. To keep samples of said goods and articles of merchandise set up in
srooms suitable for the purpose, and to make all reasonable efforts to
the same; and not to sell any other makes of like goods and articles of
chandise to the exclusion of those consigned under the terms of this con-
t.

6th. To sell the goods and articles of merchandise consigned under this
ract for enough more (that) the net amounts to be received therefor by said
y of the first part, as above stated, and set opposite said goods in the said
ten request and schedules attached, to pay all freights, taxes, expenses,
ges, compensation and commissions for the handling and selling of said
ds as herein provided, and the doing of all things herein provided to be
by the party of the second part; it being mutually understood that
said net amounts set opposite said goods in the attached schedules and
ten requests, are the net prices at which said goods and articles of mer-
ndise are to be consigned for sale, and are the net amounts, which said
nd party agrees to account for and deliver to the John Deere Plow Co.,
said goods when sold, as per terms of this contract. The full charges,
pensation, commission and expenses of said second party for the handling
selling of said goods as herein provided, and the doing of all things
ein provided to be done by the party of the second part, to be the differ-
between said net amounts and the gross amounts received from the sale
aid goods.

7th. To sell all goods and articles of merchandise consigned under this
ract, subject to the Manufacturer's regular printed Warranty, and to
le all claims for breakage and defects in accordance therewith. And
es not to part possession with any of the said goods until full and satis-
ory settlement shall have been made for same by purchaser, and will not
w, under any circumstances, any of said goods to be taken away on trial
re such settlement is made; and that all proceeds of such sales, whether
, or notes, shall be kept separate and distinct from said second party's
r business.

8th. The second party further agrees to make out and render to the said
party, on the first day of each month, and oftener if so requested, a
and complete report of all sales, made the month previous, or since the
report made; and to accompany said report with a full settlement in

accordance with this contract for all goods so reported sold, said settlement to be made with cash for all sales less 5% discount for all cash, ——— months from date of same and bearing interest at ——— per cent., per annum from ———. And the second party further agrees that when purchaser's notes are given in settlement for sales made as herein provided, said notes will be on blanks furnished by John Deere Plow Co., and are to be taken only from good, prompt paying purchasers. And the second party further agrees to endorse all such notes given to said first party in the following manner, to-wit:

"For value received, I or we hereby guarantee the payment of the within note at maturity or at any time thereafter, and waive demand, protest, notice of protest and non-payment.

"9th. It is further agreed and understood, that the goods and merchandise to be supplied hereunder are to be consigned simply, and that the title to and ownership of all goods and articles of merchandise consigned to said second party under the terms of this contract, and all proceeds of the sale of same, shall remain vested in said first party, and be its sole property and subject to its order, until the full amount to be received for said goods, as herein provided, shall have been received by said party of the first part.

"It is further agreed that this contract is to remain in force unless cancelled and annulled by said first party, until Oct. 1st, 1904, at which time said second party agrees if required by said first party, to return all goods remaining on hand unsold at the expiration of this contract to them at their warehouse in Kansas City, in good order and free of all freights and charges.

"This contract is not transferable and should the second party hereto sell out or otherwise dispose of his business at any time prior to its expiration, the right to declare this contract cancelled and annulled from and after the date of such sale or transfer is reserved to party of the first part without prejudice.

"The second party hereby agrees to forward any goods received on this contract at any time, and as said John Deere Plow Co., or their authorized agents may direct, charging only actual cost of freight and drayage, collecting same from transportation company as back charges.

"It is also agreed that the contract held by John Deere Plow Co., is to be considered the original, and to be the binding agreement in case the duplicate varies from it in any particular. And that the same may be terminated at any time at the option of the John Deere Plow Co., and the goods remaining on hand unsold shall be subject to the same terms and conditions as herein provided for.

"It is understood and agreed that, in writing and printing, this paper contains the full and entire agreement between the parties hereto, and that no outside oral or written understanding with any traveling agent of John Deere Plow Co., is of any force or effect whatever.

"Executed in duplicate.

"Given under our hands this 15th day of September, 1903, in the town of Kansas City, County of Jackson, State of Missouri.

"John Deere Plow Co.
"Per C. S. Wright, Traveling Agent.

"Subject to the approval of John Deere Plow Co.
"Approved: Hymes Buggy & Implement Co.
"Party of the Second Part."

On the 15th of September, 1903, the implement company forwarded to the plow company an order for certain goods, which, so far as it is important in the determination of the questions involved in this case, is in the following words:

"Kansas City, Mo., 9/15/1903.

"John Deere Plow Co., Kansas City, Mo.—Gentlemen: Please ship us the following named articles from Moline, on or about soon as can, or as soon after as possible, marked Hymes Buggy & Implement Co., assemble at Moline, Springfield, Mo. Ship via ———. Prices below are based upon K. C. frt. allowed delivery.

e goods as below enumerated to be well made, of good material, and rk when properly managed, according to the Manufacturer's Printed nty.

or we, hereby agree to make you payment for same in Kansas City par (Exchange and express charges prepaid.)

account is not paid when due, to draw interest at 10 per cent. from ity.

r we, hereby agree to give notes or acceptances for the amount of goods, terms of payment, when called upon to do so, and to make no claim for ge or damage after ten days from receipt of goods.

interpretation or verbal understanding of this contract not mentioned will be recognized.

orders taken subject to approval of John Deere Plow Co., and also that the title to and ownership of all goods which may be shipped as provided, shall remain in, and their proceeds in case of sale, shall be operty of John Deere Plow Co., and subject to their order until full nt shall have been made.

owing to the large lines you carry, you find it necessary to ship short ion of the orders, you may do so and we will make no claims for any nce therefrom.

ces subject to change without notice.

ler taken by C. S. Wright.

"Signed—Hymes Buggy & Implement Co.

	Description of Goods.	Price.	Terms and Remarks.

* * * * * * * * * * *"

think the questions presented by this record can all be dis- of on the appeal. Dodge v. Norlin (C. C. A.) 133 Fed. 363, 367; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. 90, 691, 48 L. Ed. 986. The case presents two principal ques- First, whether the contract and order above set out, taken ner, constitute evidence of a conditional sale or of an agency; d, whether or not the plow company is entitled to have the of $1,442.25, the proceeds of sales of goods made under the act, and which had not been paid to it, allowed as a pre- l claim. We think it was an agency contract. It is not a act in which the consignee can sell at any price, or on any he may choose, but, as we understand it, it is a contract or gnment of goods to be sold on commission by the consignee, ent for the consignor, for cash. The plow company had the under the contract, to require the goods returned, and in t lacks one of the necessary elements of a contract of sale, ly, to pay money, or its equivalent, for the goods delivered, no obligation to return. In the case of Met. Nat. Bank v. lict Co., 74 Fed. 182, 20 C. C. A. 377, this court had under con- tion a contract wherein the consignee agreed "to realize for gnment of ready-made clothing of Benedict Company, as per orandum received of Henry Benedict, president of the Benedict pany, net prices as per memorandum, without any charges of ission, freight, or any other charges," and in which the con- e also agreed "to keep the amount of the consignment at all , until the agreement expires, fully insured against fire or damage, and that no part of the assignment shall remain un-

sold nor unpaid by February 1st, 1895." And the court held that the contract was not a sale, but a contract of factorage, which passed no title to the consignee. In disposing of the case, the court, speaking through Judge Caldwell, said:

"The money to be paid by the commission company was not upon a sale of the goods to that company, but upon a sale of the goods by that company. The commission company was never to pay for the goods as upon a purchase by it, but only to account for the proceeds of the sale of them at prices fixed by the contract."

Other authorities to the same effect are Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Davis v. National Exchange Bank, 91 U. S. 618, 23 L. Ed. 214; Hunt v. Wyman, 100 Mass. 198; Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. Ed. 973; Reaper Co. v. Raynor, 38 Wis. 119; Union Stockyards & Transit Co. v. Western Land & Cattle Co., 59 Fed. 49, 7 C. C. A. 660; Weir Plow Co. v. Porter, 82 Mo. 23; Mon. Man. Co. v. Jones, 96 Wis. 619, 72 N. W. 44; In re Galt, 120 Fed. 64, 56 C. C. A. 470. In the case last cited, in considering a contract quite similar to the one here, the court said:

"It was not contemplated that Galt should ever own these wagons. He was to sell them to others for the company; his commissions to be the amount which he might receive over the prices stated in the contract. The proceeds, whether in cash or in notes of the purchasers, were to be immediately returned to the company; the notes being guaranteed by Galt. This was a del credere commission, and not a sale. The company could compel a return of the goods not sold. Galt had not the option to pay for them in money. Even with respect to the goods unsold within twelve months, the option for their return or payment was with the company, and not with Galt; and nowhere in the agreement does the latter covenant to pay for these goods, as in the case of a sale."

The contract in this case must be read in its entirety, and its construction is not to be gathered from any separate provision of it. It is upon the whole contract that we must search for the intention of the parties, and a careful scrutiny of the agreement before us, in the light of legal principles, compels us to the conviction that it must be held to be a contract of agency, and that the title to the goods in the hands of the implement company at the time of the adjudication in bankruptcy did not pass to the trustee.

A careful examination of this record and the adjudicated cases leads us to the conclusion that the plow company is not entitled to a priority over other creditors to funds in the hands of the trustee to the amount of $1,442.35, for the reason that it does not appear that any of the money received from the sale of goods made under the contract actually passed into the hands of, or are held by, the trustee. The owner of a fund which has been misappropriated by one who held it in trust cannot follow it in the hands of the trustee unless he can trace the trust fund in kind or in specific property into which it has been converted, or, if the fund has been mingled with the trustee's other property, to establish a charge on the mass of such property for the amount of this fund. In other words, he can secure a preference out of the proceeds of the estate of the insolvent only where he can trace the trust property or fund, in its original

ne substituted form, in the estate which comes into the hands
trustee.

he case of Spokane Co. v. First Nat. Bank, 68 Fed. 979, 16 C.
81, in disposing of a similar question, the court said:

are unable to assent to the proposition that, because a trust fund has
sed by the insolvent in the course of his business, the general creditors
estate are by that amount benefited, and that, therefore, equitable con-
ions require that the owner of the trust fund be paid out of the estate
r postponement or exclusion. * * * Both the settled principles of
and the weight of authority sustain the view that the plaintiff's right
blish his trust and recover his fund must depend upon his ability to
hat his property is in its original or a substituted form in the hands
defendant."

t. Nat. Bank v. Campbell Com. Co. (C. C.) 77 Fed. 705; Bank
imer (C. C.) 67 Fed. 27; Little v. Chadwick, 151 Mass. 109,
E. 1005, 7 L. R. A. 570; Cavin v. Gleason, 105 N. Y. 256, 11
504; Bank v. Armstrong (C. C.) 39 Fed. 684; Frelinghuysen
gent (C. C.) 36 Fed. 229; Beard v. Ind. Pella City, 88 Fed.
1 C. C. A. 562; Montagu v. Pacific Bank (C. C.) 81 Fed. 602;
Bank v. Blackmore, 75 Fed. 771, 21 C. C. A. 514; Standard Oil
Hawkins, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739.

ile conceding the rule to be as above stated, it is said on be-
f the plow company that this was a Missouri contract; there-
he decisions of that state should be taken as controlling in
ase. The decisions of the Supreme Court of Missouri to
our attention has been directed are to the effect that, where
ust fund is mingled with the property of the trustee, the own-
the trust fund is entitled to a preference upon the entire body
trustee's estate in insolvency upon the ground that the trust
has enhanced the estate, and thus given to the cestui que
an equity superior to that of general creditors. The trouble
plying this proposition to the present case is that the evidence
case, as we have already suggested, does not show that the
eds of the goods sold by the bankrupt prior to the adjudication,
were received, but not accounted for, by it, ever came into
nds of the trustee in bankruptcy, either in their original or in
substituted form. But be this as it may, the question is not
the construction of a contract, but upon a rule of preference
ity, and upon that question the federal decisions must control
s court, and they are all to the effect that in a case such as the
efore us the preference cannot be allowed.

ollows from these conclusions that the order of the District
must be reversed, with directions to enter an order directing
he plow company recover from the trustee in bankruptcy the
rty which the trustee received from the bankrupt, or the
eds of it; that its claim for the proceeds of the property sold,
ot accounted for, prior to the adjudication in bankruptcy, be
ed, and that the last-mentioned claim be permitted to partici-
n any dividend or dividends upon the same basis as other cred-
f the bankrupt.

LOGGIE et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 21, 1905.)

No. 1,655.

1. CUSTOMS DUTIES—CLASSIFICATION—FISH IN PACKAGES LESS THAN ONE-HALF BARREL—FROZEN FISH.

Held, that frozen fish imported in packages containing less than one-half barrel are dutiable under the provision in paragraph 258, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], for "fish in packages containing less than one-half barrel, and not specially provided for," rather than under that in paragraph 261 of said act, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], for "fish, fresh, * * * frozen, packed in ice, or otherwise prepared for preservation, not specially provided for."

2. SAME—SPECIFIC DESIGNATION—TWO OR MORE RATES APPLICABLE.

The provision in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1694], that merchandise to which "two or more rates of duty shall be applicable * * * shall pay duty at the highest of such rates," *held* not to apply in a case where one paragraph provides an ad valorem and the other a specific rate.

3. SAME—TARIFF PROVISIONS—PRESUMPTION OF RELATION TO EXISTING COURSE OF BUSINESS.

It is to be presumed that every provision of a customs act classifying merchandise has relation to some existing course of business.

Appeal from the Circuit Court of the United States for the District of Maine.

This appeal relates to an affirmance by the Circuit Court for the district of Maine of a decision of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of Bangor on Merchandise imported by A. & R. Loggie. Note Harvey v. United States (C. C.) 137 Fed. 816.

Albert H. Washburn (Comstock & Washburn, on the brief), for appellants.

Isaac W. Dyer, U. S. Atty.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This appeal relates to fresh frozen smelts packed and imported in boxes, each box containing less than one-half barrel. The Board of General Appraisers and the Circuit Court decided against the importers, who appealed to us. The issue is as between paragraph 258 and paragraph 261 of the customs act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, pp. 1650, 1651], which paragraphs are as follows:

"Par. 258. Fish known or labeled as anchovies, sardines, sprats, brislings, sardels, or sardellen, packed in oil or otherwise, in bottles, jars, tin boxes or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, box or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, box or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, box or can; containing more than thirty-three and not

than seventy cubic inches, ten cents per bottle, jar, box or can; if her packages, forty per centum ad valorem. All other fish (except shell- in tin packages, thirty per centum ad valorem; fish in packages con- ng less than one-half barrel, and not specially provided for in this hirty per centum ad valorem."

ar. 261. Fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice herwise prepared for preservation, not specially provided for in this three fourths of one cent per pound; fish, skinned or boned, one and ourth cents per pound; mackerel, halibut or salmon, fresh, pickled or l, one cent per pound."

ne United States rely on the closing words of paragraph 258, llows: "Fish in packages containing less than one-half barrel, not specially provided for in this act, thirty per centum ad rem." The importers claim that under paragraph 261 the ortation should pay a duty of three-fourths of one cent per nd. The United States, in support of their contention, cite er & Lange v. United States (C. C.) 124 Fed. 293. That was d on the seventh section of the customs act of 1897 (30 Stat. [U. S. Comp. St. 1901, p. 1694]), re-enacted from prior statutes, h provides that, if two or more rates of duty shall be applicable ny imported article, it shall pay duty at the highest of such . This agrees with the decision of the Board of General Ap- sers on the appeal of Platt & Co., of December 18, 1903 (24,848 A. 5,514), and also with its decision in the present case. The ulty in applying this proposition, however, is that the para- h on which the United States rely lays an ad valorem duty, e that on which the importers rely lays a specific duty; so it npossible to say that there would be any practical uniformity o the relative amounts of duties assessed under the two pro- ns, to which the seventh section could apply. For example, e present case the duty on the appeal of February 11, 1904, as ned by the importers, is $24.55, and as claimed by the United es, $30. Yet, on other kinds of fish of less invoice value than ts, the duty under the paragraph on which the United States might be smaller than the duty under that on which the im- ers rely, and the same might follow from a change in the ket. As it cannot reasonably be maintained that the intention ongress was that the same article should be interchangeably ified under these different paragraphs according to changes e markets, section 7 is not useful for the purposes of this ap-

veral other decisions have been cited to us, but they are some- contradictory, and neither authoritative nor satisfactory.

ragraph 258 cannot be said to have its prototype in previous lation on account of the intervention of the Wilson act of Au- 28, 1894, which was not in harmony with the policy of either ct of October, 1890, or the act of July 24, 1897, with reference ties on imported fish. This paragraph is substantially a new tment, so that its construction on the issue before us cannot be rmined by any historical examination of prior legislation or ny settled practice of the Treasury. We think, however, that

the intent of Congress, as shown by it, is free from reasonable doubt.

It is known that there is, and has been, a recognized course of business, in that fish like those on this appeal are at times imported in special packages of one-half barrel or less, and the peculiar closing phraseology of paragraph 258 has appropriate relation to it. What immediately precedes the portion of paragraph 258 relied on by the United States provides generally for fish "in tin packages," except shellfish. Then comes the clause relating to packages containing less than one-half barrel, which are assessed the same rate of duty as fish in tin packages, and the whole in the same breath. Consequently, except for the words "and not specially provided for in this act," it could not be fairly claimed that, barring only the special nature of the package, the clause is any less comprehensive than what precedes it. Therefore the only question arises from the words last quoted. The importers claim that they have relation to paragraph 261. That may be true so far as "fish, skinned or boned," and "mackerel, halibut, or salmon, fresh, pickled, or salted," are concerned; but the prior portion of paragraph 261, on which the importers rely, contains no specific provision in the sense of the expression in paragraph 258, "not specially provided for," because that covers not only frozen fish, but fresh fish, fish prepared for preservation in any form, fish smoked, dried, salted, pickled, or packed in ice. Therefore, it is so sweeping that, on the construction of the act insisted on by the importers, they are unable to point out any class of fish to which the provision relative to fish in packages containing less than one-half barrel can have any reference unless to importations of the character before us. They suggest that it may have reference to shellfish, but this is on its face trivial and inefficient, and especially so in view of the fact that nobody pretends that shellfish are ever imported in packages described in the portion of paragraph 258 on which the United States rely. Indeed, it is impracticable to give the words, "fish in packages containing less than one-half barrel," any effect unless we can do so on this appeal. Therefore, and also because of the presumption that every provision of a customs act classifying merchandise has relation to some existing course of business, and because we find, as we have said, a course of business to which the closing words of paragraph 258 are peculiarly appropriate, we conclude that the decision of the Circuit Court was correct.

The decree of the Circuit Court is affirmed.

HARVEY v. UNITED STATES.

(Circuit Court, S. D. New York. February 15, 1905.)

No. 3,522.

OMS DUTIES—CLASSIFICATION—FISH PREPARED FOR PRESERVATION—FISH N PACKAGES LESS THAN HALF BARREL.

Certain fish which have been dried, packed in ice or otherwise pre- ared for preservation, and are imported in packages containing less han one-half barrel, are dutiable under the provision in paragraph 261, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], for "fish * * * dried, * * * packed in ice or otherwise prepared for preservation," and not under paragraph 258 of said act, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], as "fish in packages containing less than one-half barrel."

n Application for Review of a Decision of the Board of United es General Appraisers.

ie decision below related to an importation at the port of New York by rey & Outerbridge, consisting of codfish in drums containing less than lf barrel. Duty was assessed by the collector at the rate of 30 per cent. alorem under the provision in paragraph 258, Tariff Act July 24, 1897, c. 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], for "fish ackages containing less than one-half barrel, and not specially provided

The importers claimed the merchandise to be dutiable at the rate of e-fourths of one cent per pound under paragraph 261 of said act (30 171 [U. S. Comp. St. 1901, p. 1651]), relating to "fish, fresh, smoked, l, salted, pickled, frozen, packed in ice or otherwise prepared for preser- on, not specially provided for." The Board of General Appraisers over- l this contention, on the authority of Meyer v. U. S. (C. C.) 124 Fed. where it was held that the two provisions above quoted are equally ific, and that fish included within both descriptions should be assessed r whichever of the two provisions fixes the higher rate, under the re- ements of section 7 of said act, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, 394]. Note In re Frye, G. A. 4,908, T. D. 22,969, and Loggie v. U. S. (C. .) 137 Fed. 813.

V. Wickham Smith, for the importers.
). Frank Lloyd, Asst. U. S. Atty.

VHEELER, District Judge. This importation is of fish, which ears to have been dried or packed in ice or otherwise prepared preservation, within the provision of paragraph 261 of the act uly 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. 1901, p. 1651], and upon which three-fourths of a cent per pound ereby laid. Paragraph 258 (30 Stat. 171 [U. S. Comp. St. 1901, 650]) lays a duty of 30 per cent. on fish in packages of less than a barrel, not specially provided for. This fish appears to be cially provided for by paragraph 261, as "prepared for preserva- ," which takes it out of this clause of paragraph 258, under ch it was assessed.

Decision reversed.

LEWIS GERMAN & CO v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 12, 1905.)

No. 175.

CUSTOMS DUTIES—CLASSIFICATION—SPENT GINGER.

The article known as spent ginger, which is a by-product from the treatment of ginger root in the manufacture of ginger extract, etc., and consists of a dried cake of ginger particles, is *held* to be "ginger root, unground," as enumerated in paragraph 667, Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 667, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (128 Fed. 467), which affirmed a decision of the Board of General Appraisers, sustaining the collector of the port of New York in his classification for duty of certain imported merchandise.

Albert Comstock, for appellants.

D. Frank Lloyd, for the United States.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The relevant paragraphs of the tariff act of 1897 are:

"Par. 287. Spices: Mustard, ground or prepared in bottles or otherwise, ten cents per pound; capsicum or red pepper, or cayenne pepper, two and one-half cents per pound; sage, one cent per pound; spices not specially provided for in this act, three cents per pound." Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653].

"Free List, par. 667. Spices: Cassia, cassia vera and cassia buds; cinnamon and chips of; cloves and clove stems; mace; nutmegs; pepper, black or white, and pimento; all of the foregoing when unground; ginger root, unground and not preserved or candied." Section 2, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688].

The article in question is known as "spent ginger." The appropriateness of the term will appear later. It is not disputed that it is a spice, and that the collector's classification under paragraph 287 would be correct, unless it is within the term "ginger root unground and not preserved or candied." The Board of General Appraisers found that "it is known to trade and commerce only as ginger, and it is also admitted that it has been ground." The testimony returned does not warrant such finding. The single witness who was examined before the board testified that the merchandise is a by-product in the manufacture of ginger extract or ginger ale. The crude root is run through cylinders, which crack it into pieces about an inch around. It is then distilled, and after that process is completed is removed from the still and pressed, so as to remove the moisture. The result is a dried cake of small particles of ginger, resulting in part from the cracking, in part from the disintegration of the vegetable matter in the stuff. It is in lumps, cakes,

d strings. There was no admission before the board that the ıger had been ground.

Some additional testimony was taken in the Circuit Court, which l not modify the foregoing description of the process. The arti- is sold "as a cheapening product for a cheap quality, used for the ne purposes as ginger absolutely." It has still a gingery taste, l is used to dilute ginger from which the essential element has t been distilled. Examination of the cake shows that it can be luced by the hand to a quite finely divided substance, the parti- s of which, however, are irregular in size. The Circuit Court ıched the conclusion that the process was substantially the uivalent of grinding, and that the root had been reduced to small rticles, and was within the dictionary meaning of "ground," erefore it could not be considered as wholly unground.

The tariff schedules in many instances impose a different rate articles which they call "ground" from that imposed on them en unground, thus following a distinction which had already en made in trade and commerce. In determining to which class y particular sample belongs, the statute should be construed in ıformity to the commercial understanding. One of the wit- sses called by the government testified that "all ginger is un- ound until it has been ground," and the proof in the case is con- cingly to that effect. The government's witnesses all testified t ginger root in the condition of this importation would not be cepted by the trade as a good delivery of ground ginger, and it ther appears that the distinction made is not merely a nominal unsubstantial one, based on the circumstance that the root has en treated by a different process from that used in producing ound ginger. Witnesses called by both sides testified that it con- ned "shreds," the fibrous material of the unground root, which uld have to be eliminated before it could be known in trade as ound ginger, and that such elimination could be secured appar- ly only by putting it in a mill and grinding it. We are there- e of the opinion that the importation is still unground, within meaning of the tariff act.

The decisions of the Circuit Court and of the Board of General praisers are reversed.

In re GRANITE CITY BANK OF DELL RAPIDS, S. D.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1905.)

No. 44.

NKRUPTCY—GENERAL POLICY OF ACT—PROPERTY IN OTHER DISTRICTS.

An adjudication in bankruptcy operates as a seizure of the bankrupt's property, by which it is taken in custodia legis wherever situated within the United States, and the title and right of possession pass by operation of law to the trustee, as custodian for the court, at once on his selection and qualification. Whether property is within the district or not is immaterial to affect the exclusive right of the court which made the adjudi-

cation to direct its sale, and to determine all claims thereto, on proper notice to the parties in interest, whether they reside within or without the district; the filing of the petition in bankruptcy itself being a caveat to all the world.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 193–232.]

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Iowa, in Bankruptcy. For opinion below, see 131 Fed. 1004.

William Wilka having been adjudged a bankrupt by the United States District Court for the Northern District of Iowa, George H. Watson, the trustee in bankruptcy, presented a petition to the court, representing that at the date of the adjudication the bankrupt owned certain personal property on his premises across the state line in South Dakota: that it was of a perishable character, exposed to deterioration, and its retention would entail great expense to the estate. The petition, inter alia, stated that the Granite City Bank of Dell Rapids, S. D., claimed a chattel mortgage on said personal property to secure a large sum of money owing to it by the bankrupt; that when said mortgage was executed said bank had acknowledged that said Wilka was insolvent; and that said mortgage constituted a preference in favor of the bank. The prayer of the petition was for an order "to sell all the grain on said land at private sale upon the markets, and that said stock be sold at public auction as soon as may be, and that a notice or order to show cause why said property should not be sold freed from all liens and claims of the said Granite City Bank, First National Bank, Conrad Schecker, and Mrs. William Wilka, and the said bankrupt, William Wilka," be made; the petition having alleged certain interest claimed in said property by the parties named in the foregoing prayer. On receipt of this petition the referee "ordered that a hearing be had upon the same, and that ten days' notice of said hearing be served upon the lienholders personally, and a copy thereof be mailed to all other creditors on the 4th day of February, 1904."

The record further recites that, "pursuant to the foregoing order, notices were served upon all lienholders of said estate, as is shown by the return upon said notice, and a notice of said hearing was on this 6th day of February, 1904, mailed to all creditors scheduled by the bankrupt, postage prepaid, a copy of which is in the following words and figures, to wit:" (Here follows a copy of the notice served and mailed.) In addition to the notices sent by mail to all the creditors of the estate, service of notice of said petition and order was made personally upon the president of said bank at Dell Rapids, S. D., on the 3d day of February, 1904. On the day set for the hearing of said petition, said Granite City Bank of Dell Rapids appeared by counsel, and objected to the jurisdiction of the court over the bankrupt to make the order of sale petitioned for, for the following reasons: (1) That neither the property referred to, nor the said Granite City Bank, is within the territorial limits over which the court has jurisdiction; (2) that no notice of the hearing upon the petition had been served upon the Granite City Bank within the territorial jurisdiction of the court; (3) that the court has no jurisdiction over the said Granite City Bank, and, without personal service upon the said Granite City Bank within the jurisdiction of the court, it had no jurisdiction of the subject-matter, to wit, the lien of said bank upon said personal property, said property being without the territorial limits over which the court has jurisdiction; (4) that the court is given no jurisdiction by the bankrupt act to order the sale of the property free from liens, without first determining in some proper proceeding the validity of such liens; and (5) that the bankrupt owns only an undivided one-half of the property sought to be sold. No other creditor interposed any objection. On a hearing before the referee, the objections of said Granite City Bank were overruled, and the referee ordered a sale of the property. The order of sale directed the trustee to sell all the grain kept upon said farm described in the trustee's petition, at private sale, for the highest price obtainable, and keep an accurate account of each article sold, and the price received therefor,

the name of the person to whom sold, which account he shall forthwith with the referee; and the referee further ordered that "all the other sonal property described in the trustee's petition shall be sold at public rivate sale, as the trustee may deem to the best interest of all concerned, that all of said property shall be sold free from any and all liens and tended liens or claims upon the same, and that the trustee keep an accu- account of each article, the price obtained therefor, and the name of the son to whom sold," and that "the trustee deposit the funds and proceeds ived from the sale of said property in the First National Bank of Rock oids, Iowa, and apply the same upon all liens which may be established n said property, in the order they subsist and become liens thereon." Exceptions were taken to the action of the referee by the Granite City nk, and at its request the matter was certified to the district judge for iew. In his certification the referee recites, among other things, that said nite City Bank filed in writing its special appearance for the purpose of ecting to the jurisdiction of the court to make the order of sale; that ther of the parties called any witnesses to testify at the hearing, and that only evidence before the referee consisted of the papers filed in relation aid order, namely, trustee's petition for order of sale, order for notices there- a copy of notice mailed to creditors, a copy of notice served personally upon persons claiming to have a lien upon said property, and the return of vice of same, and the written objections of the Granite City Bank to the sdiction of the court; "that, upon inspection of these different filings, and er hearing arguments of counsel for trustee and for the Granite City Bank, referee found that the trustee had taken possession of said property, and t it was of a perishable nature, and, in pursuance of such finding, made order to sell said property," etc.

The District Court overruled the objections of the Granite City Bank, and rmed the action of the referee. The bank has brought the matter to this rt on petition for review.

Frank R. Aikens, Harold E. Judge, Henry Robertson, and P. W. ugherty, for petitioner.

C. J. Miller, for respondent.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, strict Judges.

PHILIPS, District Judge, after stating the case as above, deliver- the opinion of the court.

The chief contention of the petitioner is based upon a miscon- tion of the scheme and policy of the bankrupt act. The filing the petition in bankruptcy "was a caveat to all the world. It s in effect an attachment and injunction. Thereafter all the perty rights of the debtor were ipso facto in abeyance until the al adjudication. If that were in his favor, they revived, and re again in full force. If it were against him, they were ex- guished as to him, and vested in the assignee (trustee) for the rposes of the trust with which he was charged. The bankrupt came, as it were, for many purposes, civiliter mortuus." This s said by the Supreme Court in Bank v. Sherman, 101 U. S. , 25 L. Ed. 866, in respect of the operation of the bankrupt act of 7.

Mr. Chief Justice Fuller, in Mueller v. Nugent, 184 U. S. 1-14, Sup. Ct. 269, 273, 46 L. Ed. 405, said:

It is as true of the present law as it was of that of 1867 that the filing of petition is a caveat to all the world, and in effect an attachment and in- ction; * * * and, on adjudication, title to the bankrupt's property

became vested in the trustee (sections 70, 21c, Act July 1, 1898, c. 541, 30 Stat. 565, 552 [U. S. Comp. St. 1901, pp. 3451, 3430]), with actual or constructive possession, and placed in the custody of the bankruptcy court."

In short, the adjudication operates as a seizure of the property of the bankrupt, by which it is taken in custodia legis. In re Rodgers, 125 Fed. 169, 60 C. C. A. 567. Upon the selection and qualification of a trustee, all the rights, title, and interest of the bankrupt, as of the time of the filing of the petition in bankruptcy, in any property or property rights, by operation of law (section 70, Bankr. Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), pass to and vest in the trustee, who then became the custodian for the court. The possession of the bankrupt, without more, is transferred to the trustee. No demand for the surrender and possession of the bankrupt's property is necessary. Indeed, he would stand in contempt of court, were he to assert the right to hold and possess the property against the trustee. He could not maintain trespass or replevin respecting any personal property owned by him prior to the adjudication in bankruptcy. No matter where the property of the bankrupt estate may have its situs, if within the United States, it passes to and vests in the trustee. By section 7, subsec. 8, of the bankrupt act (30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), on the adjudication the bankrupt is required to prepare and file schedules of all his property. This is all that is required of him as to property situate within the limits of the United States. As to property without the domain of the national act, section 7, subsec. 5, requires the bankrupt to execute transfers thereof to the trustee in bankruptcy.

It is thus made manifest that the criticism upon the petition of the trustee for an order of sale of the property in question, that it did not specifically aver that the property had been taken into the actual custody of the trustee, is without merit. As the fact appeared that the bankrupt owned the property at the time of the adjudication in bankruptcy, and as possession is presumptively with the owner, it has never been supposed by courts of bankruptcy that such petition should, ipsissimis verbis, aver that the trustee has the property in custody. The finding of the referee that the trustee had possession of the property, with or without evidence in pais, was justified as a conclusion of law from the facts apparent in the proceeding. The conclusion was in no degree contradicted by the fact that the bank held a mortgage on the property. The legal presumption was and is that, until entry by the mortgagee for condition broken, the right of possession and actual possession remained with the mortgagor.

The bankrupt act authorizes the court of bankruptcy to sell the personal property of the bankrupt freed from all liens, in the conservation of the interests of all creditors of the estate. This has been recognized under all the bankrupt acts as resting in the sound discretion of the court, exercising a jurisdiction equitable in its nature. In re Union Trust Company, 122 Fed. 937, 939, 940, 59 C. C. A. 461; In re Worland, 92 Fed. 893. When sold, any person claiming a preferred lien on the property can protect

nself by bidding thereon to prevent its sacrifice, and by apply- to the court to disaffirm the sale. And after sale he can assert right to the proceeds before the referee, when and where his im can be heard, and its priority determined. In re Rochford, Fed. 182, 59 C. C. A. 388; Bryan v. Bernheimer, 181 U. S. 188, Sup. Ct. 557, 45 L. Ed. 814.

Counsel for the bank seem strangely affected with notions about te lines under the bankrupt act. They challenge the right to ch the bank in South Dakota by notice sent out by the referee Iowa, and the right of the court of bankruptcy in Iowa to draw bank from its residence in South Dakota to determine its rights a preferred mortgagee. Under the scheme of the bankrupt act, District Court of the domicile of the bankrupt takes exclusive isdiction of the bankrupt and his property, wherever situated, administer it and distribute the proceeds pari passu among the editors according to their respective rights and priorities. Only e court—the court making the adjudication—collects, marshals, ministers, determines priorities of the parties, and directs the tribution of the assets. There are no such things in bankruptcy oceedings as courts of primary and ancillary jurisdiction. The urt in this instance acquired jurisdiction as to the Granite City nk by giving the notice prescribed by section 58 of the act (30 t. 561 [U. S. Comp. St. 1901, p. 3444]), which in this case s supplemented by notice served personally on the president the bank where the bank was located. The bank could have ap- ared and contested at its pleasure the propriety of the referee lering the sale of the property free from all liens, and the Dis- ct Court of Iowa, and it alone, could pass upon the validity of e bank's claim to the proceeds of the sale of the property. In Kellog, 121 Fed. 333, 57 C. C. A. 547. The trustee was author- d to sell the property on the premises in South Dakota, or drive away, as the court might direct. The Granite City Bank could t replevin it from the trustee. White v. Schloerb, 178 U. S. 542, Sup. Ct. 1007, 44 L. Ed. 1183.

The action of the District Court is approved, and the petition r review is dismissed.

HUBBIRD et al. v. GOIN.

rcuit Court of Appeals, Eighth Circuit, March 24, 1905. On Rehearing, June 28, 1905.)

No. 2,104.

FEDERAL COURTS—STATE DECISIONS AFFECTING REAL PROPERTY.

Decisions of the highest courts of a state affecting the title to real property will be followed by the federal courts, when like questions come under consideration in the latter jurisdiction.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 958.

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. Deed—Construction—The Rule in Shelley's Case.

A deed from a father, in consideration of love and affection and $1,000, granting to his daughter and children certain lands, with the provision in the nature of a habendum clause that "it is expressly agreed by the grantee in accepting this deed that she will not sell, convey or incumber or in any manner dispose of the same, but to retain the same for the use of herself and her children forever," does not come within the rule in Shelley's Case, in the absence of any statute of the state of Iowa abolishing such rule, under any controlling decision of the Supreme Court of that state as applied to the language of the deed in question. While the proviso, in so far as it undertakes to place a restraint upon the power of alienation by the mother, is under the statute of the state void, so as to leave her free to dispose of her interest in said land, it may nevertheless indicate the nature of the estate intended by the grantor to be conveyed to the daughter and her children. There is a wide distinction between a grant to A. and her children and a grant to A. and her heirs or the heirs of her body, as it is affected by the rule in Shelley's Case.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 413–415, 479.]

3. Same—Rule of Construction.

The intent of the grantor is the guiding star in the interpretation of deeds. Such intent is not to be concluded by any one clause or provision separately considered, but it is to be ascertained by taking and reading the instrument by its four corners, so as to make all its parts harmonious rather than inconsistent or repugnant.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 231, 236.]

4. Same—Grant to A. and Children.

A naked deed to A. and her children, without more, where two children at the time of the grant are in esse, at common law might vest the fee in A. and the then living children as tenants in common. But where the habendum clause clearly indicates that it was the mind of the grantor to provide for the mother an estate to be enjoyed by her during life and for the benefit of her children in perpetuity, it negatives the idea of a limitation of the estate to the mother and the then living children as tenants in common. Nothing appearing on the face of the instrument to indicate why the two living grandchildren of tender years should be more the objects of the grantor's affection and solicitude than those afterwards born, on the birth of the afterborn children the estate in remainder would open to let in the latter as vested remaindermen, and upon the death of the mother the then living children would become entitled to the possession of the land.

5. Statute of Limitations.

The statute of limitations at common law, as to the right of possession, would not begin to run against the remaindermen until the expiration of the particular estate. But inasmuch as under the statute of the state the two children living at the time of the grant, although minors, had the right to bring action to have their interests determined, the statute of limitation in this case had run against a possessory action by them, but had not run as to the after-born children.

Riner, District Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Southern District of Iowa.

The petition in this case alleges that Flossie E. Hubbird, Ethel Hubbird, Mary Hubbird, and Ora Hubbird are citizens of the state of Illinois and nonresidents of the state of Iowa; that they are minors under the age of 18 years of age; that by an order of the county court of Macon county, Ill., said Elsie Bennett was duly appointed guardian of the estate of said Flossie, Ethel, Mary, and Ora Hubbird, minors, and that said Elsie Bennett was thereafter

y appointed as such guardian by the district court for Decatur county, a; that said Lottie Helen Manly is a citizen of the state of Illinois, and resident of the state of Iowa; and the defendant Goin is a citizen of the te of Iowa, and a resident of the Southern District in the Southern Di- on of Iowa; and that the amount in controversy, exclusive of interest and s, exceeds the sum or value of $2,000.

he petition then alleges that on the 19th day of March, 1881, William st and Elizabeth West, husband and wife, of Decatur county, in the state Iowa, in consideration of love and affection and $1,000, executed and de- red to Elmira Hubbird and children, of Decatur county, state of Iowa, a l of conveyance, which deed is attached to the petition, and referred to a part thereof, and is in words and figures as follows:

Know All Men By These Presents: That we, William West and Elizabeth st, husband and wife, of the county of Decatur and State of Iowa, for the sideration of love and affection and one thousand dollars, hereby convey to mira Hubbird & Children, of the County of Decatur and State of Iowa, the owing described real estate, situated in the County of Decatur and State owa, to-wit: The west half of the South West quarter of Section Eighteen Township No. Seventy (70), North of Range Twenty-six (26) West con- ning according to the original survey, containing eighty acres more or less. It is expressly agreed by the grantee in accepting this deed, that she shall sell, convey or incumber or in any manner dispose of the same but to re- n the same for the use of herself and her children forever.

And we warrant the title of the same against all persons whomsoever.

In witness whereof, we have set our hands this 19th day of March, 1881.

"[Signed] Wm. West.
"[Signed] Elizabeth West.

State of Iowa, Decatur County—ss. Before me, the undersigned, a justice the peace, in and for said county, this day personally appeared Wm. West Elizabeth West, husband and wife, who are personally known to me to the identical persons whose names are affixed to the foregoing deed as ntors; and acknowledged the same to be their voluntary act and deed.

Given under my hand and official seal this 19th day of March, 1881.

"[Signed] John West, J. P."

he petition then alleges that the plaintiff's are the children of said Elmira bbird, and her only children; that said Flossie E. Hubbird was born Sep- ber 30, 1886; that said Ethel Hubbird was born October 17, 1888; that l Mary Hubbird was born September 9, 1890; that said Ora Hubbird was n January 12, 1894; that said Lottie Helen Manly was born October 20, 6; and said Elsie Bennett was born August 24, 1879, and that Elmira bbird, the mother, departed this life, at Decatur, in the state of Illinois, the 31st day of March, 1902, intestate; that pursuant to said deed of con- ance said Elmira Hubbird, on the 19th day of March, 1881, went into pos- sion of said real estate, and so continued until the 15th day of February, 3, when she, in connection with her husband, A. H. Hubbird, conveyed said l to the defendant, Thomas L. Goin, and surrendered possession to him; t the defendant claims to have acquired by said deed a fee-simple title to l premises, when in truth and in fact said deed only vested the defendant h the life estate in said real estate of Elmira Hubbird, while the fee there- s vested in the plaintiffs as her children. The petition seeks to eject the endant from the possession and to recover the rentals thereon.

o this petition the defendant demurred, on the ground that said Elmira bbird, by the terms of the deed from William West and wife, took a title fee simple, which passed to the defendant by her said deed; that the re- ction against alienation contained in said deed from William West to El- a Hubbird was void and repugnant to the laws of the state of Iowa. The murrer further interposes the objection that at the time of the making of l deed to said Elmira Hubbird, when she entered into possession of the ds, there were living and in being two children of said Elmira Hubbird and e other, to wit, Lottie Helen Hubbird, now Lottie Helen Manly, and Elsie bbird, now Elsie Bennett; and that said Flossie, Ethel, Mary, and Ora bbird have been begotten and born since the making of said deeds, and

since the defendant went into possession of said real estate, and that consequently they took nothing by said deed from William West to Elmira Hubbird; that if said Elmira Hubbird did not take under said deed the title in fee simple to said lands, then she and the children then in being took the title in fee simple as tenants in common, and the deed from said Elmira Hubbird to the defendant conveyed to him at least her undivided one-third interest in said land; so that said minor plaintiffs born since the making of said deed take nothing by inheritance from their said mother at her decease or otherwise. And, finally, that said petition shows on its face that as to the plaintiffs Lottie Helen Manly and Elsie Bennett the cause of action is barred by the statute of limitations of the state of Iowa.

The demurrer was sustained by the Circuit Court, and judgment entered thereon, to reverse which the plaintiffs below prosecute this writ of error.

Alexander McIntosh (James J. Finn and James H. McIntosh, on the brief), for plaintiffs in error.

Van R. McGinnis and Marcellus L. Temple, for defendant in error.

Before SANBORN, Circuit Judge, and PHILIPS and RINER, District Judges.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

Section 2901 of the Iowa Code provides as follows:

"Every disposition of property is void which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and twenty-one years thereafter."

In so far, therefore, as the provisions of the deed made by William West to Elmira Hubbird and children undertook to place a restraint upon the power of alienation by the grantee it was inoperative. Even without such statute, any restraint laid upon the power of alienation would contravene common-law right. 4 Kent's Com. 17. It does not necessarily follow, however, that because of such provision being ineffective as a restraint upon the power of alienation of whatever estate the grant conveyed, that it is inoperative to characterize the quality of the estate taken under the instrument. Thus, in Hurd v. Hurd et al., 64 Iowa, 414, 20 N. W. 740, while it was held that a condition which was inconsistent with the express grant might be void, yet the language expressing the condition will be construed, if possible, so as to be in harmony with the grant.

Transposing the structure of the deed, so as to preserve its essential terms and sense, and effectuating the manifest intent of the grantor, after the granting clause and in connection therewith, the deed should be read as follows: It is expressly agreed between the grantor and the grantee Elmira Hubbird in accepting this deed that she will not sell, convey, or incumber, or in any manner dispose of the same, but to retain the same to her own use during life and for her children forever. The common sense meaning is plain enough. The grantor, the father of Elmira Hubbird, knew that the infant children could not make an effective conveyance; and, as he designed to provide for the children of his daughter the fee after her death, he sought, by the attempt to lay upon her a re-

sire." The contract also specifically provided that "the party of the second part further agrees to sell all wagons shipped him under the within agreement within twelve months from the date of shipment, and in case of any failure or neglect to do so agrees to settle at the expiration of that time, or at any time thereafter when called upon to do so, for all wagons and parts of wagons remaining on hand unsold, [at] prices hereinbefore stated." in a certain manner. From which it is apparent that the contract not only fixed the price at which the property should be sold, but the amount of the consignee's commission, and it fixed a time when, and the conditions on which, the property consigned might be returned.

Counsel for claimant calls special attention to the case of Metropolitan National Bank v. Benedict Company, 74 Fed. 182, 20 C. C. A. 377. That case, in its controlling facts, is essentially different from the one under consideration. The Benedict Company, owner of the goods, by correspondence with Stern Auction & Commission Company, consummated an agreement between them by which the latter company consented to take the goods by an acceptance in writing, which specified on its face that they took them under consignment, to be sold at the prices submitted in the letter from the Benedict Company, with an express agreement that it would sell "without any charges of commission." The memorandum acceptance furthermore provided for a specific time when the agreement should expire, "that no part of the assignment (consignment) shall remain unsold or unpaid for by February 1st, 1895." Unquestionably, if at the end of that time the goods remained unsold and unpaid for, restitution belonged to the assignor. And therefore, when the Metropolitan National Bank, with notice of this agreement, took an assignment in the nature of a mortgage on the goods to secure a debt of Stern Auction & Commission Company to the bank, it was properly held that as between the parties it was a consignment on bailment. Judge Caldwell, who wrote the opinion, laid much stress upon the construction given to this agreement by the parties thereto. But surely he did not mean to say that any unknown construction placed upon the contract by the parties thereto could affect the rights of third parties who had dealt with the consignee as the apparent owner, in ignorance of such private interpretation. Throughout the examination of the managing agent of the claimant in the case at bar, its counsel, by leading questions pregnant with suggestive answers had this agent state that the contract in question was simply a consignment on commission; but when this question was put to Mr. Hymes, the managing party of the Hymes Buggy & Implement Company, he answered, in effect, that the contract would have to speak for itself.

Other reported cases are pressed upon the consideration of the court by claimant's counsel, which are not deemed in point, or of controlling effect, as they depend upon states of fact easily differentiated from the contract in question.

In conclusion, it does seem to me that, if wholesale dealers can set up a retail merchant, as in this case, in a large establishment, with no outward or visible sign of the bailment or agency, enabling him to obtain credit on the faith of his apparent ownership, and then, when attachments or bankruptcy overtake the debtor, come forward with concealed contracts of so ambiguous and double aspect as this contract presents, and maintain a special ownership in the remnant of the debtor's goods, the state statute, designed to put an end to secret liens or ownership, is of no avail.

Independent of the foregoing considerations, there is a fatal objection to the claim as a preferred creditor to the extent of the $1,442.25 on account of goods sold, and not paid for by the bankrupt. There is no evidence in this record tending to show that this money was on hand at the time of the adjudication in bankruptcy, or that it went into or was mingled with the mass of assets that passed to the control of the trustee in bankruptcy. Metropolitan National Bank v. Campbell Com. Co. (C. C.) 77 Fed. 705; Bircher v. Walther, 163 Mo. 461, 63 S. W. 691. So far from the claimant's evidence bringing the claim within the rule laid down in the foregoing cases, the testimony of the witness Hymes, introduced by the claimant, is that the money realized on sale of the goods "was deposited in bank, used in the business, or sent to the

John Deere Plow Company." This is far short of the proof required under the equity rule.

It results that the motion for rehearing is denied.

Tom H. Reynolds (Thomas R. Morrow and James P. Gilmore, on the brief), for appellant.

John S. Farrington and W. A. Rathbun, for respondent.

Before SANBORN, Circuit Judge, and RINER, District Judge.

RINER, District Judge. This was a case brought here on appeal from a decision of the District Court affirming an order of a referee in bankruptcy refusing to direct the return of certain personal property in the hands of a trustee, and to allow certain claims as preferred claims against the estate in favor of appellant and petitioner, John Deere Plow Company (hereinafter called the "Plow Company"), and also upon a petition for review. Under a stipulation of the parties, both cases are to be considered upon the same record.

In May, 1904, the Hymes Buggy & Implement Company (hereinafter called the "Implement Company"), a copartnership, was declared a bankrupt upon a petition in involuntary bankruptcy brought by the creditors of that firm, and the case was sent to a referee. The plow company presented a petition to the referee, in which it set forth that on the 15th day of September, 1903, it entered into a written contract with the implement company for the consignment of goods to be sold on commission; that under the contract certain goods, wares, and merchandise were consigned to the implement company for sale on commission and at the time of the filing of the petition in bankruptcy the implement company had on hand goods consigned to it under the contract of the value of $1,390. It was also alleged that the implement company had sold, but had not accounted for to the plow company, certain other goods received and held under the contract to the amount of $1,442.25, and which sum the implement company had retained and placed in its own business, in violation of the terms and provisions of the contract and without the knowledge or consent of the plow company. The petition prayed for an order for the delivery of the goods unsold and for the allowance of the claim of the plow company for $1,442.25 as a preferred claim. The prayer of the petition was denied by the referee, and the case certified to the District Court, where the finding of the referee was affirmed.

The contract between the plow company and the implement company is in the following words:

"This agreement, made and entered into this 15th day of September, 1903, by and between John Deere Plow Co., of Kansas City, Missouri, incorporated under the laws of the State of Missouri, party of the first part, and Hymes Buggy & Impl. Co., of Springfield, County of Greene, State of Missouri, party of the second part.

"Witnesseth, That said first party, for and in consideration of the stipulations and agreements herein contained, have this day appointed and by these presents do hereby appoint the second party as their authorized agent at Springfield, Mo., for the sale, on commission, of the consigned goods and articles of merchandise designated hereon or enumerated and described on schedules of said second party, to be attached hereto as hereinafter provided.

e court also quoted approvingly from Hileman v. Bouslaugh, a. 351, 53 Am. Dec. 474, in discussing the rule in Shelley's that:

levisor who uses words of limitation in an improper sense may so ex- he meaning of them by other words in the context as to exclude his de- om the rule, for it operates only on the intention when it has been as- ned, not on the meaning of words used to express it. The ascertainment to the ordinary rules of construction peculiar to wills; but when the on thus ascertained is found to be within the rule, there is but one it admits of no exception."

Wescott v. Binford, 104 Iowa, 615, 74 N. W. 18, 65 Am. St. 530, Judge Robinson, in discussing the rule in Shelley's Case, l not concede that it obtained in its ancient rigor in the state wa, and he emphatically said that the rule in Shelley's Case not designed to defeat the intention of the grantor or the tor, but gave to certain words, as "heirs," such force and that when used they were conclusively presumed to show an t to vest the estate in the first taker in fee. "Theoretically ule was not applied to ascertain the intent of the grantor or tor, but to declare its effect when ascertained."

e case of Halliday v. Stickler et al., 78 Iowa, 388, 43 N. W. 228, where the devise of real estate was followed by a provision whatever is left of it after the death of the devisee shall be ly divided between his heirs. That, of course, devised an e in fee, and not for life only, because there was present on the face of the instrument a power in the first taker to sell.

mbel v. Hambel, 109 Iowa, 459, 80 N. W. 528, was an uncon- nal devise to the widow, with full power as executrix to sell convey, followed by directions to divide the property remain- t her death among his children, and in case she remarried hirds of the property then remaining was to be divided among hildren. It was held that the widow took the fee under the clause because it contemplated that she could exercise the r of absolute sale. The well-settled rule of law laid down in and other cases, that where there is an absolute or unlimited e of property a subsequent clause expressing a wish, desire, rection for its disposition after death is that it will not defeat levise or bequest, nor limit the estate or interest. The abso- devise stands, and the other clause is regarded as presenting tory language only.

the case of Teany v. Mains et al., 113 Iowa, 53, 84 N. W. 953, s held that although the granting clause in the deed did not in words of inheritance, but recited that the conveyance was for the sole use of the grantee and her heirs, that she was not ve the privilege of conveying or incumbering it, she took an ute estate, and not as trustee for the heirs then living. As r Code Iowa, § 2913, a fee may be created without the word s," the subsequent use of the word "heirs" was not incon- nt with the first grant, and therefore the condition imposed, repugnant to the grant of the fee, was void. Inasmuch as by ation of the statute the word "heirs" was read into the grant-

ing clause, she took an absolute fee, and any effort thereafter to qualify it which was inconsistent with and contradictory thereof was void.

From this review of the Iowa decisions it cannot be said that that court has ever construed a deed like the one in question to come within the operation of the rule in Shelley's Case. Without stopping to inquire into the reasons or causes out of which this ancient rule had its origin, and conceding that it yet has recognition in some of the states where not interdicted by statute, it is not too much to say that it is not hospitably received and entertained in this country; and the courts, in recognition of the fact that it is little in accord with the genius of our laws affecting allodial estates in real property, are adverse to letting the rigor of the rule arbitrarily thwart the manifest intent and purpose of the grantor.

The learned judge below in his opinion said that, applying the rule in Shelley's Case to the deed, it would read as follows: "When Minerva Hubbird took an estate of freehold, and in the same conveyance an estate was limited to her heirs in fee, that the words 'heirs' are words of limitation, and not of purchase." By thus reading into the deed from William West the words "to Minerva Hubbird and her heirs," the grant was clearly enough made to come within the rule in Shelley's Case; but such is not the language of the deed.

The distinction between a grant to A. for life and remainder to her heirs, and a grant to A. for life with remainder to her children, is marked in the application of the rule in Shelley's Case. Tiffany, in his work on the Modern Law of Real Property (paragraph 25), in substance says that a deed to A. and his children cannot, at common law, convey an estate tail; and the word "children" can have no effect as a word of limitation defining the interest A. is to take, and must take effect, if at all, as a word of purchase, generally giving the children of A. living at the time of the grant a joint estate with A. in the property; but generally a devise to A. and his children, while there is a presumption that the word "children" is one of purchase and not of limitation, it is not a conclusive presumption, depending upon whether the context shows that the word was used in the sense of heirs of the body. He furthermore says that in some cases the word "children" in a conveyance to A. and his children is construed as a word of purchase, giving the children a remainder and not joint interests with A. But he further says: "By the weight of authority, such a conveyance, without any indication of an intention to the contrary, gives joint interests to A. and the children then living." So that in his view the question is more or less controlled by the intention of the grantor, to be gathered from the instrument.

Washburn on Real Property (volume 2, 5th Ed., 599) says that if upon a devise to A. for life, remainder to the children of J. S., if J. S. has children at the testator's death, they would take a vested remainder; and that if he were to have other children during the life of A., and before the remainder was to take effect in possession,

vould open and let in the children born during A.'s life, who ld take shares as vested remaindermen. On page 633 he says where the limitation of the remainder is to a son or sons, or children," and the like, of him to whom the first estate for life mited, if the term "heirs" is clearly intended as descriptio per- ae the individual or persons thus designated take as purchasers, do not come within the rule in Shelley's Case. On the other d, if the term made use of in the limitation is "son" or "child" ne sense of "heirs," and not as designatio personae, but compre- ding a class to take by inheritance, it is a term of limitation, and sents a case within the rule in Shelley's Case. And, further, that context in these cases may be resorted to to get at the sense which the term or terms are used."

iedeman (paragraph 434) says:

ut limitation to the sons, children, or issue of him who takes the life e will not be converted by the rule (in Shelley's Case) into a fee in the taker, unless they are created by will, and from a consideration of the e will it appears that these words were used in the sense of heirs. And strongest and clearest evidence is necessary to give this construction to words 'sons' or 'children.' It is easier to apply this construction to the 'issue.' The general rule is that persons thus described take as pur- ers and not by descent, and that the remainders are vested as soon as ons corresponding to the description come into being. * * * The in- ediate limitation is not destroyed by merger of the estate in possession the remainder under the operation of the rule in Shelley's Case."

What office the employment of the word "children" instead of rs" performs in a given deed or devise, whether as words of chase or limitation, is, in the view of the best-considered authori- largely one of intent, to be ascertained, not from any one part he instrument, but from its four corners:

s in the case of all contracts, the intent of the parties to the deed, when n be obtained from the instrument, will prevail, unless counteracted by rule of law. * * * Although the form of a deed may be unusual, intention of the grantor, when it appears, must be given effect, and the will not be declared void unless the various clauses are so repugnant as ave no other course to be followed." Devlin on Deeds, §§ 836, 836a.

hief Justice Kent in Jackson v. Myers, 3 Johns. 388, 395, 3 Am. 504, said:

The intent, when apparent and not repugnant to any rule of law, will con- technical terms; for the intent, and not the words, is the essense of ev- agreement. In the exposition of deeds the construction must be upon the and comparison of the whole instrument, and with an endeavor to give y part of it meaning and effect."

n Hancock v. Watson, 18 Cal. 137, it is said:

n construing an instrument, that construction is always to be adopted h will accomplish the object for which the instrument was executed."

n Prentice v. Duluth Storage, etc., Co., 58 Fed. 438, 7 C. C. A. this court thus expressed the rule:

n construing a deed the court may put itself in the place of the grantor he purpose of discovering his intention, and then, in view of all the facts circumstances surrounding him, consider how the terms of the deed may t the subject-matter."

This rule of construction obtains in Iowa. In Broliar v. Marquis et al., 80 Iowa, 49, 45 N. W. 395, where the language of the conveyance was somewhat involved and uncertain, the court said:

"If we should eliminate from the deed the words, 'and her children and joint heirs with her and myself,' the intention of the grantor could hardly be said to be doubtful, and in that case the position of the appellant would certainly be correct. We must, then, inquire if the words so obscure the intent of the grantor as to entirely avoid the conveyance, and, if not, to what extent the words change the meaning given the deed without their use. The intent of the parties must be the guiding star of interpretation."

In Hopkins v. Grimes, 14 Iowa, 73, the court said:

"The object of all rules of interpretation is to discover the intention, and this should be gathered from the whole instrument."

This is approved in Kiene v. Gmehle, 85 Iowa, 316, 52 N. W. 232.

It is to be conceded, however, that where, by the legal import of the words employed in the conveyance, as the words are construed at common law, it fixes the character of the grant and concludes any question of intent.

It may be conceded for the purpose of this case that if the deed in question had stopped with the granting clause to Elmira Hubbird and children, it might, with plausibility, be said that the mother and the two children in esse took the whole fee as tenants in common. The case of King v. Rea et al., 56 Ind. 1, cited in this connection by defendant in error, is hardly in point. So much of the grant in that case as is pertinent to this inquiry was "to Martha W. Rea and her children and their heirs and assigns forever." It was held that the deed vested the title in her and her children then in being, in common, but those begotten and born thereafter took nothing. It is to be observed again, of this case, that there occurs the words "their heirs and assigns forever." As there can be no heir of the living, and the grant was in præsenti, the after-born heir could not take; and as they were to take as conditional remaindermen, and not by purchase, it was held to bring the case within the rule in Shelley's Case.

In the later case from Indiana of Jackson v. Jackson et al. (Ind. Sup.) 26 N. E. 897, Elihu M. Jackson had certain children of his body living at the time of making the deed. The deed conveyed "to Elihu E. Jackson for life, and after his death to the then living children of his body, for the sum of natural love and affection and two dollars," with the recitation: "And the grantor hereby reserves the right to her living off of the above-described real estate during her natural life; and it is expressly understood that said Elihu E. Jackson, the grantee, is to have no greater interest than a life estate, and that at his death said tract shall go to the children of his body then living." The question was as to whether the children living at the time of the making of the deed and at the death of the grantor took the fee in the land, or whether the case was governed by the rule in Shelley's Case. The court said:

"That the children took the fee we think there can be but little doubt. They were then in being. They were capable of taking, and we think the deed as

letely vested the title in them as if they had been named in the deed. e is no room for doubt as to the intention of the grantor."

he court then adverts to and reaffirms the ruling in the case of len v. Gatewood, 1 Ind. 107, where the conveyance was to Sarah ewood during her natural life, and to her children and their as- s forever, to have and to hold, etc., to the said Sarah during her ral life, and to her children and their assigns forever. Of which court said:

here being no words of inheritance in the conveyance described in the cation, and those used—'her children'—being words of purchase, and not nitation, the rule in Shelley's Case does not apply, and a fee simple was vested in Sarah Gatewood. She took an estate for life, and her children sted remainder, whether for life or in fee it is immaterial now to inquire. think the only fair construction which can be placed upon the language in the deed is that the grantor intended to part with all her interest e land except the retaining her living off of it, and that she intended to give to the appellant a life estate, and vest the remainder in the children of the appellant, and the fee vested in the children of the appellant at time of the execution of the deed. It does not appear that any children born to the appellant after the execution of the deed, or that any living hat time have died, and no question is presented as to the rights of the ivors or those born after the execution of the deed. There are no such ls of inheritance used in this deed as to bring it within the rule in Shel- Case, and give to the grantee named a fee simple, as contended on the of the appellant. The words 'children of his body' are used as words riptive of a class who are to take the fee."

n Bodine's Administrators v. Arthur, 91 Ky. 53, 14 S. W. 904, Am. St. Rep. 162, the granting clause was to Mrs. Bodine, haben- n to Mrs. Bodine, and to her children by him (her husband) otten. The first contention was that the habendum clause was ugnant to the grant, and was therefore void. The court said:

But where it appears from the whole conveyance and attendant circum- ces that the grantor intended the habendum to enlarge, restrict, or repugn conveying clause the habendum must control. It is, in such case, to onsidered as an addendum or proviso to the conveyancing clause, which, a well-settled rule of construction, must control the conveyancing se or premises, even to the extent of destroying the effect of the same. s is so, because it is the last expression of the grantor as to the convey- e, which must control the preceding expression. * * * Such convey- es give to the named vendee a life estate, remainder to the children. This struction grows out of the fact that as there must be parties, vendors and dees, in order to make a valid conveyance, none but parties vendees can e a present estate. Such parties may be designated by their proper names, by such other designation as will identify the particular persons meant as dees. In this case the expression 'her children by W. R. Bodine begotten' s not identify the particular individuals who are to take, because they, some of them, may hereafter be born. Hence they cannot be deemed par- vendees in the sense of taking an immediate estate, but they take an es- in remainder. Such conveyances, thus construed, are effective, otherwise ; and as it must be presumed that the grantor intended all the parts of the d to have the effect that the law gives to the language used, consequently nust also be presumed that he intended to grant a life estate, with remain- unless, as intimated, the contrary intention appears."

n Smith v. Upton, 12 Ky. 27, the conveyance was "to Mrs. Smith l her children," the consideration moving from Mrs. Smith's sband. It was held that the intention of the parties is gathered m the language of the deed, as such language is explained by at-

tendant circumstances and the relation of the parties, and must control; that it was evidently the intention of the husband to give the whole estate to his wife and their children, for whom he was under equal obligation to provide. This purpose could only be effectuated by giving to the wife a life estate, remainder to the children. Whereas, if the instrument were construed as giving the wife and children a joint estate in fee, it was calculated to defeat the intention by the wife's interest passing to her children by a second marriage, who would be strangers in blood, and to whom the grantor was under no legal or moral obligation to provide. To give to the wife and the then children a joint estate would defeat the intention of the grantor as to subsequent born children.

In Elmore et al. v. Mustin, 38 Ala. 300-314, a father, in consideration of natural love and affection, conveyed to his daughter and her children, by present words of gift, several negroes and other property, "to have and to hold unto the said Sarah, her executors and administrators, forever, as her and her children's property"; the deed reserving the use and possession of the property to the donor during his life. It was held that it created a life estate in the said Sarah, with a quasi contingent remainder to such of her children as might be living at her death. Chief Justice Goldthwaite said:

"The donor virtually reserves to himself a life interest in the property, and, with this reservation, he gives it to Sarah M. Elmore, 'and to her children, the natural heirs of her body, at her death.' The interest of Mrs. Elmore is not, as has been urged, converted into an absolute gift, on the principle applicable to estates tail; for the word 'children' is here explanatory, and restrictive of the words immediately following it, and presents a stronger case than Dunn v. Davis, 12 Ala. 135, where the gift was to the 'heirs or children.' * * * The gift, it is to be observed, is to Mrs. Sarah M. Elmore for life, and 'to her children, the natural heirs of her body'; and we think that by the terms 'natural heirs of her body,' taken in connection with the word 'children,' the donor intended to limit the gift to the children who were heirs; and upon the principle, 'Nemo est hæres viventis,' the limitation could only extend to the children living at her death, thus giving them a quasi contingent remainder."

In Pennsylvania where the rule in Shelley's Case obtains, and where it was at one time held that a conveyance to A. and her children was in præsenti, therefore A. and the then living children took as tenants in common, the correctness of this ruling, in the constant struggle and progress of the law to effectuate the intention of parties making grants, was challenged and overthrown in Coursey v. Davis, 46 Pa. 25, 84 Am. Dec. 519. So. Mr. Justice Strong, in White v. Williamson, 2 Grant. Cas. 249, where the deed was to A. "for the use of the wife and children of B.," said:

"Under that declaration what interest did she take? Was it a life estate, with remainder to her children, or was it a tenancy in common with them? The court below thought it was the former and so instructed the jury. We incline to concur in that opinion. Under that declaration the children take as a class, not individually. The grant is not to the children then in esse, but it embraced those after-born. It was the gift of a father for the benefit of his descendants. If the time of the distribution was the date of the gift, then after-born children must have been excluded; for where a gift is to a

ss, the rule is that the time of distribution defines the individuals who con-tute the class."

See, also, Hague v. Hague et al., 161 Pa. 643, 29 Atl. 261, 41 Am. . Rep. 900, where it is held that a gift to Sarah Hague and her ildren is a gift of a life estate to the mother, with remainder in e to the children as a class.

The discussion of this question by Chief Justice Beard in Black-rn v. Blackburn, 109 Tenn. 674, 73 S. W. 109, commends itself well for its reason as its justice. The deed was from the father his daughter and her children forever; and in a subsequent clause e deed provided that, in case the daughter died before her hus-nd, he should have 400 acres of the land during his life, which at s death should go to said children and bodily heirs of the daugh-r. At the date of the deed Mrs. Blackburn had four children. ıbsequent to the delivery of the deed there were born to her five her children. The contention made was that the mother and the en living children took as tenants in common all the land, to the clusion of the after-born children. It was held that the deed eated a life estate in the daughter and her husband, with a vested mainder in the children living at the date of the deed, which ened and admitted the after-born children. The learned judge nceded that a conveyance to a mother and her children, without y qualifying words, "is often held to be one in præsenti, vesting e title in the then living children and the mother as tenants in mmon, and by construction of law excluding children coming into ing thereafter. In the cases where this has been held, the rule rested either upon the idea that a freehold could not be created take effect in futuro, as at common law livery of seizin was essen-al to such estate, or else upon an implication from the instrument an intention upon the part of the grantor that the title should pass the living children as if they had been named therein (citing ıthorities). But if the deed, when taken altogether, discloses purpose upon the grantor's part that all the children of the mother, ithout regard to the time of their birth, shall become beneficiaries the property conveyed, then to effectuate this purpose the mother ill be converted into a tenant for life, and the children into re-aindermen, the remainders vesting in those living at the date of e instrument, and the estate opening upon the subsequent birth children so as to embrace them. * * * And a slight indica-on will induce the courts to adopt the construction of the deed hich will effectuate the intention of the grantor. Moore v. Sim-ons, 2 Head, 546; Beecher v. Hicks, 7 Lea, 207."

He then proceeded to state that, if it had been the purpose of the rantor to limit the estate to the benefit of the children in esse, would have been easy to do so by words or terms indicating such urpose, and that, as there could be assigned no sufficient reason hy the children in being should be more the objects of his benefi-ence and solicitude than the after-born children, it would be a erversion of justice to exclude the latter.

Turning to the deed of William West to his daughter and her

children, we inquire what possible motive could the father and grandfather have had to provide alone for the minor children in esse? His daughter, as the sequel proved, was a vigorous woman, bearing children in regular order, with probable prospects of continued production. The deed on its face shows that love and affection in part moved him to its execution. In the very nature of a kindly heart, the after-born children would be as much the objects of his affection and the concern of his solicitude and providence as those in being. This strong, natural impulse should accentuate the fact that if the grandfather had intended to limit the deed to the living children he would have employed some term, some word, to indicate it. On the contrary, in the habendum clause, where he expresses a purpose to secure the estate, after the mother was gone, forever to the use of the remaindermen, he employed the comprehensive term "her children." And as the term "her children," thus employed, did not indicate inheritance, and they were not words of limitation, but descriptive of the beneficiaries, eo nomine, to take under the deed, the children living at the time of the mother's death took as purchasers, and therefore the rule in Shelley's Case should not apply.

While the deed was inartificially drawn, we cannot, on taking the deed and reading it by its four corners, escape the conviction that it was the mind and purpose of William West to vest in his daughter a life estate and to secure the remainder in her children, and we are unwilling to sacrifice this manifest purpose by giving a broad application of a most technical and harsh rule, like that established in Shelley's Case.

We hold that under the deed from William West, Elmira Hubbird took a life estate and the two children in esse a vested remainder therein, and upon the birth of after-born children the estate in remainder was opened for their admission, and that upon the death of the mother the surviving children became entitled to the possession, and are entitled to maintain the action of ejectment, unless barred by the local statutes of limitation.

Section 4223 (Code 1897) provides that:

"An action to determine and quiet the title of real property may be brought by any one, whether in or out of possession, having or claiming an interest therein, against any person claiming title thereto, though not in possession."

The period of limitations in real actions in the Iowa statutes is 10 years. Under section 3188 of the Code a woman attains her majority at the age of 18 years, and the petition shows that Lottie Helen Manly was 18 years old on the 20th day of October, 1894, and that said Elsie Bennett became 18 years of age on the 24th day of August, 1897. By section 3453 of the Code it is provided that:

"The time limit for actions hereunder, except those brought for penalties and forfeitures, shall be extended in favor of minors and insane persons so that they shall have one year from and after the termination of such disability within which to commence said action."

On the theory, therefore, that Elmira Hubbird took a life estate and the children then in being an estate in remainder, their right

ction is barred. Marray v. Quigley, 119 Iowa, 13, 14, 92 N. W. 97 Am. St. Rep. 276. The right of action, however, not being red as to the other children, the court erred in rendering judgt on the demurrer against all of the plaintiffs.

t results that the judgment as to the plaintiffs, Lottie Helen nly and Elsie Bennett, is affirmed, and reversed as to the other ntiffs, with directions for further proceedings in conformity n this opinion.

INER, District Judge (dissenting). I am unable to concur in foregoing opinion of the court in this case. The deed was made owa, and must be construed according to the laws of Iowa, as rpreted by the Supreme Court of that state. Following the rule onstruction in the case of McCleary v. Ellis, 54 Iowa, 311, 6 N. 571, 37 Am. Rep. 205, as I understand it, the condition against nation contained in this deed is void. I think the deed conveyed estate to Elmira Hubbird and her children then in existence y, and that it cannot be construed as a conveyance to the chil- n not then begotten. Elmira Hubbird and her two children n in existence would, therefore, take the estate as tenants in mon. The limitation upon the power of alienation attempted e made in the deed being void under the decisions of the court ast resort of the state of Iowa, Elmira Hubbird could and did, her deed, convey her interest in the land to the defendant in r. The interest of the two children in existence when the deed s made is barred under the statutes of Iowa. Marray v. Quigley, Iowa, 13, 92 N. W. 869, 97 Am. St. Rep. 276.

think the case should be affirmed.

On Petition for Rehearing.

PHILIPS, District Judge. Many of the criticisms made in the ition for rehearing of the former opinion herein are either based n a faulty construction of the language employed or a misconstion of what was really decided. There is but one question ed by the petition deemed worthy of consideration, and that is t the Supreme Court of Iowa, in Doyle v. Andis, 102 N. W. 177, ided since this case was submitted, has held that the rule in elley's Case is in force in the state of Iowa. This decision was a divided court—three to two. On reading both the majority minority opinions, the candid mind must concede that the intiion, made in the original opinion herein, that it was an open stion as to whether or not the rule in Shelley's Case was by the r decisions of that court established in all its ancient rigor in state of Iowa, was a justifiable suggestion. All that was affirmvely held in the former opinion herein touching this matter is that Supreme Court of that state had never applied the rule in Shels Case to a deed like the one in question, which, read by its four ners, clearly indicated the intent of the grantor to convey a life ate to his daughter, with the remainder to her children. The veyance construed in the Doyle-Andis Case was to Andis "dur-

ing his natural life, and then to his heirs." This was held by the majority opinion to come within the rule in Shelley's Case, and to vest the absolute fee in the first taker. With this application of the rule we make, and have made, no controversy, because the same instrument conveying a life estate made the limitation by way of remainder of another interest of the same legal quality to his heirs, as a class of persons to take in succession, from generation to generation. It is quite clear, both from the reasoning and authorities of the majority opinion, and the discussion of the minority, that if it had been to A. during his natural life, and then to his children, the grant would have escaped the meshes of the rule in Shelley's Case, and the children would have taken as purchasers, and not by inheritance. The very term "heirs" implies inheritance, or taking by succession.

According to the maxim, "Nemo est hæres viventis," there can be no heir of a living person. Therefore the estate in remainder could not vest during the life of the ancestor. It must pass by devolution, and the heir takes "in succession from generation to generation," so that the "limitation to the heirs entitles the ancestor to the whole estate." The term "her children," under such a deed as that made by West, the grandfather, is descriptio personæ, and as such "they at once indicate the objects and limit the scope of the gift," and become words of purchase. This, we think, is clearly deducible from the postulate laid down by Hargrave (1 Hargrave, Law Tracts, 575, 577), quoted with approval by the majority opinion in Doyle v. Andis, supra:

"When it is once settled that the donor or testator has used words of inheritance according to their legal import, has employed them intentionally to compromise the whole line of heirs to the tenant for life, and has really made him the terminus or ancestor by reference to whom the succession is to be regulated, then it will appear that, being considered according to those rules of policy from which it originated, it is perfectly immaterial whether the testator (or donor) meant to avoid the rule or not, and that to apply it, and to declare the words of inheritance to be words of limitation, vesting the inheritance in the tenant for life, as the ancestor and terminus to the heirs, is a mere matter of course. But, on the other hand, if the words of inheritance were not used in their full and proper sense, so as to include the whole inheritable blood, and make the tenant for life the ancestor or terminus for the heirs, but the testator intended to use the word 'heirs' in a limited, restrictive, untechnical sense, and to point at such individual person as should be the heir, etc., of the tenant for life at his decease, and give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork for a succession of heirs, and constitute him or her the ancestor terminus and stock for the succession to take its course from, in every one of these cases the premises are wanting upon which only the rule in Shelley's Case interposes its authority, and that rule becomes quite extraneous matter. So, then, in order to ascertain, in every case, whether or not the rule is applicable, the inquiry simply is, in what sense did the testator or donor use the words? If in the former sense, the rule always applies, notwithstanding a positive declaration that it shall not. If in the latter sense, the rule is as invariably foreign to the case, the remainder is contingent until the death of the tenant for life, and the party named as heir takes by purchase."

With the views we entertain of the clearly enough expressed mind of the grantors, William West and wife, to provide for their

ıdchildren as such, we are unwilling to thwart that will by going ɔnd any express decision of the state court in embracing the rule helley's Case.

he petition for rehearing is overruled.

INER, District Judge, dissents.

In re O'CONNELL.

In re DOW.

(Circuit Court of Appeals, First Circuit. December 22, 1904.)

No. 545.

ANKRUPTCY—PETITION FOR REVIEW—MATTERS PRESENTED BY RECORD.

On a petition to revise in matter of law bankruptcy proceedings in the District Court, the Circuit Court of Appeals will ordinarily consider only such matters of law as are shown by the record, by findings of fact or their equivalent, to have been distinctly presented to the court below.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

AME—REFUSAL TO REOPEN CASE.

The action of a court of bankruptcy in denying a petition to reopen a case after the bankrupt's estate had been closed, for the purpose of appointing a new trustee and taking action to collect further assets, was not erroneous as matter of law, where it was based on a finding by the referee, concurred in by the court, that there were no substantial assets remaining unadministered.

etition for Revision of Proceedings of the District Court of the ted States for the District of Massachusetts, in Bankruptcy.

ernard D. O'Connell, pro se.

Ielvin M. Johnson (Roger, North & Johnson, on briefs), for re- ndent Dow.

efore COLT and PUTNAM, Circuit Judges, and ALDRICH, trict Judge.

'UTNAM, Circuit Judge. This is a petition brought in this rt by Mr. O'Connell under the bankruptcy act of July 1, 1898, 41, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], asking us revise certain proceedings of the District Court with reference Lenoir A. Dow, bankrupt. Of course, we are limited to matters aw. In Boston Dry Goods Company et al., Petitioners, decided us on October 13, 1903, reported in 125 Fed. 226, 227, 230, 60 C. A. 118, we held that on petitions of this class the record should sent to us simply, clearly, and unequivocally the issues of law, he like effect as bills of exceptions, proceedings without a jury, proceedings in the Supreme Court on admiralty appeals, as vided in the act of February 16, 1875, c. 77, 18 Stat. 315 [U. S. mp. St. 1901, p. 525]. We also said that, in order that it may ear by the record that issues raised on appeal were presented ow, findings of fact which involve distinct propositions of law, something else as a substitute therefor, are necessary. In Shoe

& Leather Reporter et al., Petitioners, 129 Fed. 588, 589, 64 C. C. A. 156, we also emphasized the rule that on these proceedings we ought not to take jurisdiction ordinarily over propositions not brought specifically to the attention of the District Court. It is true that, as said in Boston Dry Goods Company, we ought to waive the strictness of the rules which we have stated as to some matters of a substantial character when justice clearly requires that it should be done; but in the present case, in view of the confused condition of the record and the confused statements of the case by both the petitioner and the respondent, it is impracticable for us to make any departure in that respect.

So far as we can discover from the record, and from briefs submitted to us, our consideration is limited to a petition filed by certain creditors after the closing of the case, which prayed that the bankruptcy proceedings in question be reopened, and sent back to the referee, for the purpose of electing a new trustee, and taking action necessary to collect and distribute further assets of the bankrupt's estate. This petition was filed on April 29, 1904, and it alleged that, since the closing of the estate, there had come to the knowledge of the trustee and creditors that there were assets of the bankrupt which should be realized, all said to be as more particularly set forth in the objections to the allowance of the petition of the bankrupt for his discharge. It is now of no consequence what the particular assets referred to were, but we gather that they were certain alleged interests in the estates of the mother and uncle of the bankrupt which were not disclosed by his schedules.

The record shows, and there is no question, that the bankrupt's schedules disclosed no assets, except what were by law exempt, and particularly no interest in either of the estates named. It shows that the final meeting, which involved the closing of the estate and discharge of the trustee, was held on January 23, 1904. It is nowhere claimed that the bankrupt had any assets unless those thus alleged. The record shows that while the petition to reopen the case was pending there were also pending objections to the discharge of the bankrupt, with specifications that he had fraudulently concealed his interests in the estates referred to. The petition to reopen the proceedings was sent to the referee, who made a report concluding that, by consent of parties, he made the report and findings on the objections to the discharge a part of the report on the petition to reopen proceedings, so far as the same were material. Also the referee reported the evidence taken before him, or a summary thereof, which was laid before the District Court, and, so far as the record shows, considered by it. The report with reference to the objections to discharge contained the following:

"Upon the foregoing evidence I find that on July 14, 1902, the bankrupt transferred to his attorney all his interest in the estate of his uncle, William H. Webster, and that thereafter he had no interest therein; that he had an interest of five dollars under the will of his mother which he failed to disclose in his schedules or in his examination, but that such failure to disclose was without fraudulent intent, and was wholly inadvertent; and that he has not knowingly and fraudulently concealed property from his trustee or made a false oath."

e referee denied the petition to reopen the case. We discover e record no findings of fact by the court itself, but only a e which, in a formal manner, affirmed the action of the referee. of course, must be taken as affirming his findings of fact. parties have referred to the evidence which was before the ee, but that cannot be taken cognizance of by us. We are, of e, required to accept the facts as found by the referee and as ently approved by the court. Accepting these facts, the only ion of law that could possibly be raised would be whether or here was any ground for reopening the proceedings. As we assume that it has been found by the District Court that there no substantial assets as alleged in the petition, the reopening l be futile; and, as the law does not do vain things, the action e District Court cannot be gainsaid as matter of law, which is nly aspect in which we can consider it.

e petition contains numerous propositions alleging irregularity e part of the referee and of the court, mainly, if not entirely, technical nature. These, although apparently discussed by parties before us, were not involved in the petition to reopen ase. That petition, as we have seen, was based entirely on the osition that there were assets which had not been administered, hat, therefore, the proceedings should be reopened. There is ng in the record to show that any other question was before District Court, nor any findings of fact which would justify considering any other question if it had been before it.

der the circumstances we have pointed out, it is enough for nd it is also conclusive on us, that it does not appear from the d that the estate of Dow had not been administered at the time etition to reopen the proceedings was filed. Therefore we can the petitioner no relief.

t there be a decree that the petition be dismissed, with costs e respondent.

In re PETTINGILL & CO.

Ex parte PRESS PUB. CO.

(Circuit Court of Appeals, First Circuit. May 4, 1905.)

No. 582.

NKRUPTCY—PETITION TO REVISE—MATTERS REVIEWABLE.

A petition to revise in matter of law the proceedings of the District ourt in bankruptcy does not usually bring the prior proceedings of a referee before the Circuit Court of Appeals for review.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to In re ggert, 43 C. C. A. 9.]

E—RECORD—OPINION OF DISTRICT COURT.

While a mere opinion filed by the judge in the District Court in a nkruptcy proceeding does not present findings of fact for the purposes a reviewing court, unless made matter of record by order of the urt, still it may be looked to for the purpose of determining in a general ay the propositions on which the case has been disposed of, and espe- ally the questions of law which were passed on.

3. SAME.

Where the record presented to the Circuit Court of Appeals on a petition to revise proceedings in the District Court in bankruptcy in matters of law contains no findings of fact by the District Court, and the opinion of that court, although stating propositions of law, shows that they were not determinative of the matter at issue which was decided as a question of fact on the evidence, there is nothing upon which the reviewing court can act.

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

On motion of Joseph W. Lund, trustee, for revision in matter of law. For opinion of District Court, see 135 Fed. 218.

Walter M. Lindsay, for petitioner.

Jeremiah Smith (Malcolm Donald, on the brief), for respondent.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. In this case the referee rejected a proof of debt because the creditor had received a preference with reasonable grounds of belief that a preference was intended. He drew his conclusion to that effect from a number of facts, covering nearly three printed pages of the record, each having more or less tendency to support the result he reached. The learned judge of the District Court merely reversed the judgment of the referee. He gave no reasons therefor in his decree, and filed no findings of fact, but passed down an opinion which we will refer to again. Thereupon, instead of appealing as provided in section 25 of the act of July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], which limits the time for appealing to ten days, the trustee, contrary to the apparent policy with reference to such appeals, filed in this court this revisory petition, which under ordinary practice, and in analogy with the time given by statute for taking out ordinary appeals or writs of error from District Courts to this court, might be done within six months from the entry of the decree to which the petition relates. Nevertheless, as the question of jurisdiction has not been raised by the parties, we pass it by, with the express statement that we are not prejudiced hereby.

In Boston Dry Goods Company, 125 Fed. 226, 227, 235, 60 C. C. A. 118, in Shoe & Leather Reporter, 129 Fed. p. 588, 589, 64 C. C. A. 156, and in Bernard D. O'Connell, Petitioner, in an opinion passed down on December 22, 1904, 137 Fed. 838, we held that on petitions of this class the record should present to us simply, clearly, and unequivocally the issues of law, to the like effect as bills of exceptions, proceedings without a jury, and proceedings in the Supreme Court on admiralty appeals as provided in the act of February 16, 1875, c. 77, 18 Stat. 315 [U. S. Comp. St. 1901, p. 525]. We also said that, in order that it may appear by the record that issues raised on appeal were presented below, findings of fact which involve distinct propositions of law, or something else as a substitute therefor, are sometimes necessary. It is well settled that a mere opinion of the court not specially made a matter of record does not take the place

finding of facts, although it may be referred to for the purpose scertaining what propositions of law governed the court in h the opinion was filed, or for the general purpose of determin- whether the case went off on facts or law.

Boston Dry Goods Company, ubi supra, the determination of eferee was affirmed; in Shoe & Leather Reporter the record nted no action by the referee; and in Bernard D. O'Connell, ioner, the District Court also affirmed the conclusion of the ee. Therefore in one respect the present record differs, be- here the court reversed the conclusion of the referee. On account the petitioner puts his propositions as follows:

rst Proposition. The record discloses but one finding of facts—that of feree—who had the parties and witnesses before him, and such finding controlled, so far as the facts are concerned, by the opinion.

cond Proposition. The finding of facts by the referee will not be dis- l on review unless it appears that the referee was manifestly wrong in nclusions.

ird Proposition. The evidence adduced before the referee justified the g of fact that the creditor had reasonable cause to believe that a pref- e was intended, within the meaning of section 60 of the bankruptcy act."

e fundamental difficulty about these propositions is that, under on 24b of the act of July 1, 1898, c. 541, 30 Stat. 553 [U. S. p. St. 1901, p. 3432], the proceedings of the District Court are re us, and not the proceedings of the referee. Although in se sense parties who are dissatisfied with the conclusions of eferee are said to appeal to the District Court, yet the action iat court on the findings of the referee did not assume the alities of an appellate tribunal. Neither, according to the usual tice, are the proceedings before the referee brought before the t on exceptions, and thus made a part of the record, as in the of a master in chancery. The relations between the court and eferee are usually of an informal character. Section 38 of the f July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p.], and general order 27 (89 Fed. xi; 32 C. C. A. xxvii), pro- for review by the court of the orders of referees in the most ral terms, and are far from limiting the court to the rules which rn a chancery suit. Therefore, according to the common prac- the District Court was authorized to disregard the findings of eferee entirely, if it saw fit so to do, and proceed de novo, or t them for reasons of law, or refuse to accept them in whole or art, without assigning reasons therefor. The position of the ioner in this particular would require this court to be bound lusively by the findings by the referee of the preliminary and nate facts, although the District Court was not so bound, a osition which defeats itself on its very face.

may be further added that, even if we were authorized to go tly to the findings by the referee, as claimed by the petitioner, record would still lack sufficient to enable us to accomplish a ion of any matter of law, because they are all findings of various which lead up to an ultimate conclusion, also of mere fact. efore, if we should undertake to revise his proceedings, we d be considering, not questions of law, but the probative effect

of numerous disputed details of various business transactions between the parties concerned. The true answer, however, on this branch of the case is, as we have already said, that we are not authorized to revise the proceedings of the referee, but only those of the District Court, and that the record contains no such statement of the ultimate facts as would enable us to dispose of its proceedings on mere questions of law.

It is claimed by the petitioner that, even if an issue of law is not raised by the record in the usual manner, the detailed facts, stated by the referee in the way we have explained, lead conclusively to the ultimate proposition that the creditor's proof should have been rejected, and therefore that a proper issue arises from the mere reversal. In this respect the petitioner seeks to put himself in a position analogous to that of one who, in an action at law, asks the court to direct a verdict one way or the other on all the proofs which have been adduced on a jury trial. That in this way, in ordinary common law proceedings, an issue may be raised for an appellate tribunal cannot be questioned. We, however, have no occasion to determine whether this practice can be applied to a revisory petition of the character before us, because it is too evident that, on such a condition of preliminary facts as is exhibited by this record, no judge at nisi prius would be required to direct a verdict as claimed by the petitioner. A mere reference to Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971, relied on by the District Court, and to the conclusion of the Supreme Court on the facts therein revealed, demonstrates this proposition.

While, as we have said, the rule has been settled for an indefinite period that a mere opinion filed by a judge in a court of first instance does not present findings of fact of the character described in our decisions to which we have referred, unless made a matter of record by order of the court in which the opinion is passed down, nevertheless it is also equally well settled that it may be looked to for the purpose of determining in a general way the propositions on which the case has been disposed of, and especially the questions of law which were passed on. Opinions are being constantly used by the Supreme Court for such purposes. It is true that the present opinion states a proposition of law as follows:

"Insolvency is no longer inability to pay debts in the regular course of business, but exists only 'whenever the aggregate of (the bankrupt's) property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.' Grounds for a reasonable belief in a present inability to pay debts in the course of business are not necessarily grounds for believing that a man's property, at a fair valuation, is not sufficient to pay his debts."

If the learned judge of the District Court had drawn his conclusion squarely from this proposition, the case might be in a position where we could take jurisdiction with some effect; but he did not do so. He follows what we have just quoted by this observation:

"In view of both the decision and the language of the Supreme Court, I am constrained to reverse the decision of the referee. See, also, King v. Storer, 75 Me. 63; Petersen v. Schroeder, 75 Wis. 577, 44 N. W. 652."

District Judge reviewed the detailed facts at length in con-
with Grant v. National Bank, which was decided under the
ptcy act of 1867 (14 Stat. 517, c. 176), and he holds that,
ng them on the practical rules of Grant v. National Bank, it
still follow that the creditor had no reasonable ground of
hat a preference was intended. Therefore, even if we should
that the proposition of law distinguishing between the pres-
tute and that of 1867, stated by the learned judge of the Dis-
ourt, could not be sustained, this would not dispose of this
n, because we would then be thrown back upon the necessity
ewing the preliminary facts as they were reviewed by him
light of the rules as they existed when Grant v. National
vas decided. In other words, the proposition of law by which
rned judge distinguishes the present statute from previous
s in no view eliminates from this case the necessity of investi-
the detailed and preliminary facts and the ultimate con-
of fact to be deduced therefrom.

iew of the question of jurisdiction, which we do not pass on,
nk costs should not be awarded.

here be a decree that the petition be dismissed, without costs.

HE VEDAMORE. THE LILIE. HENRY v. MICHAEL et al.

(Circuit Court of Appeals, Fourth Circuit. May 10, 1905.)

No. 566.

ISION—PROPER NAVIGATION—STATION OF LOOKOUT.

While no specific location on a vessel is prescribed for the lookout, he required by good navigation to be placed at the point best suited for purpose alike of hearing and observing the approach of objects likely be brought into collision with the vessel; having regard to the cir-nstances of the case and condition of the weather.

Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 142,]

—STEAMSHIP AND SCHOONER—IMPROPERLY LOCATED LOOKOUT.

Where a large ocean-going steamship, with decks considerably above water, was navigating Chesapeake Bay in the night in foggy weath-a lookout stationed in the crow's-nest, 60 feet above the deck, and feet from the stem, was not properly located to see and hear objects front of the vessel, and especially small vessels of the character that ally navigate the bay, frequently loaded down to their water mark; the ship was in fault for a collision with a schooner, whose fog nal, regularly sounded, was not heard by the lookout until imme-tely before collision.

Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 163.]

eal from the District Court of the United States for the Dis-f Maryland.

opinion below, see 131 Fed. 154.

rles W. Field and R. E. Lee Marshall, for appellant.

ert H. Smith, for appellee.

ore GOFF and PRITCHARD, Circuit Judges, and WAD-, District Judge.

WADDILL, District Judge. This is an appeal from a decree of the United States District Court for the District of Maryland, in admiralty, adjudging the Vedamore solely in fault for a collision with the schooner Lilie, which occurred in Chesapeake Bay, about 12:20 o'clock on the morning of the 31st of January, 1904, during a fog. The Vedamore was a large ocean-going freight steamer, of 4,122 tons burden, laden with live stock, and bound southwardly down the bay from Baltimore; and the Lilie was a two-masted schooner bound up the bay to Baltimore, with a cargo of cord wood.

The faults alleged against the steamship are, briefly, that she was navigating outside of the usual track of vessels of her size in said bay, at the point of collision, and that her navigators failed to keep a strict and proper lookout, and failed to avoid the schooner after they became aware of her proximity; that they were proceeding at too high a rate of speed in the then condition of the weather and the prevalence of the fog. The faults charged against the schooner are that she failed to keep a proper lookout, suitably located; that she was running at too high a rate of speed during the prevalence of the fog then existing; and that she failed to keep her course, and, on the contrary, starboarded her helm, bringing about the collision.

The case was heard by the court below, the witnesses being examined orally, and the conclusion arrived at was that the Lilie was free from fault in the collision, and that the same could only have occurred from immoderate speed on the part of the steamer, or by her failure to seasonably hear the schooner's fog signal, and that, in the judgment of the court, the collision was attributable to the latter cause. The findings of the lower court were, among other things, to the effect that the steamer was one of the largest class of ocean-going freightboats; that her bridge was 150 feet from her bow; that her only lookout was in the crow's-nest on the foremast, some 60 feet above the deck, and about 100 feet from the stem; that the steamer was carrying a deck load of about 1,000 sheep, immediately under the crow's-nest, and on the forward deck; that, when the schooner's fog signal was first heard on the bridge by the master, he said to the pilot, "I have just heard either a fog horn, or the bleating of a sheep," and just then the lookout signaled, by one stroke on his bell, a vessel on the port bow, the pilot rang to the engine room full speed astern, and the collision quickly followed.

It will not be necessary, in the view taken by the court, to review at length the evidence in the cause, in so far as there is any difference between the parties upon the facts, further than to say that the same has been fully considered, and we see no reason to differ with the conclusions reached by the lower court thereon. The real question in the case turns upon the correctness of the decision of the lower court respecting the location of the lookout on the vessel at the time of the collision. In that conclusion we also concur. While it is true that no specific location on a vessel is prescribed for the lookout, it goes without saying that such location should be at the point best suited for the purpose alike of hearing and observing the approach of objects likely to be brought into collision with the vessel upon which the lookout is located. Confessedly, upon a large

ng ship, the decks of which are considerably above the further elevation of 60 feet in the air, at a point 100 feet stem of such ship, would not be a desirable place for either r seeing objects in front of the moving vessel; and this larly true of small vessels of the character that navigate s of Chesapeake Bay, in the vicinity of the collision, when den, frequently down to their water marks, and when, as se, the chances of hearing are further interrupted by the of a large flock of sheep immediately under and in front ne lookout in the crow's-nest and the master and pilot on e, it is not surprising that the master was unable to dis- the difference between the sound of a fog horn and the of the sheep below.

urt, in The Michigan, 63 Fed. 280, 287, 288, 11 C. C. A. a case not unlike this in many respects, speaking through ., said:

mer was also guilty of a very grave incidental fault, but for which t would not have occurred. A very large portion of the carrying r eastern seaboard is done by modern three and four masted schoon- have great capacity for freight in the hull, and lie low upon the water. are not more than 5 to 8 feet above the surface. Vessels of this class l the waters of our Atlantic seaboard, night and day. The Michi- vessel of different build. Her main deck was 20 feet above the . Her captain's bridge was 35 to 40 feet above the water. Her dge was 8 feet above deck, and nearly 30 feet above the water. bridge was set nearly 40 feet to the rear of the high-pointed stem sel. It was impossible for a man standing 40 feet back of the his lookout bridge, to keep a proper lookout, especially in hazy night, for the large class of vessels lying low on the water, which e approaches to the Virginia Capes. It was a flagrant fault in the hat on the occasion of this collision she had no lookout in her up to her stem, in position to look over the point of the vessel on and to discover in good time vessels that might be ahead of her se."

no reason for departing from the rule there laid down as ce of the location of lookouts on steamships navigating the Chesapeake Bay. In the present case there is much great- why that doctrine should be strictly adhered to. To hold ocation of the lookout on the Vedamore in this collision per one, and best suited for either seeing or hearing, would doing away with that most important aid in the efficient n of ships. The fact that the lookout upon the Vedamore ear the fog signals regularly sounded by the Lilie, within proximity of the two vessels, namely 200 feet, strongly tself to show either that the lookout upon the Vedamore cient or improperly located. In discussing the presump- ng from the failure to hear fog signals, the Supreme Court ited States in the case of The New York, 175 U. S. 204, t. 73, 44 L. Ed. 126, speaking through Mr. Justice Brown,

on is given why the signals of the Conemaugh were not heard, and, York was not more than a mile distant from her when her first blown, her inability to hear them is inexplicible, except upon the t no sufficient lookout was maintained, or that such lookout did

not attend properly to his duties. Her officers failed conspicuously to see what they ought to have seen, or to hear what they ought to have heard. This, unexplained, is conclusive evidence of a defective lookout"—and citing The Sea Gull, 23 Wall. 165, 23 L. Ed. 99; The James Adger, 3 Blatchf. 515, Fed. Cas. No. 7,188; The Pantio, 14 Blatchf. 545, Fed. Cas. No. 4,636; The Sunnyside, 91 U. S. 208, 23 L. Ed. 302; Spencer on Collisions, § 175.

Counsel for appellant earnestly insists that inasmuch as, in the then condition of the weather, the two vessels could not have been seen more than 200 feet apart, the location of the lookout in the bow was immaterial, and that, as this case is one depending rather upon the ability to hear than see, the location of the lookout in the crow's-nest was quite as desirable a position as that of the eye of the ship, for the purpose of hearing. We cannot concur in this view, as we believe that a lookout properly stationed in the bow of the ship would have been in a better position to have heard the sounds of the fog horn from a vessel low down in the water, and that certainly it would have been much better for the purpose of observing objects. Appellant also earnestly urges that the absence of the lookout in the bow of the ship on this occasion did not add to the chances of the collision, inasmuch as the ship's first officer was in the bow, looking after the ship's anchor, and that he from that point did not hear the fog signals; and, moreover, says that it was impracticable, by reason of the large number of sheep on the ship's deck, to have a lookout properly stationed there.

As to the latter defense, it cannot avail the ship, since she was bound to properly place her lookout, nor will it do to say that its deck was so overcrowded that proper room could not be reserved for that purpose, and, so far as the first officer's location in the bow of the ship is concerned, while it is not entirely clear from the evidence that he was there until after the schooner was sighted and reported, still that likewise would not serve to relieve the ship from responsibility, as the services of a proper lookout, suitably located, cannot be dispensed with, because some officer of the ship engaged in other duties, such as arranging to lower the ship's anchor, may or may not have heard the fog signals or observed the approaching vessel.

Counsel for appellant cites authorities to show that, if the failure to station a lookout in the bow of the ship did not add to the chances of the collision, they should not be held liable therefor. There is no dispute as to the general proposition that faults which do not cause or materially affect the collision are immaterial, but we do not think that this is such a case. On the contrary, the collision was brought about because of the failure to properly locate the lookout, where he could have seen and heard.

The decision of the lower court is affirmed.

RICHMOND v. OREGON R. & NAV. CO.

(Circuit Court of Appeals, Ninth District. May 1, 1905.)

No. 1,109.

LROADS—FIRES—DEFECTIVE APPLIANCES—NEGLIGENCE.

Where a fire was set by sparks emitted from one or both of the locotives hauling a train, in April, 1903, when it was very dry, and one the locomotives was still equipped with a perforated plate instead of wire netting spark arrester, which plates were only used in the winter ne when there was no risk from fire, and the plate which had been in e other locomotive had been changed for a netting on the morning of e fire, the question of defendant's negligence was for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 42-1744.]

IE—APPEAL—THEORY OF CAUSE.

Where, during the trial of an action against a railroad company for re alleged to have been caused by certain locomotives, plaintiff's coun-l, on being asked which of the two engines he claimed set the fire, re-ied that it was one of two engines attached to a certain train, and efendant introduced evidence concerning the spark-arresting equipment both of such engines, it was not entitled to claim on appeal that the uestion of negligence with reference to one of the engines was not in sue.

Error to the Circuit Court of the United States for the South-Division of the District of Washington.

an L. Sharpstein and Frank B. Sharpstein (A. P. Black, of sel), for plaintiff in error.

W. Cotton, Lester S. Wilson, and Henry F. Conner, for de-nt in error.

fore GILBERT, ROSS, and MORROW, Circuit Judges.

ORROW, Circuit Judge. This is an action brought by the tiff in error to recover from the defendant in error the sum of 3, the value of 5,448 sacks of barley, which, it is alleged, were oyed by fire by reason of the negligence of the defendant in

It is alleged that the barley in question was stored in a house at Alto, in the state of Washington, which warehouse situated in the immediate vicinity of the line of railroad be-ng to and operated by the defendant in error; that on the 27th of April, 1903, while engines of the defendant in error were ing and passing along the track opposite and close to the said house, large quantities of sparks, coals, and burning cinders emitted and thrown therefrom and scattered thereby over and the said warehouse, causing the destruction of the warehouse f the barley stored within it. The defendant in error denies negligence upon its part in the operation of its engines, and s that the fire occurred without any carelessness or negligence ever by it or its agents or servants.

e case was tried before a jury. No question appears to have made as to the destruction of the barley or its value. At the usion of the testimony on behalf of the plaintiff the defendant

moved for a nonsuit, upon the ground that the evidence was insufficient to justify a verdict in favor of the plaintiff. This motion was denied. Testimony was then introduced on behalf of the defendant, and upon the conclusion of the evidence the defendant moved the court to instruct the jury to return a verdict in favor of the defendant. This motion was granted and the jury so instructed. The action of the court in instructing the jury to return a verdict in favor of the defendant is assigned as error.

From the evidence it appears that at Alto station on defendant's line of road there is a down grade to the track from east to west. A passenger train known as "Train No. 7," west bound, passed Alto station about 2:30 p. m. on April 27, 1903. This train was hauled into Alto station up a steep grade, extending from Starbuck to a point a short distance east of Alto depot, by two engines, numbered 87 and 133. Engine No. 87 was the regular engine, and engine No. 133 was the helper, coupled on ahead of the regular engine.

The warehouse in which plaintiff's barley was stored was located on the south side of the main track, about 144 feet west of the west end of the depot, which was on the opposite or north side of the track. These compass directions, and those hereafter given, are not strictly accurate, as appears from the maps introduced in evidence, but they are the directions given by the witnesses, and are sufficiently correct to give a general idea of the location of the tracks and buildings at Alto station. The distance from the main track to the warehouse was about 20 feet. A spur track on the north side of the main track left the latter track at a switch about 64 feet east of the east end of the warehouse, and about 80 feet west of the west end of the depot. When the train arrived at Alto station from the east, the head engine, No. 133, stopped at a sufficient distance east of the switch to the spur track to permit that switch to be turned, and allow the head engine, after it had been detached from the train, to go off on the spur track, having completed its run as helper. When the head engine stopped for this switch its front end was not less than 64 feet east of the east end of the warehouse, and the second engine was the length of the first engine still further east. The train was opposite the depot, the mail car directly opposite the depot door. When the head engine is cut off the air is released, which is taken by the second engine, and the brakes set to keep the train from moving until the engineer receives the signal to go. The train stops for a minute or so, and then proceeds on its way westward with the regular engine. This was what occurred on the day of the fire. The helper engine remained on the spur track until the train had passed. The fireman then opened the switch, and the engine backed out onto the main track, and returned eastward down the hill to Starbuck. The helper engine passed in front of the warehouse a short distance to the north of the main track, and to a point some 50 or 100 feet west of the extreme end of the warehouse, and in returning again passed in front of the warehouse.

The testimony on behalf of the plaintiff was to the effect that the wind at this time was blowing across the track towards the warehouse in which plaintiff's barley was stored. There had been no

for a period of about 25 days, and the weather was described
ɔeing very dry. No fire was used in or about the warehouse.
ween five and ten minutes after the passenger train had passed
ɔ station the warehouse was discovered to be on fire at two
ɛs on the roof, about six or eight feet apart, halfway between
comb and the eaves. The fire destroyed the warehouse and its
tents. A brakeman named Allen, in the employ of the defend-
was called as a witness by the plaintiff. He testified that when
train was leaving the depot, and about opposite the warehouse,
engine checked up in speed and then started on again. The
ing wheels of the engine seemed to revolve a little faster than
would in natural motion. He was asked by the court if he
ced smoke or sparks or cinders or anything of that kind com-
from the smokestack of the locomotive. He said he did not.

his evidence on the part of the plaintiff was deemed sufficient
go to the jury as tending to establish the fact that the fire was
asioned by a spark from one of the locomotives, and to call upon
defendant to show that it was not negligent. This action of the
rt is not now a subject of controversy. The only question pre-
ted in the record for our consideration is whether, upon the con-
ion of the trial, there was evidence sufficient to go to the jury
ling to show that the defendant or its employés had been in any
ɔect negligent. The evidence on this point related (1) to the
dling of engine No. 87 by the engineer, and (2) to the equip-
nt of the engines with suitable spark-arresting devices.

here was evidence that when the train was leaving the depot,
was about opposite the warehouse, engine No. 87, hauling the
n, was checked up in speed and then started again, and that the
ing wheels of the engine seemed to revolve a little faster than
would in natural motion. It is contended on the part of the
ntiff that there was a slipping of the driving wheels, and that
action caused the engine to exhaust and throw out more sparks
n it otherwise would do. But the same witness who testified
he action of the driving wheels also testified that he did not
ice smoke or sparks or cinders coming from the smokestack of
locomotive. The incident itself is explained by the evidence
the part of the defendant that when the head engine is cut off
n the train the engineer on the other engine takes full control
he train, and cuts his valve in so that in descending the grade
can stop the train in case of an emergency; and that, to insure
t he has got the air, when he starts the train he makes the appli-
on and sets the brakes slightly, to feel the shock, to be sure he
got the braking power in his valve. He then releases, "and lets
train drift." As the train was on the down grade at this point,
as no sparks or cinders were seen coming from the locomotive,
evidence relating to the taking of the air brake was sufficient
ɔvercome whatever inference or presumption of negligence there
ght be arising out of the evidence concerning the action of the
ing wheels of the engine.

With respect to the spark-arresting devices of the two engines,
ppears that engine No. 87 was on that day equipped with a wire

netting four meshes to the inch, in which the openings in the meshes were 5/32 of an inch square, and that engine No. 133 was equipped with a perforated plate, in which the openings were 5/32 of an inch wide and 7/8 of an inch long. The evidence tends to show that the perforated plate is used in the engines during the winter time when there is no risk from fire, while the wire netting is placed in the engine in the summer time to prevent the setting of fires. The wire netting had been placed in engine No. 87 in place of a perforated plate on the morning of April 27th, the day of the fire at Alto station. The same degree of care that made a change in the spark-arresting device in engine No. 87 required that there should have been a change made to the wire netting in engine No. 133; and the retention of the perforated plate in the latter engine was, under the circumstances, such evidence of neglect that the question should have been submitted to the jury.

It is contended, however, by counsel for the defendant in error, that the question of negligence in engine No. 133 cannot be considered here, for the reason that the case was tried in the court below solely upon the theory that the fire was set by engine No. 87. The record is to the contrary. It appears that early in the trial counsel for the defendant asked counsel for the plaintiff if he claimed that it was either engine No. 87 or engine No. 133 attached to train No. 7 that set the fire, to which counsel for plaintiff replied that it was one of the engines attached to the train coming to Walla Walla that day. Furthermore, counsel for the defendant introduced evidence on the part of the defendant concerning the spark-arresting equipment of both of these engines, showing that he understood that he was to meet the presumption of negligence arising from the fact that sparks from one or the other of these engines set fire to the warehouse.

The judgment of the Circuit Court is reversed, with instructions to grant a new trial.

CORRIGAN TRANSIT CO. et al. v. SANITARY DIST. OF CHICAGO.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,095.

1. NAVIGABLE WATERS—OBSTRUCTIONS TO NAVIGATION—CURRENTS—ALTERATION OF STREAMS—GOVERNMENT PERMIT—CONSTRUCTION.

The government permit to create a current in the Chicago river by connecting a branch thereof with the sanitary canal, providing that the sanitary district shall assume all responsibility for damages to property and navigation by reason of the introduction of such current, constituted a mere contract of indemnity to save the government harmless from liability for such damages, and not an undertaking on the part of the sanitary district to pay damages to third persons for which they would otherwise have no cause of action.

2. SAME—LIBEL—SCOPE.

Where a libel against a Chicago sanitary district to recover damages to shipping by reason of respondent's introduction of a current in the Chicago river was predicated on the introduction of any current therein which would render navigation more difficult and expensive than it pre-

viously was, libelants were not entitled to recover on account of the rate of the current on the date the damages occurred.

ME.

Where the Secretary of War authorized the construction of improvements in the Chicago river so as to secure a flowage capacity of 300,000 ubic feet per minute with a velocity of 1¼ miles an hour, but reserving he right at any time, when it became apparent that the current created n the river was an unreasonable obstruction to navigation, to close the connection between the river and the canal of the sanitary district, the rant was not conditioned on the district's keeping the current within he stated velocity.

ME—UNAMBIGUOUS GRANT—PREAMBLE—REFERENCE.

The grant of permission to the Sanitary District of Chicago to open he channel constructed by it and cause the water of the Chicago river o flow into the same, subject to conditions specified, being unambiguous, he preamble of the permit could not be resorted to for the purpose of mposing an additional condition requiring the district to keep the current within a stated velocity.

ME—CONSTRUCTION.

One of the clauses in the preamble of the grant of permission to the Chicago Sanitary District to connect its canal with the Chicago river recited that the district had constructed an artificial channel between certain termini, and had been previously granted permission by the Secretary of War to make certain improvements in the Chicago river, to correct and regulate the cross-section of the river so as to secure a flowage capacity of 300,000 cubic feet per minute with a velocity of 1¼ miles an hour, it being intended to connect such artificial channel with the river. *Held*, that the sanitary district did not thereby bind itself either to do the work, or guaranty the resulting rate of flowage.

ME.

Where libelants sought to recover damages against the Chicago Sanitary District under a permit granted by the Secretary of War, by which such district introduced a current into the Chicago river, an objection that the Secretary of War had no authority to issue such permit, in that Act Cong. March 3, 1899, c. 425, § 10, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3541], authorizing the Secretary of War to issue such permits, was unconstitutional, was repugnant to the scope of the libel.

ME—NAVIGABLE RIVERS—FEDERAL IMPROVEMENT—EFFECT.

The federal government's expenditure of money for the improvement of the Chicago river did not evidence an intention on its part to exclude the state of Illinois from all dominion and control over such river, lying wholly within the boundaries of the state.

ME.

Congress not having acted under the commerce clause of the Constitution with reference to the regulation or control of the current introduced into the Chicago river, lying wholly within the boundaries of Illinois, by the improvements of the Chicago Sanitary District constructed under consent of the Secretary of War, such regulation was within the jurisdiction of the state as to all the world except future Congresses.

ppeal from the District Court of the United States for the thern Division of the Northern District of Illinois.

or opinion below, see 125 Fed. 611.

pellants' libel alleged:

That libelants were interested, some as owners and some in other ways, e barge Algeria.

That the defendant was a municipal corporation organized under the of Illinois.

That prior to October 4, 1900, the defendant had constructed a canal from nt in Chicago to Lockport, Ill., and had connected the South Branch of the

Chicago river with the canal so as to produce a current in the river by the flow of water from Lake Michigan up the river and into the canal.

(4) That for many years prior to the time when the Chicago river and defendant's canal were connected the river was a navigable waterway of the United States, capable of floating vessels of large tonnage bound from the port of Chicago to ports in other states of the United States and in foreign countries, and that there was no appreciable current in the river.

(5) That on numerous occasions prior to October 4, 1900, the barge Algeria had been towed down the South Branch of the Chicago river and out into Lake Michigan, heavily laden with cargoes of grain, and bound for the port of Buffalo, N. Y.

(6) That the barge Algeria was 288 feet in length, 44 in width, and 19 in depth.

(7) That before connecting the canal with the river the defendant, in pursuance of section 10 of the rivers and harbors act of March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3541], applied to the Secretary of War for permission to make the connection; "that such permission was thereupon granted by the Secretary of War upon the express condition that the said sanitary district must and should assume all responsibility for the damage to property and navigation interests by reason of the introduction of a current in said Chicago river, and the said connection was made by the sanitary district under and in pursuance of the terms of said permit so granted by the Secretary of War."

(8) That the barge Algeria was without motive power of her own, and was used by libelants as a tow of the steamer Bulgaria.

(9) That there were numerous drawbridges across the river between Armour's Elevator D and the harbor; that the approaches and center supports lessened the width and capacity of the channel; that thereby the current was increased; and that when a large vessel entered a draw the current was further increased.

(10) That on October 2, 1900, the barge Algeria was towed to Armour's Elevator D, where she took on board a cargo of grain; that on October 4th she was taken in charge by tugs to be towed out of the river to the outer harbor, where her consort was waiting; that the current in the river and through the draws of the bridges was so swift and strong that libelants were compelled to consume more time and to employ more tugs than were necessary before the canal and river were connected; "that said barge would not have encountered any difficulties, and libelants would not have sustained any of the damages hereinafter set forth, had it not been for the introduction of a current into said river by reason of the connecting of the same with said canal in manner aforesaid, and the very strong current which prevailed on said 4th day of October, 1900, and until said barge reached the outer harbor."

(11) That the steamer Bulgaria was waiting at the outer harbor, and libelants were compelled to hold her and her crew during all the time they were engaged in moving the barge.

(12) "That the delays and difficulties encountered in towing the said barge Algeria down the said river were caused solely by the fault of the said sanitary district in permitting and maintaining so strong a current in the said river."

(13) That the barge sustained damages to her timber heads and lines, and libelants were forced to pay for extra services of tugs and suffered loss by the delay, "which damages aggregate $1,081.86, for all of which loss said sanitary district is liable by reason of its permitting and maintaining a current in said Chicago river as aforesaid."

(14) That libelants called on the defendant to settle, and defendant denied liability.

The defendant's answer admitted the truth of the averments in the second, third, fourth, and fourteenth paragraphs of the libel, and alleged ignorance of the matters set forth in the first, fifth, sixth, eighth, and eleventh.

Respecting the seventh, defendant admitted that it had applied to the Secretary of War for permission to turn the waters of the river into the canal, and it exhibited a literal copy of the permit (which is set forth further along in this statement). "And the defendant further alleges that at the time of the

d injury in said libel it strictly conformed to the conditions of said per-
nd did not violate the same, and denies that this defendant is liable for
npeded progress of libelants in navigating said river or other damage
ed by libelants resulting from the creation of a current in said Chicago
and this defendant further alleges that said permit does not bear the
uction contended for by said libelants."
pecting the ninth paragraph of the libel, defendant admitted the condi-
s to bridges, but averred that it had not created any such obstructions
channel.
is defendant is ignorant of the matters alleged in paragraph 10 of said
except as to the allegation that a very strong current prevailed on the
ıy of October, 1900, and denies that at said time a strong current pre-
."
pecting the twelfth paragraph, defendant denied that the difficulties en-
ered were caused by any fault on its part, and averred that it had a
right to maintain a current in the river without incurring any liability
e delays and difficulties in navigation.
cerning the items of damage stated in the thirteenth paragraph, the de-
nt pleaded ignorance, but denied that it became liable for the damage
count of maintaining a current in the river.
t part of section 10 of the rivers and harbors act of March 3, 1899, which
olicable to the change in the river made by defendant, is set out in the
ble of the permit. The permit is as follows:
hereas, by section 10 of an act of Congress approved March 3, 1899, en-
'An act making appropriations for the construction, repair and pres-
on of certain public works on rivers, and harbors, and for other pur-
' it is provided that 'it shall not be lawful to alter or modify the course,
on, condition or capacity of the channel of any navigable water of the
l States unless the work has been recommended by the chief of engi-
and authorized by the Secretary of War prior to beginning the same';

hereas, the Sanitary District of Chicago, a municipal corporation organ-
nder the laws of the state of Illinois, has constructed an artificial chan-
om Robey street, Chicago, to Lockport, and has been heretofore granted
ssion by the Secretary of War to make certain improvements in the
go river for the purpose of correcting and regulating the cross section
river so as to secure a flowage capacity of 300,000 cubic feet per minute
a velocity of one and one-quarter miles an hour, it being intended to con-
he said artificial channel with the west fork of the South Branch of the
go river at Robey street in the said city of Chicago; and
hereas, the said Sanitary District of Chicago has now applied to the
tary of War for permission to divert the waters of the said Chicago
and cause them to flow into the said artificial channel at Robey street
oresaid; and
hereas, the said Sanitary District of Chicago represents that such mov-
ams and sluicegates as are necessary to at all times secure absolute and
ete control of the volume and velocity of flow through the Chicago river
been constructed:
w, Therefore, the chief of engineers having consented thereto, this is to
y that the Secretary of War hereby gives permission to the said Sanitary
ct of Chicago to open the channel constructed and cause the water of
go river to flow into the same, subject to the following conditions:
That it be distinctly understood that it is the intention of the Secre-
f War to submit the questions connected with the work of the Sanitary
ct of Chicago to Congress for consideration and final action, and that
ermit shall be subject to such action as may be taken by Congress.
That if, at any time, it becomes apparent that the current created by
drainage works in the South and Main Branches of the Chicago river,
reasonably obstructive to navigation or injurious to property, the Secre-
f War reserves the right to close said discharge through said channel
modify it to such extent as may be demanded by navigation and prop-
nterests along said Chicago river and its South Branch.
That the Sanitary District of Chicago must assume all responsibility

for damages to property and navigation interests by reason of the introduction of a current in Chicago river.

"Witness my hand this 8th day of May, 1899.

"[Signed] R. A. Alger, Secretary of War.

"John M. Wilson, Brig. Gen'l, Chief of Eng., U. S. A.

"[Seal.]"

Defendant was created by Illinois for health purposes. It is unnecessary to detail the terms of its charter, for there is neither averment nor proof that it exceeded the powers granted to it by the state. The Chicago river is wholly within the domain of Illinois.

From a decree dismissing the libel this appeal is taken.

Henry D. Goulder and C. W. Greenfield, for appellants.

John M. Harlan and Seymour Jones, for appellee.

Before JENKINS and BAKER, Circuit Judges, and HUMPHREY, District Judge.

BAKER, Circuit Judge (after stating the facts). 1. The libel exhibits this theory of recovery: Defendant, though an instrumentality of the state, could not lawfully alter the course of the river without the consent of the Secretary of War. In obtaining that consent defendant made a promise, which inured to the benefit of libelants, that it would pay all damages occasioned by the change. The change created a current which naturally would (and in libelants' case actually did) require more time and more expense in moving barges than formerly. Therefore defendant must pay. The permit does not contain a promise by defendant to pay damages caused by the change. The third condition, which is relied on, obliges defendant to "assume all responsibility for damages" by reason of the introduction of a current in the river. This was an indemnifying contract, purely between the parties, and not an undertaking by defendant to pay to outsiders damages for which otherwise they would have no cause of action. Defendant's obligation was to pay or fight all claims for damages on account of the current and save the federal government harmless. No elaboration, we believe, can make this conclusion more apparent than does a mere reading of the permit.

2. In argument at the bar libelants urged that defendant should be held liable on account of the rate of the current on October 4, 1900. Some of many reasons for denying the contention are these:

(1) It is outside of the scope of the libel. No averment respecting rate of current was made. Liability was predicated on the introduction of a current (any current) that would render navigation more difficult and expensive than it was previously.

(2) The grant of permission was not conditioned upon defendant's keeping within a stated maximum. The second condition indicates the secretary's intention to observe the effect of defendant's canal operations, and thereafter, if he should deem it necessary in behalf of the public interests committed to his care, to regulate the rate and volume of the current.

(3) In the grant of permission no reference to rate is found. The only reference is in the second clause of the preamble to the grant. But a preamble cannot be resorted to except to help solve an am-

r in the body of the grant or enactment. The grant here is biguous.

But, if the preamble be taken up, the reference to rate is to be in a recital of defendant's purpose in asking an earlier of permission to correct and regulate the cross-section of the Observe that defendant asked leave to do a certain thing omplish a certain result. Certainly defendant thereby neither itself to do the work, nor guarantied the resulting rate, nor nted to remove the abutments and piers of bridges which it right to touch.

Defendant's evidence, by engineer's measurements, showed rage velocity of a mile and an eighth an hour, and that on er 4, 1900, no unusual current prevailed. Libelants' wit- observed the effect of the current upon the movement of rge, and estimated the velocity at three miles an hour be- bridges and four miles in the draws. Even at the places defendant was at liberty to correct and regulate the cross- n, it was not undertaking to secure a limit of a mile and a r an hour when 600 or 700 square feet of the cross-section ken up by the barge Algeria.

ibelants have taken the further position here that the part ion 10 (Act March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. 01, p. 3541]), which purports to authorize the Secretary of o issue permits is unconstitutional as being a delegation of tive power; that by reason of appropriations made from n, and by reason of the inhibitory portion of section 10, the l government had taken exclusive control of the river, and ant had no power to modify the volume and current; and ne defendant must therefore be made to respond.

This theory of liability is not merely outside of, it is repug- o, the scope of the libel. Libelants came into court assert- e legality of the permit, and a legal right in themselves to r on the strength of defendant's assumption of responsibility third condition. Even if we perceived any merit in the t contention, we should not be warranted in giving libelants ree on a matter concerning which there is no issue of fact law in the pleadings, thus rewarding them for disavowing ibel.

The federal government's expenditure of money for the im- nent of the river did not evidence an intent on its part to e the state from all dominion and control over this water- hich lies wholly within the state. Willamette Iron Bridge Hatch, 125 U. S. 13, 8 Sup. Ct. 811, 31 L. Ed. 629; Cum- v. Chicago, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525.

A decision of the question whether legislative power was ted to the secretary (see Field v. Clark, 143 U. S. 649, 12 Ct. 495, 36 L. Ed. 294; Buttfield v. Stranahan, 192 U. S. 470, . Ct. 349, 48 L. Ed. 525) is unnecessary, for the reason that ts are in error in assuming that section 10, thus emasculated, remain in force. Congress, acting under the commerce , said to Illinois, which would otherwise be sovereign, "You

are not to change the course of the river unless you first obtain the secretary's approval of your plan." The sentence in its entirety—the subjunctive clause as well as the indicative—expressed the will of Congress. The expressed intention was, not to exclude Illinois utterly from exercising her police powers over the river for the welfare of her citizens (and that suggests a nice and delicate question), but to permit the continuation of the exercise upon condition. Now, if the conditional clause is to be deleted, it is not for the courts to construct a new congressional policy out of the fragment. Compare Montgomery v. Portland, 190 U. S. 105, 23 Sup. Ct. 735, 47 L. Ed. 965.

(4) If section 10 stands, libelants' attack fails, because defendant obtained the permit and complied with its conditions. If section 10 falls, what is the result? If a matter affecting commerce is of national scope and susceptible of uniform regulation, the failure of Congress to speak to the subject is deemed equivalent to a declaration that the states shall let the matter alone; but if the matter is local, and concerns the public policy of a state, though it may incidentally affect interstate and foreign commerce, congressional inaction is a recognition that the subject is fitter for local regulation, and is an invitation that the state continue in the unimpeded exercise of its police powers, on the understanding, however, that Congress may thereafter intervene to the extent, at least, of destroying and forbidding whatever unnecessarily embarrasses commerce. Covington Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; Lake Shore, etc., Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702, and cases therein cited. The bridging, dredging, purification of a navigable water-way wholly within a state are matters of the latter class. Escanaba Transp. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; Lake Shore, etc., Ry. Co. v. Ohio, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. Ed. 747. With the commerce clause in abeyance, Illinois, as to every being in the world except future Congresses, was absolute sovereign in the premises. The absolute sovereign may change the grade of highways or may vacate them, may alter the courses and currents of rivers or may dam or fill them up, and neither alien nor subject traveler and navigator may complain. No one can claim a vested right to have the United States interfere with Illinois, nor can a cause of action arise from want of interference.

The decree is affirmed.

In re COSMOPOLITAN POWER CO.

STATE OF NEW JERSEY v. ANDERSON.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,122.

...PTCY—CLAIMS—DISALLOWANCE—APPEAL.
...ere a state filed a claim against a bankrupt corporation for an al... franchise tax, and more than $500 of such claim was disallowed, ...tate was entitled to appeal from such disallowance, under Bankr. ...uly 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], ...rizing appeals to the Circuit Court of Appeals from a judgment ...ing or rejecting a debt or claim of $500 or over.

... Note.—Appeal and review in bankruptcy cases, see note to In re ...t, 43 C. C. A. 9.]

SCOPE OF REVIEW.
...ere the disallowance of a claim against a bankrupt's estate was ...rly in the Circuit Court of Appeals by an appeal respecting the ...nt of the claim, taken as authorized by Bankr. Act July 1, 1898, ... § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], the appellant ...ntitled to present any question concerning the security or rank ...e debt, as an incident thereof.

...-STATE DECISIONS—EFFECT ON FEDERAL COURTS.
...ederal court of bankruptcy, in determining whether a state imposi... a tax, within Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 ... Comp. St. 1901, p. 3447], requiring priority of payment thereof, ...not be bound by the decisions of the state courts unless the state ...ons have authoritatively expounded the substance of the question, ...not merely given the name "tax" to an exaction which is not such.

... Note.—State laws as rules of decision in federal courts see notes ...ilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

STATE STATUTES—CONSTRUCTION—CORPORATE IMPOSITIONS.
...state statute requiring all corporations incorporated under the laws ...e state, with certain specified exceptions, to pay an annual license ...r franchise tax of one-tenth of 1 per cent. of all amounts of capital ... issued and outstanding, etc., was not a tax on the corporation's ...hise or property, but an imposition which corporations subsequently ...ized contracted by their charters to pay.

...d. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 47.]

...STATE BOARD—ASSESSMENT—REVIEW.
...ere an imposition by a state on a corporation organized under its ... was not a tax, but a mere liability created by the corporation's ...er, the assessment of the state board did not constitute a quasi ...ial act, preventing a court of bankruptcy from considering the con... between the state and the corporation, to determine the measure ... liability.

...ere a corporation was under a contract liability to pay to the state ...r whose laws it was incorporated one-tenth of 1 per cent. of all ...nts of capital stock issued and outstanding on January 1st of each ... and the corporation on January 1, 1902, had stock issued and out...ing to the amount of $10,000,000, it was liable on that amount, ...gh the stock was reduced to $2,500,000 on May 13, 1902, prior to ...naturity of the corporation's obligation to pay.

...-INTEREST.
...ere a corporation was bound to pay to the state by which it was ...porated one-tenth of 1 per cent. on its outstanding capital stock ...nuary 1st of each year, to be paid on or before July 1st, the amount

due on stock outstanding on January 1st did not constitute a matured claim on which suit could be brought until July 1st, and therefore did not bear interest before that date.

Appeal from the District Court of the United States for the Northern Division of the Northern District of Illinois.

The Cosmopolitan Power Company was organized under the incorporation laws of New Jersey on April 30, 1900, for an unlimited period, to make and deal in engines, machines, materials, and merchandise of all kinds, anywhere within the United States and its territories and possessions. The company's seat of operations and all of its tangible property were in Illinois. Its authorized capital stock was $40,000,000. The amount thereof issued and outstanding on January 1, 1902, was $10,000,000. On May 13, 1902, the company duly reduced its capital stock to $2,500,000, all of which was then and thereafter outstanding.

The company was adjudged a bankrupt on a petition filed April 23, 1903. New Jersey filed a claim, and thereafter asked for an order that the trustee pay it in advance of any dividend to creditors, under section 64a (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), as follows:

Tax 1902	$5,750 00
Interest to October 15, 1903	891 25
Costs on injunction proceedings because of nonpayments of taxes (begun in August, 1903)	26 15
Tax 1903	2,500 00
Interest to October 15, 1903	87 50
Total	$9,254 90

Section 64a reads: "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

A statute of New Jersey (Gen. St. 1895, p. 3335, §§ 251, 252, 257, 258, 269) entitled "An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," which was in force when the bankrupt was incorporated, provided that "all corporations * * * shall make annual return to the State Board of Assessors on or before the first Tuesday of May in each year. * * * and shall pay an annual license fee or franchise tax of 1/10 of one per centum of all amounts of capital stock issued and outstanding on January 1 of such year up to and including the sum of three million dollars," on any amount in excess of three million, not exceeding five million dollars, 1/20 of one per centum, and on any further excess $.20 per million or any part thereof; that the state board shall fix the amount of the "annual license fee or franchise tax" in case the corporation fails to make its return; that on or before the first Monday in June the state board shall report to the Comptroller the basis and amount of such tax, which "shall thereupon become due and payable and it shall be the duty of the State Treasurer to receive the same"; that "such tax, when determined, shall be a debt due from such company to the state"; that, if the tax remains unpaid on July 1st, it shall thenceforth, until paid, bear interest at the rate of 1 per centum a month, and the state thereupon may maintain an action at law for its recovery; that "such tax shall also be a preferred debt in case of insolvency"; that, if any tax remains in arrears for three months, the state may apply for an injunction to restrain the company from exercising its franchises; and that, if any company is delinquent for two years, its charter shall be void, unless further time be given for the payment of such taxes.

New Jersey's Constitution (article 4, § 7, subd. 12) requires that "property shall be assessed for taxes under general laws by uniform rules according to its true value."

'eree and the court denied priority, but allowed a reduced amount, as a general claim.

nt contends that the court erred in refusing to direct the trustee e claim as taxes, in reducing the amount claimed for 1902, and in the amount claimed for 1903.

e denies the merits of all of these contentions, but insists that on il the question of priority cannot be considered.

Mayer, for appellant.

D. Silbur, for appellee.

e JENKINS, GROSSCUP, and BAKER, Circuit Judges.

ER, Circuit Judge (after stating the facts as above). 1. As an $500 of appellant's claim was disallowed, an appeal under 25a (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 3432]) is undoubtedly proper. In re Friend, Moss & Morris .) 134 Fed. 778. The case being here on appeal respecting unt of the claim, we think appellant may also present any concerning the security or rank of the debt, as an incident (Cunningham v. German Ins. Co., 103 Fed. 932, 43 C. C. though the question of lien or priority, if alone involved, e reviewed only under section 24b (In re Rouse, Hazard 1 Fed. 109, 33 C. C. A. 356). If the case of In re Worcester 102 Fed. 808, 42 C. C. A. 637, is to be construed as re- us to split the case and dismiss the portion that affects , we are not disposed, as now advised, to follow it.

pellant argues that her highest court has decided that rge is a tax, and that the decision is controlling here. gument is founded on the case of Hancock v. Singer Mfg. N. J. Law, 289, 41 Atl. 846, 42 L. R. A. 852, decided Novem- 1898. Appellee contends with equal earnestness that the se of In re United States Car Co., 60 N. J. Eq. 514, 43 Atl. cided July 7, 1899, holds that the charge is not a tax. Mutual Mercantile Agency, 8 Am. Bankr. Rep. 435, the relied on the Singer Co. Case, without noting the Car Co. nd directed the trustee to pay New Jersey a claim like this s under section 64a. In Re Danville Rolling Mill Co. 121 Fed. 432, the District Court relied on the Car Co. Case, noting the Singer Co. Case, and refused to order the pay- New Jersey's claim as taxes.

before the passage of the act for an "annual license fee or se tax," the Singer Company had been granted by New a charter which provided that upon certain conditions "the l personal property of the said corporation not actually and within the state of New Jersey, and the stock of the said tion held or owned by any of its stockholders, shall not e to any tax or impost whatsoever." The state undertook ect from the Singer Company an "annual license fee or se tax." In Singer Mfg. Co. v. Heppenheimer, 58 N. J. 34, 34 Atl. 1061, 32 L. R. A. 643, the attempt was defeated. second Singer Co. Case, relied on by appellant, the first de- vas adhered to. The rationale, it seems to us, is this: The

state could collect nothing on account of franchises except (either or both) compensation for granting them, or taxes upon their value as property after they had been granted. The consideration for the Singer Company charter was determined upon when the charter was granted. The contract in that respect could not thereafter be impaired by the state. Therefore, if the statute is to be construed as an attempt of the state to exact further compensation for the pre-existing franchises of the Singer Company, it cannot be given effect. The franchises to be and to do, when granted, became property, which was subject to be taxed as other property, unless the state had lawfully bargained away or limited its right. The state had agreed not to tax the company's property which was outside of the state. It was contemplated in the charter that the company should, and it did in fact, own tangible property and exercise its franchises beyond the state's lines. Therefore, if the statute is to be construed as an attempt of the state to tax so much of the franchise values as lie outside of the state, it would be an impairment of the contract. The expressions in the opinion that the "license fee" is a "tax" must be read, we think, in the light of the fact that the court was dealing with a charter with relation to which the statute was subsequent legislation. Carroll v. Lessee of Carroll, 16 How. 275, 286, 14 L. Ed. 936.

In the Car Co. Case, supra, the corporation, to judge from the decision, was organized under the general laws of New Jersey after the statute relating to the so-called "annual license fee or franchise tax" was in force. The corporation was decreed to be insolvent, receivers were appointed, and thereafter the State Board of Assessors returned to the Comptroller an assessment of the "annual license fee or franchise tax." The trial court, interpreting the statutory charge as a tax upon the corporate franchises, and finding that the franchises were valueless and had not been exercised by the receivers, held that the tax was not payable out of the funds in the receivers' hands until after all indebtedness existing at the time of their appointment was discharged. The reviewing tribunal, not denying the justness of the trial court's application of the statute to the facts, if its interpretation of the statute was correct, said:

"We cannot concur in this view. Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax upon corporate franchises. In fact, it is not, strictly speaking, a tax at all, nor has it the elements of one. It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter, or not, solely as a condition of its continued existence. The state, in creating a corporation, has the right to impose upon its creature such conditions as the Legislature, within constitutional limits, may deem proper; and the acceptance by the corporation of the franchises, powers, and privileges conferred upon it binds it to the performance of those conditions so long as it continues to remain in possession of those franchises, powers, and privileges, and the conditions themselves remain unrevoked by the Legislature."

We are of the opinion that the foregoing excerpt is not a mere dictum, but that, on the contrary, it is the court's determination of the essential nature of the statutory imposition, properly given in

ng the question presented. If so, the case may be accepted as
olling, because it is not for the United States bankruptcy
s to insist upon a state's receiving as a tax under section 64a
hing which the state declares is not. In re Ott (D. C.) 95 Fed.

if we are mistaken, and if the Singer Co. Case is to be ac-
l as an authoritative assertion that the charge in question
tax, we do not believe that the United States bankruptcy
s are bound to follow it blindly. The question with them is
terpretation and application of section 64a. If the Legisla-
of a state gives the name "tax" to an exaction which is
tax, and if the courts of the state join in the misnomer,
the bankruptcy courts are not required to disregard the
ance of the thing, to the detriment of other claimants. The
courts may authoritatively expound the substance, and the
l courts will adopt such exposition; but whether the sub-
e constitutes a tax or not is independent of the name. And
ver the latter part of section 64a seems to direct the bank-
y courts to determine independently the "legality of any such

t be conceded that the word "taxes," in section 64a, includes
contribution to the support of government which any state
exact from the persons, occupations, and possessions of its
ns and corporate subjects, is the charge in question a tax?
not a capitation tax, for it is not laid upon corporations
e head. It is not an occupation tax, for it has no regard
e business in which the corporations engage. It is not a
rty tax, for it pays no heed to the extent or value of prop-
as the state Constitution requires. Franchises are prop-
The franchise to be and the franchise to do both go wherever
orporation goes. Both are property. Adams Express Co.
io, 166 U. S. 185, 224, 17 Sup. Ct. 604, 41 L. Ed. 965. A
may grant franchises, and then tax them as property, just
may grant or lease land, and then tax the granted estate as
rty. But the tax upon the estate is not to be confused with
nsideration for the grant. If one pays a lump sum or annual
as the consideration for the grant, he does so by virtue of a
act; but he is not thereby relieved from the sovereign demand,
itum. And that is the distinguishing feature of a tax. The
eign does not bargain with his subject; he commands. The
e here under consideration does not purport to be an amend-
of the incorporation laws of the state. But when the incor-
ors of the bankrupt came to seek a charter, this statute ex-
ed one of the terms on which it could be obtained and held.
overeign state could not command the incorporators to accept
rter. It could only say, "If you do accept it, you must pay
l so for the grant."

When the bankrupt failed to make its return for 1902, the state
, assuming that the authorized capital stock of $40,000,000
ssued and outstanding on January 1, 1902, fixed the amount
e charge at $5,750. The referee and the court reduced this

to $4,250, the amount properly chargeable to a capital stock of $10,000,000 issued and outstanding. Appellant insists that the action of the state board was quasi judicial and is not subject to collateral attack. This contention would require consideration if the charge were a tax. Holding it to be a liability under a contract, we find no error in the court's looking to the contract for the measure of the liability. Whether, as appellee urges, the court erred in allowing any sum whatever for 1902, cannot be reviewed, as no cross-appeal was taken.

4. As to the $2,500 item, the question is whether it was a debt owing on April 23, 1903, when the petition was filed. The promise of the bankrupt, as we construe it, was to pay on or before the 1st of July in each year a sum based on the amount of stock issued and outstanding on the 1st day of January of that year. On January 1, 1902, the amount of stock issued and outstanding was $10,000,000. That determined the amount, even though the stock was reduced to $2,500,000 on May 13, 1902, long before the obligation matured and could be sued upon. Prior to January 1, 1903, the promise to pay on or before July 1, 1903, did not evidence an accrued debt, because it could not be known whether any stock would be outstanding when the 1st of January should come around. But on that date we think the promise accrued to pay one-tenth of one per centum on $2,500,000 of stock then outstanding. That the claim bore no interest and could not be sued upon before the 1st of July affects only the maturity of the obligation.

The District Court is directed to add to its allowance of a general claim the sum of $2,500, less a rebate of interest at 1 per cent. a month from July 1, 1903, back to April 23, 1903. In other respects the decree is affirmed. Costs here to be divided equally.

TYEE CONSOLIDATED MINING CO. v. JENNINGS.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1905.)

No. 1,101.

1. MINING CLAIMS—ADVERSE POSSESSION—COMMENCEMENT.

Adverse possession of a mining claim in the territory of Alaska, as against the locator or his successors in interest, cannot be instituted before the issuance of a patent therefor by the United States.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 35.]

2. SAME—SUSPENSION OF STATUTE.

Code Civ. Proc. Or. § 4, providing that in all cases where a cause of action has already accrued, and the period provided within which an action might be brought has expired or will expire within one year from the approval of the act, an action may be brought on such cause within a year from the date of such approval, having operated to its full extent in the territory of Alaska when it was first introduced into the Alaska law by Act Cong. May 17, 1884 (chapter 53, 23 Stat. 24), it did not again become operative on being re-enacted into the Alaska Code of Civil Procedure by Act Cong. June 6, 1900 (chapter 786, 31 Stat. 321).

rror to the District Court of the United States for the First
n of the District of Alaska.

laintiff in error brought an action in ejectment on the 3d day of
01, against the defendant in error, in the United States District Court
District of Alaska, to recover the possession of a tract of land de-
as a mining claim situated on Douglas Island, Alaska, and known
'Julia Lode Claim." It was alleged in the complaint that plaintiff
grantors had been the owners of the Julia lode claim at all times
ecember 26, 1890, at which date plaintiff's grantor, N. W. Murry,
possessed of a fee-simple title to said claim by virtue of a United
nineral patent issued on that date by the President of the United
It was further alleged that, while plaintiff was so possessed, de-
on or about June 7, 1900, without right or title so to do, entered
and ousted and ejected plaintiff therefrom, and since then has con-
o withhold from plaintiff the possession of said premises. To this
it the defendant demurred, on the ground that the complaint did not
cts sufficient to constitute a cause of action. The demurrer was over-
nd the defendant, Leander Anderson, answering the complaint, de-
intiff's allegations of ownership of the claim, and, as an affirmative
alleged that the defendant, by himself and his grantors, had been
minterrupted, exclusive, hostile, adverse, and notorious possession of
described real property, including the premises claimed by the plain-
a period in excess of 12 years prior to the bringing of the action.
further alleged that the cause of action alleged in the complaint did
ue at any time within 10 years next before the commencement of the

s stipulated between the parties to the action that the patent for
n in controversy was issued on December 26, 1890, to M. W. Murry,
t plaintiff, by divers mesne conveyances, had all the rights which
had under the patent. There was also a reference to take further
ny, and, upon the stipulation and a report by the referee, the court
hat the defendant had been in the possession of the premises for a
f more than 10 years, and that the plaintiff had not brought his ac-
hin 10 years, the period of limitation fixed by law, and thereupon
rt entered a judgment dismissing the action. From this judgment
in error prosecutes the present writ of error.

. Lewis, E. S. Pillsbury, Pillsbury, Madison & Sutro, and
. Heid (Alfred Sutro, of counsel), for plaintiff in error.
n & Gillette and John R. Winn (Charles B. Marks, of coun-
r defendant in error, Leander Anderson.

re GILBERT, ROSS, and MORROW, Circuit Judges.

RROW, Circuit Judge (after stating the facts). The act of
ess making further provision for a civil government for
, approved June 6, 1900 (chapter 786, 31 Stat. 321), pro-
in section 4 of title 2, that no action shall be maintained
recovery of real property, or for the recovery of the pos-
thereof, unless it shall appear that the plaintiff, his an-
predecessor, or grantor, was seised or possessed of the
es in question within 10 years before the commencement of
ion. In Tyee Consolidated Mining Co. v. Langstedt (C.
136 Fed. 124, this court held that in the territory of Alaska
e possession of a mining claim, as against the locator thereof
successors in interest, could not be initiated at any time
the issuance of the patent therefor by the United States.
present case the patent was issued to the plaintiff's grantor

on December 26, 1890. At that time the laws of Oregon were, so far as applicable, in force in the territory of Alaska, by the provisions of section 7 of the act of Congress of May 17, 1884 (chapter 53, 23 Stat. 24, 25). The statute of limitations of Oregon relating to the commencement of actions to recover real property or the possession thereof is a period of 10 years. The act of Congress approved May 17, 1884 (chapter 53, 23 Stat. 24), had made the general laws of the state of Oregon the law in the District of Alaska, so far as the same might be applicable and not in conflict with the provisions of the act of Congress or the laws of the United States. The Alaska Code of Civil Procedure contained in the act of June 6, 1900, re-enacted the Oregon Code of Civil Procedure, with some changes to conform to the new system of government established by the act. Sections 3 and 4 of title 2 of the Alaska Code are almost exact copies of sections 3 and 4 of the Oregon Code of Civil Procedure. In section 4 of both Codes there is this proviso:

"In all cases where a cause of action has already accrued, and the period provided in this section within which an action may be brought has expired, or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of the act."

When this proviso was first introduced into the law of Alaska by the act of May 17, 1884, as part of section 4 of the Oregon Code, it served the purpose of preventing the injustice of suddenly introducing a statute of limitations into a new country. The proviso is a usual one in connection with statutes of limitations, and is intended to preserve whatever existing rights there may be at the time of their enactment for a short period, to enable parties to submit whatever claim of right they may have to the court for determination. This proviso served this purpose in the Oregon Code, and also at the time this Code was originally adopted for Alaska. But there was no necessity for it in the re-enacted Code of Civil Procedure contained in the act of June 6, 1900. It had served its purpose once, and there was no need for it a second time. The act of June 6, 1900, did nothing more than re-enact and print in the statutes of the United States the Code of Civil Procedure of Alaska which had been in force in that territory since May 17, 1884, and was plainly intended to add nothing to what had previously existed under that statute. The period of limitation for the commencement of this action expired under this statute on December 26, 1900, and, as this action was not commenced until June 3, 1901, it was properly dismissed.

The judgment of the court below is affirmed.

DELITY & DEPOSIT CO. OF MARYLAND v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 13, 1905.)

No. 179.

TED STATES—CONTRACTS—BREACH—BONDS—DISCHARGE OF SURETY.
Where a United States contractor agreed to remove stone belonging the United States stored on leased land on or before June 11, 1900, was an implied condition of the contract that the government should ep its lease of the ground in force during such time, and its failure do so, resulting in the owner's notifying the contractor to deliver mediate possession, and the commencement of dispossession proceedgs against him, operated as a breach of the contract by the governnt, discharging the contractor's surety from liability on the contracts bond.

Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and rety, § 296.]

E—WAIVER.
Where the surety of a government contractor was discharged by the govnment's breach of contract operating to materially shorten the time performance of the contract, the fact that the contractor thereafter sumed work and waived the government's breach was ineffectual as ainst such surety.

Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and rety, § 296.]

Error to the Circuit Court of the United States for the Southern ct of New York.

Russell Soley, for plaintiff in error.
ıry A. Wise, for defendant in error.

ore WALLACE, LACOMBE, and TOWNSEND, Circuit s.

ALLACE, Circuit Judge. This is a writ of error by the dent in the court below to review a judgment for the plaintiff red upon the verdict of a jury.

e action was brought against the defendant as a surety upon a executed to the United States by one Conkling, as principal, tioned for the faithful performance by Conkling of a contract ed into May 18, 1899, between Conkling and the United s. The contract provided that Conkling should remove "the owned by the United States, stored on the south side of the ırough Dyckman's Meadows," amounting to 235,000 cubic , more or less; that he should be paid therefor by the United s at the rate of 22 cents per cubic yard; that he should come the removal of the stone on or before June 17, 1899, and ıe should complete the removal on or before June 11, 1900. o provided that, in case Conkling should, in the judgment e engineer in charge for the United States, fail to prosecute ully and diligently the work, the government should be at y to annul the contract by giving notice to that effect to ing.

e following facts appeared upon the trial: The premises which the stone was at the date of the making of the con-

tract, which premises were known as "Dyckman's Meadows," had been leased by the United States from Dyckman for the purpose of depositing and storing the stone thereon for the term of one year expiring December 1, 1898. The lease was conditioned that the government should remove the stone at the expiration of the term. This lease was renewed for the further term expiring December 1, 1899. December 1, 1899, after Conkling had entered on the performance of his contract, the lessor served written notice upon him of the expiration of the term of the lease to the government, demanding the immediate possession of the premises, and requesting him to remove at once any property which he might have thereon. Conkling promptly informed the government of this notice, and requested instructions. Shortly thereafter dispossess proceedings were commenced by the lessor in one of the local courts against Conkling. In January the government intervened in this proceeding, and denied the jurisdiction of the court; and the proceeding was adjourned from time to time during the months of January and February. In the latter part of February the government obtained from the lessor a new lease of the premises for the term of one year beginning January 1, 1900. Until February 27th Conkling received no instructions from the government except those to the effect that the matter was under consideration, and he must resume work, but on that day he was notified that the United States had been authorized to enter upon the premises. The notification also contained this statement:

"I have therefore to request that you resume at once the work and remove the stone under your contract dated May 18, 1898, which was suspended by you without authority from this office. If work is not commenced promptly, and satisfactory progress is not made, it will be necessary to annul the contract and to proceed to the completion of the work as prescribed therein."

It further appeared that Conkling did not, after December 1, 1899, attempt to go on with the work of removing the stone, and on May 3, 1900, the government gave him written notice annulling the contract for noncompliance with its terms.

The only assignment of error which we deem it necessary to consider is that based upon the refusal of the court to order a verdict for the defendant. At the close of the evidence the defendant requested that such a verdict be directed upon the ground, among others, that there had been a breach of contract upon the part of the government in permitting the lease to lapse.

Upon the undisputed facts we are of the opinion that the trial judge should have directed a verdict as requested by the defendant, and that the defendant, as a surety, was discharged by the default of the government to remain in lawful possession of the demised premises during the period necessary to enable Conkling to fulfill his contract. The contract by necessary implication included an obligation on the part of the government to permit Conkling to remove the stone, and in this behalf to secure to him the privilege of access to the premises during the necessary period of his performance. It is quite immaterial that this understanding

not expressed in the contract. The parties contracted on asis of the continuing existence of this privilege, because other- the contract would have been incapable of performance by r. The law implies in all contracts that each party shall do e things which are indispensable precedent conditions to per- ance by the other party. "If one party undertakes to per- work which necessitates a great outlay of money, time, or ble, and he is only to be paid by the measure of the work he performed, the contract necessarily presupposes and implies ne part of the other party an obligation to supply the work." ldison on Contracts, 1026. An adjudged case which is pecul- apposite to the present is Murray v. Kansas City, 47 Mo. 105. In that case the plaintiff had entered into a contract the city to construct a viaduct, the performance of which prevented by an injunction procured by a third party upon ground that the city had no right of way. In affirming a ment in his favor against the city for damages the court said:

"The city had full authority under its organic law to secure the right of if not already acquired, and by its contract with Murray it impliedly d to secure a place for the structure. We know of no reason why the ould not contract for the construction of the viaduct in advance of se- g the right of way for its location, just as a railroad company may con- for the grading of its roadbed before securing the entire right of way. old, then, that Kansas City made a binding contract with Murray, and by such a contract the city undertook by implication to secure the right y for the viaduct, and that said city failed to comply with such obliga- and became at the date of such perpetual injunction liable to plaintiff amages by him thereby suffered."

the law of New York, as at common law, the tenant who s over after the expiration of his term without the permission is landlord becomes a trespasser at the election of the land- and to entitle him to claim any rights either as a tenant at or as a tenant at sufferance the holding over must be continued such a length of time and under such circumstances as to au- ize the implication of assent upon the part of the landlord. missioner of Pilots v. Clark, 33 N. Y. 251; Schuyler v. Smith, N. Y. 309, 10 Am. Rep. 609; Smith v. Littlefield, 51 N. Y. 539; nes v. Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep.

By the failure of the government to renew the lease Conkling interrupted in the performance of his contract for a period of e months, during which time he could only have entered upon premises to remove the stone as a trespasser. It was not mbent upon him to undertake performance in that capacity. n the facts as they appeared upon the trial, because the gov- nent had not performed upon its own part it was not entitled ecover against Conkling for nonperformance of the contract; equently there was no right of recovery against the defendant as ty.

ome of the evidence upon the trial indicates that Conkling anxious to throw up his contract, and had been assured by e of the subordinate officers of the government that the gov- nent would protect him if he would go on with the work.

The rights of the parties, however, do not depend upon Conkling's motives. It suffices that he had a right to avail himself of the situation which had been created by the default of the government. Even if he had chosen to waive that default, and, when the government procured the new lease, had resumed work under the contract, but had subsequently failed to fulfill, the interruption of three months caused by the act of the government was a variation of the contract which discharged the surety, and Conkling's waiver would have been ineffectual as against the defendant. Coughran v. Bigelow, 164 U. S. 301, 17 Sup. Ct. 117, 41 L. Ed. 442. This interruption, shortening to nine months the term for performing an undertaking which by the contract was to be performed within twelve months, effected a substantial deviation in the contract which the surety guarantied; and the rule is familiar that any material alteration or deviation from the terms of a contract for the performance of which a surety is bound, made by the parties without his consent, will release him from his obligation. United States v. Freel, 99 Fed. 237, 39 C. C. A. 491; Id., 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1171.

The judgment is reversed.

CITY OF COLUMBUS et al. v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1905.)

No. 2,098.

1. MUNICIPAL CORPORATIONS—STREETS—VACATION—STATUTES—VALIDITY.

As the Nebraska organic act, providing that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the act, except that no law shall be passed interfering with the primary disposal of the soil, etc., contains nothing depriving the Legislature of authority over city streets, the Legislature was authorized to pass Act Jan. 25, 1866, declaring that all streets, parts of streets, etc., situated in the town of Columbus, previously taken by the Union Pacific Railroad for turnouts, standing places for cars, depots, etc., should be vacated so long as the same should be so used, and that a perfect title should be vested in the railroad company by the act, to terminate on the termination of the use.

2. SAME—CITY ORDINANCES.

Gen. St. Neb. 1873, c. 9, conferred on cities the right to open or vacate any street, etc., within the city limits, under certain conditions, whenever deemed expedient for the public good, or to give a right of way to any railroad company, etc. Chapter 11, § 83, declared that if it should be necessary, in the location of any part of a railroad, to occupy any street of a municipal corporation, it should be competent for the city and the railroad company to agree on the manner, terms, and conditions on which the same should be used, etc., and, if they are unable to agree, the railroad might appropriate the street in the same manner as provided for the appropriation of property by individuals. *Held*, that under such acts the city of Columbus had power to pass an ordinance vacating certain streets to a railroad company on specified conditions.

3. SAME—TERMS OF ORDINANCE.

The ordinance vacating a street was not void as a grant or sale, instead of a vacation, because it contained a provision: "There shall be

nd is hereby granted," etc., "to the railroad company that portion of
ie street vacated for depot purposes."

ME—FORFEITURE.

Where it did not appear that either defendant city or any of its in-
abitants would be in any way injured by a change in the location of
railroad's passenger station or freight depot, and the city acquiesced
the change of the passenger depot for 17 years, the city was estopped
claim that such change operated as a forfeiture of the railroad com-
ny's rights in certain streets vacated under an ordinance providing
r the location of such depots.

peal from the Circuit Court of the United States for the Dis-
of Nebraska.

n J. Sullivan and W. M. Cornelius, for appellants.
son Rich (W. R. Kelly and John N. Baldwin, on the brief), for
llee.

fore SANBORN, Circuit Judge, and PHILIPS and RINER,
ict Judges.

NER, District Judge. This was a bill in equity, filed by the
n Pacific Railroad Company, a corporation organized under
aws of the state of Utah, against the city of Columbus and its
rs, to enjoin the city from attempting to open M street in the
of Columbus across certain grounds and right of way of the
lainant. The complainant claims exclusive possession to that
on of M street crossing its tracks between the southern bound-
f Eleventh and the northern boundary of Twelfth street, un-
and by virtue of an act of the Legislature of the territory of
aska, approved on the 25th of January, 1866, section 3 of which
s as follows:

c. 3. That all streets, parts of streets, alleys, highways and other public
ds, situate in the town of Columbus, in the county of Platte, and terri-
of Nebraska, and heretofore taken, selected, designated, occupied or
priated by said Union Pacific Railroad Company for turn-outs, standing
s, for cars, depots, station houses, turn-tables, water stations, engine
s, and other structures required or used in the construction and operation
id railroad, or for the convenience of the same, or which may be here-
taken, selected, designated, occupied or appropriated for the purposes
said, be and the same are hereby vacated so long as the same shall be
and occupied by said company, and the full, complete, absolute and per-
itle to the same is hereby vested in said Union Pacific Railroad Com-
for the purposes aforesaid, and for the construction and operation of
said railroad: Provided, that whenever such streets, parts of streets,
s, highways and other public grounds, shall cease to be used and occu-
for the purposes aforesaid, they shall revert to the use of the said town
lumbus and of the inhabitants thereof."

nd by virtue of an ordinance, designated in the record as "Or-
nce No. 55," sections 1, 2, and 3 of which provide:

ial Ordinance Granting to the Union Pacific Railroad Company and its
uccessors the Right of Way Through, Across and Over Certain Streets
d Alleys in the City of Columbus.

ection 1. Be it ordained by the mayor and councilmen of the city of
mbus, there shall be and is hereby granted to the Union Pacific Railroad
pany, its successors and assigns, forever, the right to construct, maintain
perate its railroad with single or double track, with necessary and con-
nt side tracks, turn-outs, and switches, as now located except on Twelfth

street, and operated through, across and over the following described streets and alleys situate in the city of Columbus, to-wit: A, B, C, D, E, F, G, H, I, Washington Avenue, K, L, M, N, O, P, Q, R, S, Eleventh, Twelfth, and Thirteenth streets, for a distance of 100 feet on either side of the center line of the main tracks as now laid out and used, all of the above being within the corporate limits of said city of Columbus, it being the intention that said right of way hereby granted shall embrace all that portion of said streets and alleys for a width of 200 feet being 100 feet on either side of the center line of said railroad as located and built in the year 1866, and as now occupied, and there being hereby granted to said company the right and privilege to run its trains and cars through, across and over said streets and alleys, and to build and connect with its tracks such switches, turn-outs and other appliances and structures as may be necessary and convenient to the operation and use of its road: Provided, that the said railroad company shall remove from that portion of Twelfth street lying west of the east boundary of N street, all switches, turnouts or side tracks, kept or maintained thereon.

"Sec. 2. That the following streets, alleys and grounds are hereby vacated and granted to the use of said company for its exclusive occupancy, with such tracks, station houses, freight houses, store houses and other structures as may be necessary or convenient to the business and operation of said railroad; provided, that if the same cease to be used for railroad purposes and shall be permanently abandoned by said company, the same shall revert to said city. The streets to be vacated by said ordinance are as follows, to wit: Eleventh street to the western boundary of Q street to the western boundary of the city; Twelfth street from the eastern boundary of N street to the eastern boundary of I street; P street from the northern boundary of Eleventh street to the southern boundary of Twelfth street; M street from the northern boundary of Eleventh street to the southern boundary of Twelfth street, as heretofore located, and K street from alleys in blocks eighty (80) and eighty-one (81) to alleys in blocks ninety-six (96) and ninety-seven (97).

"Sec. 3. That the mayor of said city of Columbus be and he hereby is authorized and required to make, execute and deliver to said Union Pacific Railroad Company, a conveyance in due form of law, granting to said railroad company the right of way through the streets hereintofore named in section one (1) and the right to use, occupy and enjoy the streets hereintofore vacated and granted by section two (2) of this ordinance. Said conveyance to be for the consideration that said railroad company was heretofore built, maintained and operated its road through said city, and shall continue hereafter to so maintain and operate the same, and maintain its depot and freight houses substantially in their present location."

It is also alleged in the bill that by virtue of an ordinance passed by the city council of the city of Columbus on the 15th of June, 1900, it is entitled to the exclusive use of an additional portion of M street, extending 20 feet north of the north line of Twelfth street. Answers were filed by the city and Israel Gluck, a resident of the city of Columbus and a citizen of the state of Nebraska, who was made a party defendant to the bill. To these answers replications were filed, and the case came on for hearing before the Circuit Court upon an agreed statement of facts, resulting in a decree perpetually enjoining the defendants from interfering with the use and occupation of M street from a point 105 feet north of the north line of Eleventh street to the north line of Twelfth street.

The agreed statement of facts shows: That on the 8th of January, 1857, the "Columbus Company" recorded a plat including all of the present city of Columbus, donating the streets and alleys to the use of the public. The deed is as follows:

"Know all men by these presents: That we, the undersigned, A. B. Malcom, president, and James C. Mitchell, secretary, of the Columbus Company, here-

...ets and alleys as marked and designated on the plat of ... town, for the use of the public.

...by order of the board of directors of said company this 8th day of ..., A. D. 1857.

A. P. Malone, President.
...A. D. Jones. James C. Mitchell, Secretary."

...at the town of Columbus was incorporated under an act of the ...orial legislature of Nebraska, approved October 9, 1858 (Laws ... p. 939). That thereafter, on the 11th day of February, 1859, ...Legislature passed another act to incorporate Columbus in ...e county, in the territory of Nebraska (Laws 1861, p. 108). ...on the 18th day of August, 1870, the city council of Columbus ...d an ordinance known as "Ordinance No. 20," incorporating ...ity of Columbus, in Platte county, Neb. That the defendant ...ity of Columbus succeeded to all the rights of the Columbus ...pany, Columbus Townsite Company, and town of Columbus. ...on the 7th day of January, 1877, the Legislature of the state ...braska passed an act (Laws 1877, p. 36[illegible]), entitled "An Act ...ending the incorporation of the city of Columbus, in Platte ...ty, state of Nebraska, and all acts and ordinances of the city ...to thereof and the officers thereof. That in the year 1877 the ...plainant, or its predecessor in title, had in operation over and ...s M street, in said city of Columbus, lines of main, side, and ...hing tracks. That at the time of the filing of the complaint ...ill herein the complainant had 10 main, side, and switching ...s over and across M street. That M street has not been open ...blic travel across the right of way of complainant at the points ...ed by its tracks at any time whatsoever. That complainant ...ow occupied that portion of M street beginning with the north ...of Eleventh street, and extending north for about 180 feet, ...that that portion has been graded and filled by the city and ...by the public generally from the year 1877 to the present time. ...the public has at all times since the location of the railroad ...ed over and used a strip of ground along and north of side ...ain tracks between L and N streets, and across M street, with... feet of the main line track, but there has never been any ...way or road established or laid out, either by state, county, or ...action. It is admitted that the fee to the street was in the ...and the record does not show that any questions in relation to ...ights of an abutting property owner are involved.

...the absence of constitutional restriction, we think the act of ... a valid exercise of legislative power. That acts which would ...rwise be nuisances cease to be such when they have the sanc... of a valid statute, and that whatever the Legislature may con...tionally authorize to be done is lawful, is too well settled to ...re the citation of authority. Section 8 of the organic act ...ning the territory of Nebraska is as follows:

"Sec. 8. And be it further enacted that the legislative power of the territory ...tended to all rightful subjects of legislation consistent with the Constitu... of the United States and the provisions of this act; but no law shall ...ed inconsistent with the primary disposal of the soil, no tax shall be ...ed upon the property of the United States, nor shall the lands or other

property of nonresidents be taxed higher than the lands or other property of residents. * * *"

There is nothing in the organic act by way of limitation upon the power of the Legislature which prohibits it from passing an act such as is here complained of. The act in question is a rightful subject of legislation, and is consistent with the Constitution of the United States and the provisions of the organic law. That the powers of the Legislature over the streets of a municipal corporation are greater than the powers of the municipality itself, even where the fee to the streets and the control over them is lodged in the corporation, has been often decided. Mr. Dillon in his work on Municipal Corporations states the rule as follows:

"As respects the public or municipalities, there is, in the absence of special constitutional restriction, no limit upon the power of the Legislature as to the uses to which streets may be devoted." 2 Dillon, Mun. Corp. par. 657.

And, again, in paragraph 666, the same author says:

"The plenary power of the Legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue the public easement in them, or invest municipal corporations with this authority."

Public corporations are but parts of the machinery employed in carrying on the affairs of the government, and are subject to be changed or modified as the exigencies of the public may demand; and if no restraints on the legislative power of control are found in the Constitution, they must rest alone in the legislative discretion. Kittle v. Fremont, 1 Neb. 329; St. Louis v. Allen, 13 Mo. 400; Richards Co. v. Lawrence County, 12 Ill. 1; State v. Cowan, 29 Mo. 330; Granby v. Thurston, 23 Conn. 416; Langworthy v. Dubuque, 16 Iowa, 271; Bradshaw v. Omaha, 1 Neb. 16; Sinton v. Ashbury, 41 Cal. 530; People v. Pinckney, 32 N. Y. 377.

There are some authorities, it is true, which seemingly conflict with the rule above stated; but we think a careful examination of these cases will disclose that most of them are cases where there has been either an attempt by the Legislature to vacate a street, when the Legislature did not have the power, because of some limitation found in the Constitution of the state, or cases where a city has attempted to vacate a street and the power was not expressly conferred upon it by its charter. In either case the attempted vacation would be without authority of law, and could not, for that reason, be enforced. But no such question arises in this case, and our conclusion is that the act in question violated no provision of the organic act and was valid.

We think, also, that the ordinance complained of was a valid exercise of municipal power conferred upon the city by the statute of the state. It is conceded that at the time this ordinance was passed the common council of the city was governed by the provisions of chapter 9 of the General Statutes of Nebraska of 1873, which, among other things, conferred upon the city the power—

"To open, widen, or otherwise improve or vacate any street, avenue, alley or lane, within the limits of the city, and also to create, open or improve any

new street, avenue, alley or lane: Provided, that all damages sustained by the citizens of the city or the owners of the property therein, shall be ascertained in such manner as shall be provided by ordinance: Provided, further, that whenever any street, avenue, alley or lane shall be vacated, the same shall revert to the owners of the adjacent real estate, one-half to each side thereof."

"To create, open, widen or extend any street, avenue, lane or alley, or annul, vacate or discontinue the same, whenever deemed expedient for the public good, and to take private property for public use, or for the purpose of giving right of way or other privileges, to any railroad company, or for the purpose of erecting or establishing market houses and market places or for any other public purposes. * * *"

Section 83, c. 11, of the General Statutes of 1873, which was in force at the time of the passage of the ordinance complained of and the execution of the deed, provides as follows:

"If it shall be necessary in the location of any part of any railroad, to occupy any road, street, alley or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree, thereupon, and it shall be necessary in the judgment of the directors of said railroad company, to use or occupy such road, street, alley or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter."

Pursuant to the provisions of these statutes, we think the city had the power to vacate the street in controversy. The mere fact that the Legislature had theretofore authorized the vacation of the street does not affect the question. The state law and the ordinance may both stand together, if not inconsistent.

It is urged, however, that the ordinance is void because it was not only a vacation, but a vacation and grant, or sale. We concur in the conclusion, reached by the Circuit Court, that the provision, "There shall be and is hereby granted," etc., "to the railroad company that portion of the street vacated for depot purposes," found in the ordinance, did not render the ordinance void. Whitsett v. Union Depot Co., 10 Colo. 243, 15 Pac. 339. In that case, the court said:

"A municipal corporation is not warranted by law in exercising its power to vacate streets in an arbitrary manner and without regard to the interest and convenience of the public or of individual rights; but when the power to vacate exists, and has been exercised with due regard to the interest both of the public and of private rights, the fact that the vacating ordinance provides for the use which is to be made of the street, or portion thereof vacated, does not aid a property holder who seeks to annul the ordinance on the ground that he is interested in keeping the street open. The object to be accomplished in the present case may fairly be said to be one of great interest and convenience to the public. The establishment and construction of a union railroad depot for the use of all railroads entering within or centering in the city is a convenience, not only to all residents of the city, but to the public generally. We are, therefore, of opinion that the privileges granted to the Union Depot Company afford no ground for equitable interposition."

It is also insisted that the railroad company forfeited all rights under section 3 of the ordinance under discussion, because it

changed the location of its passenger station and seeks to change the location of its freight station. The ordinance provides that the depot and freight house shall be maintained substantially in their present location. From the agreed statement of facts it appears that the passenger depot, which was erected in 1887, is distant 538 feet from the original depot, and that the location of the proposed freight depot is distant 988 feet from the original freight depot. The change in the location of the passenger depot was made without objection, and it has existed in its present location for 17 or 18 years. The railroad company claims the right to change its freight depot under the provisions of section 4 of an ordinance of the city, passed June 15, 1900, which provides as follows:

"Sec. 4. The right and privilege is hereby granted Union Pacific Railroad Company to locate and maintain its freight station at such point as it may select between L street and North street in said city of Columbus, notwithstanding the provisions of Ordinance No. 55 of said city. The conditions of said ordinance and the conveyance thereunder are hereby modified accordingly in respect to the location of Union Pacific railroad station."

It does not appear from the record that either the city or any of its inhabitants were in any way injured or damaged by reason of the change made in the location of the passenger station, or that they will be damaged by the proposed change of the location of the freight depot. We may well assume that the city acted upon full information and determined that the change was for the best interests of the city and the public, and we think it should not now be heard to complain if the change is made. The other assignments of error require no discussion.

The decree of the Circuit Court will be affirmed.

MAR SING v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 1, 1905.)

No. 1,127.

1. ALIENS—CHINESE—DEPORTATION—REVIEW.

Under Act Cong. May 5, 1892, c. 60, § 3, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], providing that any Chinese person arrested shall be adjudged to be unlawfully within the United States unless he shall establish by affirmative proof to the satisfaction of the judge or commissioner his right to remain, the judgment of a District Court ordering deportation of a Chinese person will be affirmed on appeal, unless the case clearly shows that an incorrect conclusion has been reached.

2. SAME—EVIDENCE.

Where a Chinese person arrested as unlawfully within the United States at the time of his arrest was working as a servant in a boarding house, and since coming to the United States had worked as a cook and deliveryman in a store in which he had no interest, he was not a "merchant" as defined by Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], as amended by Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 [U. S. Comp. St. 1901, p. 1321], and, not having procured a certificate of residence as required by section 6, a deportation order issued against him was not error.

eal from the District Court of the United States for the rn Division of the District of Washington.

el Landon for appellant.
A. Frye, U. S. Atty.

re GILBERT, ROSS, and MORROW, Circuit Judges.

S, Circuit Judge, delivered the opinion of the court.
is an appeal from a judgment of the United States District for the District of Washington, Northern Division, affirming decision of a commissioner adjudging the appellant to be ully within the United States, and directing his deportation na. At the time of his arrest the appellant was residing at ownsend. He was proceeded against upon the ground that a laborer, and had not the certificate of registration required . His claim is that he was a merchant, and not a laborer.
ection 3 of the act of Congress of May 5, 1892, c. 60, 27 Stat. S. Comp. St. 1901, p. 1320], it is provided that any Chinese arrested under the provisions of the act shall be adjudged nlawfully within the United States, unless he shall establish rmative proof, to the satisfaction of the judge or commis- his right to remain; and section 6 of that act, as amended act of November 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1321] requires Chinese laborers who are entitled to remain the United States to obtain a certificate of residence from ector of internal revenue of their district, failing to do which, to certain excuses, they shall be deported. The terms ant" and "laborers" are defined in section 2 of the act of s amended by that of 1893, as follows:

2. The words 'laborer' or 'laborers,' wherever used in this act, or in to which this is an amendment, shall be construed to mean both and unskilled manual laborers, including Chinese employed in mining, huckstering, peddling, laundrymen or those engaged in taking, or otherwise preserving shell or other fish for home consumption or ion.

term 'merchant' as employed herein and in the acts of which this is ory, shall have the following meaning and none other: A merchant son engaged in buying and selling merchandise, at a fixed place of , which business is conducted in his name, and who during the time s to be engaged as a merchant does not engage in the performance of ual labor, except such as is necessary in the conduct of his business merchant."

appellant, after a hearing before the commissioner, was by ficer found to be a laborer, and without the required cer- of registration, and was accordingly ordered deported. Up- eal to the District Court a further hearing was had, and, upon ny there taken, the District Court made a like finding, and d the order of the commissioner. Under such circumstances, ablished rule for this court is that the judgment of the Dis- ourt should not be interfered with, unless the case shows that an incorrect conclusion has been reached. Tom Hong ed States, 193 U. S. 517, 522, 24 Sup. Ct. 517, 48 L. Ed. 772;

Bak Kan v. United States, 186 U. S. 193, 201, 22 Sup. Ct. 801, 46 L. Ed. 1121.

A careful reading of the record satisfies us that we would not be justified in reversing the judgment appealed from. A few references to the testimony and proofs appearing in the record will make this plain. In the testimony of the appellant himself he distinctly swore that he had never performed any manual labor in Port Townsend, where he then and for many years had resided, whereas the stenographer for the Chinese Bureau, J. D. Hoye, a witness on behalf of the government, testified that immediately preceding the appellant's arrest he was engaged in waiting on the table in the house at which the witness boarded, and had been so employed, to the witness' knowledge, a little over one week. The court below found the fact to be as testified to by Hoye, and against the testimony of the appellant, with which conclusion an appellate court cannot properly be expected to interfere.

Again: A merchant is defined by the statute to be "a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant." Turning to the record, we find that the appellant testified that he first came to the United States when he was 12 years old, and landed at San Francisco, and when asked, "What did you do when you first came to the United States?" answered, "I was in business with the King Chong Company, San Francisco, on Washington street," and that he remained in San Francisco six years, and then went to Port Townsend, where he has resided ever since, although he testified that he went back to China once during that time, and remained in China from September, 1895, to September, 1896, in which latter month he returned to the United States. He claims that his business in Port Townsend was that of a merchant, as a member of a company called the Wing Sing Company, which company conducted a grocery and drug store in Port Townsend, but, when asked what he did in that store, the appellant answered:

"Do all kind of work. Q. Well, what? A. I am nail up the box and deliver the goods to the customer. Q. Delivering them around town? A. Yes, in the town. Q. What else did you do? A. Never did any other things. Q. Never done anything else? A. No."

On the hearing in the court below, the government introduced this statement in writing, which was signed by the appellant:

"I live Port Townsend for 8 or nine years. First came to United States 12 years ago. Came on the 'Victoria' from China, landed at Tacoma, about 11 or 12 years ago, then went to Port Townsend, lived there ever since. I am cook for Wing Sing Co. to this time since I first came to United States. Never did any other work. I have no interest in the store my uncle Mar Tai owns an interest in that store, when I first came from China he only gave me a few dollars a month. I get $20 per month. I send all my money back to China. This is my picture. I had it taken at Port Townsend more than 10 years ago. I first came U. S. K. S. 19, stayed here two years, then went to China remained there about a year & came back. During those two

I was cook in Wing Sing Co's store. I paid my fare from China. my r gave me the money—my uncle Mar Tai paid it from here to China paid for my return—I have not paid him anything. I lived in Port send when I got this paper. I don't know Mr. Bartlett or Learned. ders gave me this paper. My uncle Mar Tai made this paper and gave Mr. Saunders to sign. This paper was signed everything ready before I to China. I have no business, never had any just cook. I don't know much he paid for the paper. (Uncle.)

"(Sgd. in Chinese characters) Mar Sing."

ne appellant in his testimony admitted that he signed the paper ed, but testified that he did not understand English, and did not erstand its contents at the time of signing it; but the witness Kee, who was the Chinese interpreter for the government, tes- l that the statements made in the paper are the correct transla- of the statements made by the appellant in Chinese, and that appellant did understand the statements so made and signed by

ther matters appear in the record tending in the same direc- , but we think enough has been stated to show that the case is one in which this court would be justified in interfering with conclusion of the court below.

ne judgment is affirmed.

MALONE et al. v. JACKSON.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1905.)

INES—RELOCATION—STATUTES.

Rev. St. U. S. § 2322 [U. S. Comp. St. 1901, p. 1425], provides that locators of mining claims shall have the exclusive right of possession of all the surface included within the lines of their location; and section 2324 [U. S. Comp. St. 1901, p. 1426] makes it a condition precedent that the locator shall perform labor or make improvements in a designated amount each year. Act Jan. 22, 1880, c. 9, 21 Stat. 61 [U. S. Comp. St. 1901, p. 1427], provides that a period within which work may be done annually on an unpatented claim located after May 10, 1872, shall commence on January 1st next, succeeding the location. *Held*, that where a claim was located on December 6, 1898, it was not subject to relocation for the locator's failure to do the required work until after December 31, 1899.

AME—ACTUAL POSSESSION—OUSTER.

Where plaintiff entered a mining claim when it was subject to relocation, and did certain work thereon; but, after it became subject to location, defendants made a peaceable adverse entry, plaintiff was not entitled to maintain ejectment based on his prior possession, on the ground that defendants were mere trespassers.

AME.

Plaintiff located the mining claim in controversy on January 1, 1899, which had been previously located in December, 1898. Plaintiff remained in actual possession from 1900 to 1902, but made no relocation of the claim after January 1, 1900, when the original locator's rights expired for failure to do required assessment work, and on January 1, 1902, defendant entered peaceably and relocated the claim. *Held*, that defendant's relocation gave him the exclusive right of possession for one year from the date of his location.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

The defendant in error, Jean S. Jackson, brought an action in ejectment on September 13, 1902, against William Malone, Julius Kidderlene, Charles Evans, Thomas Nye, and George Medina, in the United States District Court for the Second Division of the District of Alaska, to recover the possession of a mining claim known as "No. 17 Above Discovery on Osborne Creek," in the District of Alaska. It is alleged in the complaint that on the 9th day of July, 1899, plaintiff made a valuable discovery of gold within the limits of the placer mining claim afterwards known and described as "Placer Mining Claim No. 17 Above Discovery on Osborne Creek," and situated in the Cape Nome mining district of Alaska; that the premises contained within the exterior limits of the said placer mining claim were then free and open, unappropriated, and unexplored mineral lands of the United States, and subject to location and appropriation; that thereafter, on the 10th day of July, 1899, plaintiff marked the location of said placer mining claim upon the ground, so that the boundaries could be readily traced, and posted a notice thereon, signed by the plaintiff, containing the name of the locator, the day of the location, and such description of the claim with reference to natural objects and permanent monuments as would and did identify the same; that on the 12th day of July, 1899, plaintiff filed for record in the office of the recorder of the Cape Nome mining district a notice of such location, and thereafter at sundry times prior to the 25th day of August, 1902, the plaintiff made valuable discoveries of placer gold in the gravel beds contained within the limits of said placer claim; that plaintiff was at all times subsequent to the location thereof the owner in fee of said placer mining claim, and entitled to the possession thereof; that on the 25th day of August, 1902, the defendants entered upon said mining claim and ousted and ejected plaintiff therefrom, and ever since said date have held the possession of said mining claim from the plaintiff; that, by reason of the withholding of the possession of said mining claim from the plaintiff by the defendants, the plaintiff has been damaged in the sum of $3,000.

The defendants answered, denying the allegations of the said complaint, and setting up two defenses: First, that on the 6th day of December, 1898, one Frank Osborne, who was then a citizen of the United States, entered upon the ground described in the complaint, discovered therein placer gold, and located the claim in the name and for the benefit of one H. M. Baker, who was a citizen of the United States; that he marked the location upon the ground so that its boundaries could be readily traced, by posting notices upon the claim; that he filed a similar notice in the office of the recorder of the district, and the same was duly recorded; that on the 1st day of January, 1902, the defendant William Malone entered upon the ground described in the complaint, which was vacant, unappropriated, and unoccupied mineral land belonging to the government of the United States; that the defendant Malone discovered placer gold in said ground; that he staked and located the same as a placer mining claim in his own name, and for his own use and benefit; that he marked the location upon the ground by stakes, and by posting a notice thereon containing the name of the locator, the date of location, and such description of the claim with reference to natural objects and permanent monuments as would and did identify the same; and that he filed a similar notice with the recorder of the district, and the same was recorded.

The reply of the plaintiff denies that on the 1st day of January, 1902, the land and premises described in plaintiff's complaint, and designated as "No. 17 Above Discovery on Osborne Creek," was vacant or unappropriated or unoccupied public lands belonging to the government of the United States.

The case was tried before a jury, and, upon the conclusion of the evidence, counsel for the plaintiff moved the court to instruct the jury to return a verdict for the plaintiff, for the reason that the defense set up by the defendants did not constitute a defense to the cause of action set up in the complaint. The court granted plaintiff's motion, and the jury, being so instructed, returned a verdict accordingly. The action of the court in instructing the jury to return a verdict for the plaintiff is assigned as error.

. C. Campbell, W. H. Metson, and Ira D. Orton (Thomas H. eeze, of counsel), for plaintiffs in error.
ohn L. McGinn, for defendant in error.
Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts). The defend- in error objects that the assignments of error do not comply h rule 11 of this court, requiring that assignments of error "shall up separately and particularly each error asserted and intended be urged." The purpose of this rule and of rule 24 is to secure lear, but brief, statement of the precise question to be reviewed, l enable the court to understand the subject of the controversy hout laborious search. If this appears clearly and distinctly in record as pointed out by the assignments of error, it is all that required. In this case there is no difficulty in understanding the estion as presented by the record, and further particularity in the ignments of error is therefore unnecessary.

Plaintiff's action is in the nature of a suit in ejectment against the fendants to recover the possession of a mining claim. His right action is based upon an alleged possession under claim of owner- p, supported by a location made in accordance with the pro- lure prescribed by the laws of the United States.

The first defense set up by the defendants is a prior location made and on behalf of one H. M. Baker on December 6, 1898. The de- dants do not connect themselves with any right or title under s location, but it is set up for the purpose of establishing the t that the ground was not free and open, unappropriated and explored, mining land of the United States, subject to appropria- n and location, when the plaintiff made his location, on July 10, 99. It is provided in section 2322 [U. S. Comp. St. 1901, p. 1425] the Revised Statutes that locators of mining claims shall have exclusive right of possession and enjoyment of all the surface luded within the lines of their locations. Section 2324 [U. S. mp. St. 1901, p. 1426] provides, as a condition upon which a ning claim may be held, that the locator shall perform labor or ke improvements in a designated amount each year. The act of nuary 22, 1880, c. 9, 21 Stat. 61 [U. S. Comp. St. 1901, p. 1427], ovides that the period within which the work to be done an- ally on unpatented claims located since May 10, 1872, shall com- nce on the 1st day of January next succeeding the date of the lo- ion of the claim. Under this act the period for the annual work quired to protect the Baker location commenced January 1, 1899, d continued during the entire year expiring on December 31, 99. The claim was therefore not open to relocation when plain- made his location, on July 10, 1899. The law upon this subject s declared by the Supreme Court, in Belk v. Meagher, 104 U. S. , 284, 26 L. Ed. 735, as follows:

> Mining claims are not open to relocation until the rights of a former loca- have come to an end. A relocator seeks to avail himself of mineral in public lands which another has discovered. This he cannot do until the iscoverer has, in law, abandoned his claim, and left the property open for

another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void, and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

But plaintiff contends that he is entitled to recover on the strength of his prior actual possession of the premises under claim of ownership as against defendants, who, it is said, are mere trespassers on the land, or, at most, claiming possession under a later location. This claim has also been determined adversely by the Supreme Court in the case just cited. In that case, as in this, the defendant was a subsequent locator, but entered into possession of the premises peaceably and without force. As against this possession, the plaintiff, in Belk v. Meagher, claimed the right to recover. But the court said:

"Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate unless he secured what is here made the equivalent of a valid location by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in, and all others out; and, if he was not actually in, he was, in law, out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being, in law, vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. * * * No one contends that the defendants effected their entry and secured their relocation by force. They knew what Belk had done, and what he was doing. He had no right to the possession, and was only on the land at intervals. There was no inclosure, and he had made no improvements. He apparently exercised no other acts of ownership after January 1st than every explorer of the mineral lands of the United States does when he goes on them and uses his pick to search for and examine lodes and veins. As his attempted relocation was invalid, his rights were no more than those of a simple explorer. In two months he had done, as he himself says, 'no hard work on the claim,' and he 'probably put two days' work on the ground.' This was the extent of his possession. He was not an original discoverer, but he sought to avail himself of what others had found. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough, as we think, to prevent an entry peaceably and in good faith for the purpose of securing a right under the act of Congress to the exclusive possession and enjoyment of the property. The defendants, having got into possession and perfected a relocation, have secured the better right. When this suit was begun they had not only possession, but a right granted by the United States to continue their possession against all adverse claimants. The possession by Belk was that of a mere intruder, while that of the defendants was accompanied by color of title."

The defendant in error contends, however, that the location made by Baker in 1898 was as effectual to preclude Malone from making a location in 1902 as it was Jackson in 1899, for the reason that the evidence does not show that the Baker location was ever terminated, either by forfeiture or abandonment. The Baker location was suffi-

cient to give to the locator an exclusive right to the possession and enjoyment of the property until January 1, 1900. The location of Jackson on July 10, 1899, was therefore void, and gave him no right of possession. But Jackson appears to have been in the actual possession of the claim in the years 1900, 1901, and 1902. He testified that he was on the claim in 1900; that he had two men on it for two weeks—one person besides himself. In the year 1901 he ran a 40-foot drain and two little cuts into the side. The value of the work done, he says, was $200. He found deposits of gold on the claim in the year 1901. He worked on the claim in August of the year 1902. He had a tent on the property. This evidence was sufficient to show that Baker had abandoned the claim, and that it was open to relocation after January 1, 1900. But Jackson did not relocate the claim after that date. He was merely in possession as an explorer. He did not add to his possession the right of exclusive possession which he would have obtained by a valid relocation. This was done by Malone on January 1, 1902, and this relocation by Malone gave him the right of exclusive possession until January 1, 1903. Had Jackson relocated the claim on January 1, 1900, he would have added to his possession the exclusive right of possession; and, had he then made the expenditures and improvements required by the statute during the year 1901, the claim would not have been open to relocation on January 1, 1902, and Malone's relocation on that date would have been void. But as it was, Malone's relocation was valid, and his ouster of Jackson left the latter without the right of possession which it was necessary for him to have in order to maintain this suit. The court should therefore have instructed the jury to return a verdict for the defendant, instead of for the plaintiff.

The judgment of the court below is reversed, with instructions to grant a new trial.

CONSUMERS' GAS TRUST CO. v. QUINBY.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1905.)

No. 1,099.

1. FEDERAL COURTS — JURISDICTION—STATUTES—APPLICATION—CORPORATIONS—STOCKHOLDERS—ULTRA VIRES BUSINESS—ACTIONS.

Rev. St. § 629 [U. S. Comp. St. 1901, p. 508], declaring that federal courts shall not have jurisdiction of an action on an assigned claim, unless suit might have been brought in the absence of an assignment, does not apply to a bill by a nonresident stockholder of a corporation, who acquired his stock by assignment from a resident of the state where the corporation was domiciled, to restrain the latter's directors and trustees from using the corporate assets for an alleged ultra vires business, affecting complainant's interest only in common with all other stockholders.

2. SAME—STOCKHOLDERS' SUITS—COLLUSION.

That a stockholder of a corporation was acting in concert with other stockholders in suing in the federal courts to enjoin the alleged use of corporate assets in an ultra vires business, which other stockholders were citizens of the same state as the corporation, and that they contributed

to the expenses of the suit, did not affect the court's jurisdiction, or establish that the suit was collusive, within equity rule 94, requiring every bill by one or more stockholders against the corporation, etc., to allege that the suit is not collusive, in order to confer jurisdiction on a federal court; it appearing that the majority stockholders and directors were opposed to the objects of the bill.

3. SAME—VERIFICATION.

Where a bill by a stockholder to restrain the use of corporate assets in an alleged ultra vires business was amended by leave of court, in order that it might be verified by complainant personally, it was immaterial that the original verification was made by another.

4. SAME—STATE AND FEDERAL COURTS—CONFLICTING JURISDICTION—SUITS IN PERSONAM.

A noncitizen stockholder was entitled to maintain a suit in the federal courts to restrain the use of corporate assets in an alleged ultra vires business, notwithstanding the pendency of two prior suits for similar relief in the state courts; all of the suits being in personam, and there being no conflict over property in custodia legis.

[Ed. Note.—Conflict of jurisdiction between state and federal courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

5. SAME—DECISIONS OF STATE COURTS—CONTROLLING AUTHORITY.

The decisions of the highest courts of a state, interpreting state statutes under which a corporation was organized, are controlling on the federal courts.

6. SAME—TRUSTS—RIGHTS OF STOCKHOLDERS.

Where a business corporation was organized to mine and sell natural gas to the residents of a city, the fact that the stock subscription contracts required repayment of amounts paid by subscribers, with interest and that after such payment the corporation should reduce the price of gas to consumers to cost, without further dividends to shareholders, and that the entire capital stock was under the voting power and control of five trustees, selected from the stockholders, did not deprive the latter of their character and rights as such on payment of their subscriptions, with interest, and hence, on the termination of the corporation's business by the supply of natural gas becoming exhausted, they were entitled to have the corporation dissolved and its assets distributed to them.

7. CORPORATIONS—ORGANIZATION—NATURAL GAS COMPANIES—POWERS.

Rev. St. Ind. 1881, c. 35 (Burns' Ann. St. 1901, § 5051), provides that persons desiring to carry on any kind of manufacturing, mining, mechanical, or chemical business, etc., shall make, sign, and acknowledge a certificate in writing, stating the corporate name, the object of its formation, its capital stock, etc., and file the same with the recorder of the county and a duplicate in the office of the Secretary of State. Defendant corporation was organized "to drill and mine for natural gas, petroleum, and other minerals, and to purchase, lease, and otherwise acquire gas and petroleum wells, and the products thereof, to furnish the same to its patrons for use, and by manufacture to convert the same into gas for fuel and illuminating purposes, and other articles of commerce," after which the organizers of the company procured the passage of Burns' Ann. St. 1894, § 5099, defining the word "mining," as used in the former statute, to "cover and include the sinking, drilling, boring, and operating of wells for petroleum and natural gas," and made it applicable to the organization in question. *Held*, that such corporation had no power, after the supply of natural gas was exhausted, to use its assets to manufacture artificial gas and furnish the same to consumers.

8. SAME—STATUTES—AMENDMENT.

The undertaking to manufacture contained in defendant's certificate of incorporation being merely incidental to the mining business for which the corporation was organized, the right to manufacture artificial gas was

not conferred, as against dissenting stockholders, by Acts 1903, p. 147, c. 73, declaring that the articles of incorporation of any company having filed a certificate under Act May 20, 1852, or any of its amendments or supplements, wherein the object of the company has been stated as embracing any or all of the purposes of any one of the subdivisions of section 1 of the act, were thereby legalized and declared to be as effectual as if the original statute and all its amendments had stated that companies might be formed thereunder for any and all of the purposes therein enumerated.

Grosscup, Circuit Judge, dissenting in part.

Appeal from the Circuit Court of the United States for the District of Indiana.

This cause was submitted upon the bill and answers as amended, and the appeal is from a final decree which sustains the bill and grants the relief sought against the appellants (defendants therein), the Consumers' Gas Trust Company and its trustees and directors, respectively.

The appellee (complainant), Byron C. Quinby, avers that he is a citizen of the state of Massachusetts and the owner of shares of capital stock in the Consumers' Gas Trust Company "to the amount, par value, of $3,499.85," and "sues on behalf of himself and all others similarly interested," and that the "suit is not a collusive one to confer on this court jurisdiction of a case of which it would not otherwise have cognizance." As originally filed the bill was not verified by the complainant personally, but by George H. Evans, on information and belief. Subsequently it was verified by complainant, under leave of court; but the amended bill was verified only by Evans, as on information and belief. The defendants are citizens of Indiana; the Consumers' Gas Trust Company being a corporation organized under the laws of that state and having its principal place of business at Indianapolis. Substantially the following facts and circumstances are stated in the bill and amendment:

On June 27, 1887, the common council and board of aldermen of the city of Indianapolis adopted an ordinance, which was approved by the mayor, authorizing the use of the streets of the city for mains, pipes, and conduits for the purpose of supplying natural gas to its inhabitants at a schedule of prices therein specified, and requiring that any corporation or company should file with the city clerk its written acceptance of the ordinance to obtain the benefits thereof. On November 2, 1887, the defendant Consumers' Gas Trust Company was incorporated for the purpose of operating under such ordinance, under a general statute of Indiana providing for the organization of manufacturing and mining companies, by the adoption of articles of association which provide substantially as follows: "The objects of the formation of such corporation are to drill and mine for natural gas, petroleum, and other minerals, and to purchase, lease, and otherwise acquire gas and petroleum wells and the product thereof, and to furnish the same to its patrons for use, and by manufacture to convert the same into gas for fuel and illuminating purposes and other articles of commerce, and the sale of the product to its patrons," and to these ends to take, hold, convey, and mortgage real estate by fee simple or lesser title, and to own, operate, and maintain such machinery, works, lines of pipe, and appliances as the carrying out of the object above mentioned may require. That the capital stock of the company should be $500,000, to be divided into shares of $25 each. That the term of existence of the corporation should be 50 years. That the business and prudential concerns of the corporation should be managed by a board of directors, consisting of nine members, to be, after the first year, annually elected by the board of trustees hereinafter provided for. That "the entire capital stock of the corporation shall be placed under the control of a board of five trustees and their successors, who shall be stockholders in said company, which said board of trustees shall have full, complete, exclusive, and irrevocable power during the continuance of this

corporation to hold said stock and to vote the same as fully and completely as if they were the owners of said capital stock, to elect directors as above provided, and to fill any vacancy that may occur in said board of directors. Said entire capital stock shall be voted as a unit, and, in case said trustees shall not agree as to how said stock shall be voted, the majority of them shall cast the vote of the board. If a vacancy should occur in the board of trustees by death, resignation, removals from the city of Indianapolis, or otherwise, such vacancy shall be filled by the remaining members of the board; and, in the event of the failure of such board to fill such vacancy, the Marion circuit court shall, upon application of any stockholder, after said trustees shall have had ten days' notice in writing of such application and shall have in the meantime failed to fill such vacancy, appoint some competent person to fill the same." That "said trustees shall issue to each subscriber to the capital stock of said company, upon full payment by each subscriber to said company of the amount of his subscription, and upon the stock therefor being issued to said trustees as above provided, a certificate, showing the amount of stock held by said trustees in trust for said subscriber; and said subscriber, or holder of said certificate by assignment, shall be entitled by virtue thereof to receive from said company all dividends which shall be earned by said stock, which dividends, not to exceed eight per cent. per annum so long as the certificates of the indebtedness of the company are not fully canceled, shall be paid in money, or may be applied in payment of any indebtedness of said holder to the company as a consumer of gas." That "when said certificate holder shall have received, by dividends or otherwise, on said certificate, an amount equal to his subscription, with interest at the rate of eight per centum per annum thereon and after the payment of all indebtedness of the said company, then it shall be the duty of the directors of said company to reduce the price of gas so that the same shall thereafter be supplied to consumers at cost." That "for the purpose of the development of the supply of gas and the construction of pipe lines, the board of directors shall have power to borrow money for the use of the company, and to issue therefor certificates of indebtedness, bearing interest at a rate not exceeding eight per centum per annum." That "no indebtedness except for current expenses, shall be contracted by the board of directors in any other form than the certificates above mentioned, without the consent of the board of trustees herein above provided for, acting for the stockholders; and no indebtedness of any kind shall be contracted, except on the consent of two-thirds of said board of directors." That "the principal place of business of the company shall be Indianapolis, Marion county, Indiana."

A board of directors was named in the articles to serve for the first year. Such board adopted by-laws which provided: That the secretary should "keep correct accounts, in books provided for that purpose, of all the dealings of the corporation with its stockholders, officers, creditors, and patrons, according to such system as may be provided by the board of directors. He shall attest and affix the corporate seal to all stock certificates, and keep a complete and careful record of certificates issued by the trustees to the subscribers to the capital stock and their assigns." Also that "the committee on private consumers and rates shall attend to the business of fixing a schedule of prices, subject to the approval of the board of directors, at which gas shall be supplied to private consumers within the limits of the city of Indianapolis, and shall hear and decide on all complaints and grievances of said consumers, subject to the approval of the board of directors. If at any time said committee shall deem it advisable to furnish gas to private consumers at less rates than is provided in the city ordinance now in force on that subject, they shall report their recommendation in that behalf to the board of directors." Also that "at the first regular meeting in November of each year the board of directors shall request of the trustees in writing the appointment of a committee of three stockholders, other than directors, to make thorough and careful examinations of all accounts of the company and verify the same; said committee to have the power to appoint such expert accountants as may be necessary." The board of directors then proceeded to solicit subscriptions for shares of the capital stock of the company, and with the consent of the board of trustees adopted a printed form

for such subscriptions. All subscriptions to the capital stock, both as originally fixed and as subsequently increased by amendment, were made upon the form so adopted. Upon the payment of subscriptions the company "issued to each such subscriber, to evidence his interest in said company by virtue of his said subscription and payment," what is called a "final certificate." The subscription form referred to contains this agreement: "I hereby agree that the stock above subscribed shall be issued to the board of trustees above named in perpetual and irrevocable trust, in the manner and according to the terms and conditions of the articles of incorporation under which said company is organized, and that when the indebtedness of said company is fully paid and the subscribers to stock shall have received an amount equal to the amount by them subscribed and paid, with eight per cent. interest, that the price for gas supplied by said company shall thereafter be fixed at cost." The subscription agreement also contained the names of the board of trustees and of the board of directors selected for such purposes.

The final certificate referred to as issued to the subscribers, after stating the name of the subscriber, his payment into the treasury of the company of the sum stated "in full payment, satisfaction, and discharge of his subscription to the capital stock of said company, and that his said subscription is hereby canceled," recites as follows: "In consideration of the payment of the above-named sum of money the Consumers' Gas Trust Company hereby contracts and agrees that after the payment of all indebtedness of said company, contracted for supplies, leases, materials, labor, and the construction of pipe lines and gas wells, all the net earnings of said company shall be applied pro rata to the repayment to the subscribers or their assigns of all fully paid subscriptions to the capital stock of said company until all the same are repaid in full, together with interest thereon at the rate of 8 per centum per annum; interest to be calculated from the date of payment of each several installments of all fully paid subscriptions to the said capital of said company. Said company, in consideration of the payment of said sum of money herein above named, further hereby contracts and agrees that after all indebtedness of said company, contracted for supplies, leases, materials, labor, and the construction of pipe lines and gas wells, is fully paid, and after all fully paid subscriptions to the capital of said company are repaid to the subscribers, or their assigns, together with interest thereon as herein above provided, the said the Consumers' Gas Trust Company will reduce the price of gas so that the same shall thereafter be supplied to all patrons of said company at its actual cost. For and in consideration of the contracts and agreements of said company herein above set forth, and for and in consideration of the great and permanent benefit to the entire community of the city of Indianapolis to be derived from having natural gas supplied or furnished at its actual cost, ———, by the acceptance of this certificate, hereby contracts and agrees, for himself and his assigns, that the capital stock of said company, issued to the board of five trustees thereof in shares of $25 each, based on the payment of the subscription to the capital of said company hereinabove mentioned, shall be and remain under the exclusive and irrevocable control of said board of five trustees and their successors, with full, complete, exclusive, and irrevocable power in said board of trustees to hold said stock and to vote the same during the continuance of the Consumers' Gas Trust Company as a corporation, for all the uses and purposes in the articles of incorporation of said company mentioned, set forth, and described."

Subscriptions to the capital stock were made accordingly for the amount authorized, which were paid and certificates issued in the form mentioned. Thereupon the company proceeded to acquire leases of natural gas territory in the then newly discovered gas fields of Indiana, drilled wells to obtain such gas, and constructed a line of mains and pipes to the city of Indianapolis, and a system of natural gas mains and pipe lines in the streets and alleys of that city, and was thus enabled to and did convey natural gas to Indianapolis, and entered upon the distribution of the same to the inhabitants. The authorized capital was found insufficient, and, after borrowing additional sums, an amendment of the articles was made, providing for an increase of the stock to $1,000,000; the resolution for that purpose stating

that the increase was "for the purpose of raising money to fully complete and equip the plant for supplying the entire city with natural gas." Subscriptions for the increased capital stock were made to the amount of $105,000, and, on payment thereof, like final certificates were issued to the subscribers, and the entire additional amount was invested in the construction and extension of the plant. On November 29, 1892, the directors of the company voted to convert the interest, at the rate of 8 per cent. per annum, which had accrued and should accrue to January 1, 1893, on the amount of capital stock, into shares of capital stock of equal amount, and to issue certificates therefor to the holders of certificates, in like form with the original certificates, and, such arrangement being carried out, the capital stock was thereby increased to $789,000, and no further addition thereto was ever made.

The bill further avers: "It was contemplated at the time of the organization of said company, and was a principal inducement to the organization thereof and the subscriptions to its capital stock, that the supply of natural gas for Indianapolis would be obtained permanently, or at least for many years, from a part of the natural gas fields within a distance of about 25 miles from said city, and at small expense, so that the receipts of the company from the sale thereof at the rates prescribed in the said ordinance of June 27, 1887, would be so largely in excess of operating expenses that the company would be able to pay all debts contracted for money borrowed to construct its plant, and interest and dividends on its shares of capital stock, and such dividends would equal the par value of such shares long before the supply of natural gas had failed, or the cost of supplying the same had materially increased, and that thereupon it would become practicable for said company to reduce the price below that prescribed by said ordinance, and thereafter supply the same to the inhabitants of the city at cost, which it was contemplated would be less than the maximum price fixed by said ordinance." Also that: "It was well known, at the time of the organization of the Consumers' Gas Trust Company, that petroleum was often, if not usually, present underlying gas deposits, where such deposits were found in rock formation such as that in which the Indiana natural gas deposits were found, so that it was anticipated, at the time of the organization of said company, that, in drilling its wells for natural gas, petroleum might or would be found, be produced by such wells when the natural gas deposits reached thereby should be exhausted or diminished, and that other minerals might in the same manner be found, so that in said articles of association provision was made, as hereinbefore shown, for the operation of said company in petroleum and other minerals; but complainant avers that it was not contemplated that said company should operate in drilling or mining for petroleum or other minerals, or in purchasing, leasing, or otherwise acquiring petroleum wells, or the product thereof, or in furnishing petroleum for consumption or use, independently of its business as a natural gas company, but that its operations in petroleum and other minerals were intended to be such only as were connected with and incident to its business as a natural gas company, and that, in so far as it was contemplated that said company should or could engage in any kind of manufacturing business, such business should be incidental to its business as a natural gas company, and confined to the conversion of the petroleum and other products, exclusive of natural gas, obtained from its natural gas and petroleum wells, into gas for fuel and light and other articles of commerce, and did not contemplate or mean that the said company could or should at any time, be converted into an exclusively manufacturing company engaged in the business of manufacturing artificial gas from coal or other minerals, not the products of its natural gas and petroleum wells; and plaintiff avers and charges that during the entire existence of said Consumers' Gas Trust Company the operations and business of said company were at all times confined to natural gas, exclusive even of any operations or dealings in petroleum, until after the natural gas supply had become much depleted, when there was an inflow of petroleum, so that the natural gas leases and wells of the company yielded in some instances petroleum in sufficient quantity to make it worth while for the company to collect and dispose of the same by sale as crude oil in

be market, which it thereafter did and is still engaged in doing in a small way and only incidental to its business as a natural gas company."

During the period commencing July 1, 1893, and ending July 1, 1903, the company paid interest at the rate of 8 per cent. per annum on its capital stock as represented by the final certificates, and dividends as well, and the dividends so paid aggregated 95 per cent. of the par value of each share. These payments of dividends and interest were made out of the earnings of the company in its natural gas business, and, excepting the amounts so paid, together with the operating expenses and the sum reserved for contingencies, all of the receipts of the company, as well as its entire capital stock, were expended for its plant, lands, and gas wells, and in the transportation of the gas and distribution to the inhabitants of such city, so that at the commencement of the action the assets of the company, except certain sums realized from the sale of a certain portion of its plant, consisted of the natural gas mains and pipes, pumping plants, and leases of natural gas lands which had been used exclusively for the production, supply and distribution of natural gas; and it is averred that the property was not adapted to any other use or business, and had not been constructed, acquired, or intended to be used for any other purpose or business. It is further averred that no authority exists, by ordinance or otherwise, for the use of the streets or public places of Indianapolis by the company for any other purpose than distributing and supplying natural gas. It is further averred that the supply of natural gas has failed, so that it has become impossible for the defendant company to bring to the city of Indianapolis an adequate supply for any purpose to any of its consumers, except a small number who were supplied near to the high pressure mains at the point where such mains enter the city, and who consume substantially all of the gas delivered by such mains, and that even they were not sufficiently supplied, and such supply would shortly fail; that when it became apparent that the supply was failing, and it would never be practicable to reduce the price as prescribed in an ordinance of June 27, 1887, and that it would eventually become impossible to supply the same at any cost to the inhabitants of the city, the defendant company ceased to extend its system of distributing mains and pipes in the city, and confined its operations thereafter to the territory to which its system then extended, which only accommodated about 40 per cent. of the inhabitants of the city; that after the winter of 1902-03, it became impossible to carry on the operations of the company in supplying natural gas without actual loss, and during the winter of 1903-04 such operations were impossible, even at a loss, to afford service of any value to the few consumers who were supplied near the mains entering the city; that thereupon the board of directors, in anticipation of the cessation of the business of the company, sold certain of its leases and part of its lines of mains and pipe, and the money realized therefrom was substantially all the money in the treasury of the company when the annual meeting of the stockholders was held in November, 1903, for the election of a board of directors.

In November, 1903, at the annual meeting of the stockholders, the trustees elected as the board of directors the defendants Bement Lyman, John P. Frenzel, Albert A. Barnes, John E. Scott, William J. Richards, Henry C. Atkins, James W. Lilly, Hervey Bates, Jr., and Frederick Fahnley, of whom Bement Lyman, John P. Frenzel, Albert A. Barnes, John E. Scott, and Frederick Fahnley had been members of the board during the preceding year; and the directors so elected thereupon qualified as such, and ever since had been and now are the board of directors of said company, and as such ever since have been and now are in the control and management of the business and affairs of said company, each of them being stockholders in the company, holding as their only evidence thereof certificates in the form of the final certificate hereinbefore set out. Thereupon, it is averred, this board of directors, "by a majority only of its members, to wit, said William J. Richards, Henry C. Atkins, James W. Lilly, Hervey Bates, Jr., and Albert A. Barnes, adopted as the true construction of the articles of association of said company that the holders of the certificates representing moneys paid to said company for its shares of capital stock in discharge of the subscrip-

tions for such shares, made in the form hereinbefore set out, were not stockholders in said company, nor in any way represented by the board of directors thereof, nor interested, as beneficiaries or otherwise, in said company or its business or assets, except only that they were entitled to receive a further and final payment of five per centum of the par value of the amount stated to have been paid to said company in the respective certificates held by them, together with interest from July 1, 1903, at the rate of eight per centum per annum on such five per centum until the same was paid; that upon such payment being made the entire assets of the company were subject to be managed, controlled, and disposed of by the board of directors, without accountability in any way to the holders of said certificates, or any of them, as having any interest in said company, or in its shares of capital stock, by virtue of said certificates; that it was within the objects and purposes for which said company was organized to engage in the manufacture from coal and other substances of artificial gas, for fuel and light, and to supply the same to the inhabitants of the city of Indianapolis at the bare cost of such manufacture and sale, the said company being limited by its articles of association to furnish such gas at cost, so that it should not make any profit whatever from its future business and operations; and that the board of trustees, after such final payment to said certificate holders, would continue to hold in trust the shares of the capital stock of said company during the corporate existence of said company, for the purpose of voting the same for all the purposes for which said stock could be voted, and to exercise all the other rights and powers resulting from the ownership of the shares of the capital stock of said company, as trustees for the inhabitants generally of the city of Indianapolis, or such of them as should be or desire to be supplied by said company with artificial gas for fuel and light, in order to secure to such inhabitants the continuance of such supply at the actual cost thereof, and no more during the existence of said company." It is further averred that the board of directors by like majority constantly maintain and assert, in substance, "that the rights and powers of said company, and of its board of directors and trustees, and of the holders of certificates issued by it on account of payments for shares of its capital stock, and of the inhabitants of said city generally, or such of them as shall desire to be supplied with artificial gas, are respectively such as are above stated, and not other or different, and that it was and is their right and duty to control and manage the business of said company and to dispose of its assets in accordance therewith"; that in pursuance of such construction and policy it was resolved by the board to make a final payment "of five per centum of the amount represented by each final certificate issued by said company," together with interest thereon to January 1, 1904, and set apart the moneys to make such payment, and that payments be made accordingly by the treasurer of the company upon presentation of the certificates; that each certificate should thereupon be stamped as fully paid, and thereafter no further payments should be made to the certificate holders; and the directors have ever since maintained and asserted that by such action all right, title, and interest of each and every certificate holder is extinguished, except to receive a final payment so provided for.

The board of directors proceeded thereupon to ascertain the cost of constructing a plant for the manufacture of artificial gas and the cost of supplying the same, and the value of the natural gas plant and other assets of said company, and what part, if any, of said plant could be adapted to use and be used in manufacturing and supplying artificial gas, and the cost thereof, and also the amount that could be realized by sale of the remaining plant and assets of the company—all at the expense to the company of $3,700—and thereupon, on February 9, 1904, by like majority vote, adopted the following resolution: "Whereas, pursuant to the resolutions adopted by this board on November 7, 1903, and November 17, 1903, the board has secured reports from the auditing committee authorized to examine and report as to the financial condition of the company, and also reports from Mr. Prossor and Mr. Brill, experts employed to report as to the value of the assets of the company, and also as to the methods and probable cost of constructing a plant for the manufacture of artificial gas: Therefore be it resolved that

is the judgment of this board of directors that it is practicable for the nsumers' Gas Trust Company to construct a plant for the manufacture artificial gas to supply the citizens of Indianapolis with fuel and illumiing gas. And be it further resolved that, for the purpose of raising funds the construction of such plant, we favor the sale by the company of its ses and other property outside of the said city, and the borrowing by the npany of such additional funds, not exceeding the sum of $500,000, as y be found necessary for the construction of such plant. Therefore be further resolved that the company do borrow the sum of $500,000 for the struction of such plant, such sum to be used as a special fund for the rpose, and only for the purpose, of constructing such plant, such sum to borrowed upon such security and such terms as may be hereafter deterned by the board of directors and board of trustees. And be it further olved that the board of trustees of the company be requested to signify ir consent to such proposed loan and the contracting of such indebtedness may be incurred in the construction of such plant. It being the intention this board in carrying out these resolutions to furnish artificial gas to consumers of this company at ultimate cost, and we pledge ourselves to s policy."

The value of the natural gas plant of the defendant company, including ses and other assets, is averred to amount to $960,078.50, with no existing ebtedness against the company. It is also averred that the board of ditors has no power to carry on the business, except as a natural gas comny; that, as it is impracticable to further continue such business, it is duty of the board to wind up the company and make distribution of its ets to the certificate holders in proportion to their shares; that the value complainant's certificates exceeds the face value thereof, unless the busis shall be converted into an artificial gas company to sell gas at cost, which case their value would be only $175. That on February 17, 1904, demanded of the defendants constituting the board of trustees, at a time en they were in session as a board, that they should take action to pret the board of directors from converting the company into an artificial company, and from denying his rights as a shareholder, which request s refused. It is further averred, in the amendment to the bill, "that the rd of directors of said company will, after selling, or otherwise disps, as soon as they can, of the entire plant and other property of said comny, except its mains and pipe lines in the city of Indianapolis, expend of the proceeds thereof, and other moneys borrowed by them on the dit of said company, in the construction of an artificial gas plant, and gage said company exclusively in the manufacture of artificial gas as reinbefore alleged, and in selling such gas to consumers in the city of lianapolis at the bare cost thereof, without any profit to said company, l so to continue to do until the term of existence of said corporation has pired, in accordance with the construction put by them as aforesaid upon articles of association of said company, and in order to carry into effect h construction."

The answers of the defendants do not controvert the allegations of fact the bill respecting the authority and form of the corporate organization, ms of subscription and stock certificates, operations of the company, prodings of trustees and directors, respectively, and cessation of the supply natural gas, so that it is no longer practicable to furnish it to the people Indianapolis. But matter is set up by way (1) of challenging jurisdiction the bill, (2) of showing that the founders intended and created a trust favor of the people of Indianapolis for supplying gas at actual cost, whener the shareholders were repaid the amount of their investment and inest, and (3) of showing power vested in the trustees, through the terms the organization, aided by subsequent legislation and the intention and duct of the corporators, to employ the franchise and assets in the protion and supply of artificial gas to that end. While the allegations of answer are voluminous, the appellants' brief presents a concise statement the ultimate facts and deductions—aside from legislation procured subquently to the organization—which are relied upon for reversal of the

decree. Such abstract is adopted as sufficient recital of the matter so set up, namely:

"Natural gas was discovered in Indiana in 1886–87, 25 miles north of Indianapolis. The Consumers' Gas Trust Company was organized on November 2, 1887, under the manufacturers' and miners' act—chapter 35, Rev. St. 1881, now chapter 38, Burns' Ann. St. 1901. During the year 1887 two lines were being constructed from the gas field to the corporate limits of the city for the purpose of supplying natural gas. These lines were bought up by the Indianapolis Gas Company and those allied with it, which had the only gas plant in Indianapolis. The city council, in June, 1887, had passed an ordinance fixing schedules of prices for natural gas when used as fuel or light. After the Indianapolis Gas Company had acquired control of the lines aforesaid, it caused to be introduced into the common council an amendatory ordinance largely increasing the rates fixed by the ordinance. The people were disappointed and determined to resist the threatened monopoly. A public meeting was held on the Board of Trade on October 27, 1887, and a plan was presented and adopted for constructing a gas plant by the people and for the people. A corporation was to be organized, but not as a money-making venture. This plan was, in short, that every man should be asked to subscribe such sum as he felt able to contribute; that the corporation should be organized under the manufacturers' and miners' act, and in such way as that it could never pass under the control of the Indianapolis Gas Company, or any other person or corporation; and when the subscribers had been repaid the amount of their subscription, with 8 per cent. interest, then the company should furnish gas to the people of the city at cost. Committees were appointed to take subscriptions, to frame the articles, and so on.

"The committee on organization, in carrying out the purpose, framed the articles so as to provide that all the capital stock, when paid for, should be issued to a board of five trustees, named in the articles, who were given power to fill all vacancies on their board, and who were given full, exclusive, and irrevocable power during the continuance of the corporation to hold all the stock and vote the same as fully and completely as if they were the owners of said stock. By article 7 the trustees were required to issue to each subscriber, upon the payment in full of his subscription, a final certificate showing the amount of stock held by the trustees in trust, which amount, par value, was to be repaid by the company, with 8 per cent. interest. When a certificate holder had been repaid, by dividends or otherwise, upon his certificate, an amount equal to his subscription, with interest as aforesaid, and after the payment of all indebtedness of the company, 'then it should be the duty of said directors to reduce the price of gas, so that the same shall thereafter be supplied at cost.' The objects of the corporation were stated in article 2 as follows: 'Art. 2. The objects of the formation of such corporation are to drill and mine for natural gas, petroleum, and other minerals, and to purchase, lease, and otherwise acquire gas and petroleum wells and the products thereof, and to furnish the same to its patrons for use, and by manufacture to convert the same into gas for fuel and illuminating purposes, and other articles of commerce, and the sale of the product to its patrons, to these ends to take, hold, convey, and mortgage real estate, by fee simple or lesser title, and to own, operate, and maintain such machinery, works, lines of pipe, and appliances as the carrying out of the objects above mentioned may require.'

"The company was organized, put 133 miles of pipes in the city, connected this plant with the gas field, and supplied gas in this way till it gave out early this year. As each subscription was paid there was issued the same final certificate of payment to every person entitled to repayment. The company owes no debts, and has paid 95 per cent. of the principal of these certificates and all the interest, and in 1903 set apart a sum sufficient to pay the remaining 5 per cent. and notified the owners to come and get their money. Four of the trustees and five of the directors now favor the construction of gas works in connection with the city plant to supply gas to the people at cost. The remaining trustee and the minority directors contend that the corporation has no power to engage in the business of manufacturing gas, holding that its powers are limited to furnishing natural gas

. In this posture of affairs, Byron C. Quinby, of Massachusetts, a cer-
ate holder, filed his bill on February 19, 1904, in the Circuit Court,
nst the company and the five trustees and nine directors, to enjoin the
pany from using its assets or borrowing money to erect gas works, and
anufacture and supply gas, on the ground that the company has no pow-
under the articles and laws, to do so. The minority trustee and the
rity directors, holding to this view, suffered default. The corporation
the majority trustees and directors appeared and first filed a plea, show-
that the total assets of the corporation were of the value of $960,078.59,
the face value of the certificates outstanding was $788,657.10, and that
complainant held three certificates, one of the par value of $2,500, one
he par value of $265.40, and one of the par value of $743.45; that the
st certificate was issued first to John and Edward Schmidt, citizens of
ana, and by them assigned to the complainant, who took a reissued cer-
ate from the company to himself. The plea asserts that appellant can-
sue on the larger certificate under the acts of Congress, and that the ag-
ate of the other two certificates is not $2,000. Wherefore that sum is not
ispute so as to give the court jurisdiction. The plea was overruled.
Thereupon the defendants answering filed their joint and several answer,
ng forth in detail and at length the material facts above stated and many
rs in support thereof; also showing that before the complainant filed
bill two suits had been brought and were then pending in the courts of
state involving substantially the same question presented on the bill:
further, that there was not $2,000 in controversy; and, again, that the
plainant, as a certificate holder, is not a stockholder, but in the nature
creditor, and that his bill as originally filed and as finally amended
not verified by the oath of complainant, within the meaning of rule 94,
did not state facts as required thereby. It was further shown that
e of the minority directors and others in the year 1903 had determined
cquire all the final certificates possible, wreck the corporation, wind up
divide the assets, and for this purpose had organized the Eureka In-
ment Company, which had acquired a majority of the outstanding certifi-
s, and that 'complainant did not file said bill for himself alone and in
own interest, but at the instance and request and in the interests of the
Eureka Investment Company, or those allied with it in interest, and in
r to help said investment company, and those associated with it, to
k the corporation, wind up its affairs, and distribute its assets.'"

Addison C. Harris and Daniel Waite Howe, for appellants.

Ferdinand Winter and Alexander C. Ayres, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and SEA-
AN, District Judge.

SEAMAN, District Judge, after stating the facts, delivered the
nion of the court.

The questions raised by the assignments of error are: (1)
ether the court possessed jurisdiction to entertain the suit;
whether prior suits pending in state courts arrest jurisdiction;
(3) whether the corporation defendant is empowered to con-
ct works and operate for supplying the people of Indianapolis
h artificial gas at cost. Specific reference to the 14 assignments
nnecessary, as all contentions are within one or the other of
se inquiries.

. Jurisdiction of the bill is challenged because it appears that
of the final certificates owned by the complainant, of the par
ue of $2,500, was originally issued to John and Edward Schmidt,
zens of Indiana, who assigned to the complainant, and the cer-
ate thereupon, described in the bill, was reissued by the company

to the complainant, so that, exclusive of such interest derived through assignment, the par value of his remaining certificates aggregates less than $2,000. We are of opinion that the statutory provision in reference to suits to recover the contents of choses in action in favor of an assignee [U. S. Comp. St. 1901, § 629, p. 508], on which this objection rests, is not applicable to the case at bar. The relief sought is against the use of the corporate assets for alleged ultra vires business, affecting not alone his interest, but that of all other stockholders. Primarily the cause of action is in the corporation; but, subject to the limitations of equity rule 94, a stockholder may prosecute the suit for the benefit of all. Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401; 5 Rose's Notes U. S. Rep. 587. Ownership of stock is an essential requirement to maintain the bill on behalf of the corporate interests, but the relief sought is for the benefit of all like interests, and not for that of the individual alone. The suit is not one to recover the contents of a chose in action, in the sense of the statute referred to, and it is deemed unnecessary to discuss the question whether the complainant holds the $2,500 certificate as assignee. The further contention that the shareholders retain no beneficial interest in the corporation, beyond 5 per cent. of their certificates, which has been set apart by the directors to make the amount repaid upon the principal equal to 100 per cent., is involved in the inquiry upon the merits, and will be considered under the third question for review.

The objections urged of noncompliance with equity rule 94, and that the suit appears to be collusive, under the allegations of the answer, are without force, and within the ruling of this court in New Albany Water Works v. Louisville Banking Co., 58 C. C. A. 576, 122 Fed. 776. In reference to verification of the bill, if the original verification was defective, the defect was cured by the personal verification subsequently, under leave granted by the court. The several assignments of error in respect of jurisdiction are overruled accordingly.

2. The answers aver the pendency in state courts of two prior suits—one on behalf of the corporation defendant and the other against it—wherein "the principal questions are involved which are involved here," and it is urged thereupon that rules of comity, at least, are violated by the procedure in the federal court. The case at bar, and the prior actions so set up as well, are suits in personam. It is well settled that the right of a noncitizen to maintain such suit independently in the federal forum is not barred by the pendency of a prior suit of like import in another co-ordinate jurisdiction, and this view is conceded on behalf of the appellant. As no interference with or conflict over property in custodia legis (actual or constructive) is involved, we deem it equally clear that the complainant cannot be deprived of his constitutional privilege to have the suit not only entertained, but adjudicated in due course, in the federal forum. The case of Farmers' Loan & Trust Company v. Lake Street Elevated Railroad Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667, and others cited in the brief for appellants upon this point, are plainly distinguishable, as neither of these pend-

g actions is in rem, nor of a nature to vest the custody of specific
operty in one or the other court. No conflict of jurisdictions
pears to have arisen, and we are satisfied that no invasion has
curred and that no room appears for conflict in the present aspect
the controversy.

3. The remaining inquiry goes to the merits of the decree. It
volves, not only the property interests of the corporation and its
areholders, but rights asserted on behalf of the people of Indian-
olis. The relief sought by the bill and granted by the decree rests
on these propositions: (1) That the corporate franchise does
t authorize diversion of the business from supplying natural gas
the production and supply of artificial gas to the people of
dianapolis at cost; (2) that the cessation of the natural gas
pply in the fields tributary to Indianapolis has caused abandon-
ent of the former business as no longer practicable, so that the
rporate property is no longer available for the purposes of the
corporation; and (3) that the shareholders retain their interest
erein and are entitled to relief against threatened diversion and
r distribution of the assets. While the appellants concede the
ct thus asserted as to the failure of natural gas supply and the
cessary abandonment of that business, and the purpose of the
ustees and directors to undertake use of the franchise, pipe lines,
d property in the city of Indianapolis for the erection of works
produce artificial gas, to be supplied to the people at cost, both
the other propositions in support of the decree are earnestly
sputed. Their contentions are two-fold—referring to the pur-
se and scope of the incorporation, as disclosed in the circumstan-
s, terms of the articles and subscriptions, and subsequent legisla-
on—and in substance these: (1) That the organizers intended
d created a charitable trust, in favor of the patrons and public,
provide for supply of gas in Indianapolis at cost, whenever their
nounts invested in the work were repaid, with interest, and after
ch repayment no beneficial interest remained in the shareholders;
) that such trust contemplated the production and supply of
tificial gas, whenever the natural gas fields were exhausted, and
thority was extended to that end, by the terms and intent of the
ticles, within the meaning of statutory provisions, either then
isting or subsequently enacted.

The fact that a trust was created by the organizers for certain
rposes is unquestionable. It was distinctly provided in the ar-
cles of association to place the entire capital stock under the con-
ol of five trustees, selected from the stockholders, with irrevocable
wer to "vote the same [as a unit] as fully and completely as
they were the owners," elect directors, and fill vacancies, while
he business and prudential concerns" were to be managed by a
oard of nine directors. The trustees were to issue to the subscrib-
s for capital stock, upon full payment, certificates thereof, which
titled the holder to certain dividends; but the articles provided
at when the holder shall have received in dividends or otherwise
n amount equal to his subscription," with interest at 8 per cent.
er annum, and all indebtedness of the company was paid, "it shall

be the duty of said directors of said company to reduce the price of gas, so that the same shall thereafter be supplied at cost." This provision for reducing the price of gas to cost, when the subscribers had received dividends to the amount prescribed, was carried as well into the subscription agreements and the certificates issued to the shareholders. In all other respects the purposes of the corporation are for the business undertakings stated in the articles, within the statutory authority, and it is not organized as a charitable or public corporation. The shareholders have plainly agreed by these terms that the business shall be conducted without profit to the corporation, and for the benefit of consumers, after dividends have been received to the extent of the capital stock and interest. In other words, they stipulate in such event that the operation and use of franchises and property for the purposes of the incorporation shall be carried on to furnish gas to consumers at cost, instead of profit to the shareholders. The shareholders retain their shares, nevertheless, with any beneficial interest in the corporate assets which remains when the use is terminated by expiration of the franchise or other legal cause. By the articles the trustees are vested with mere voting powers, as representatives of the body of stockholders, and the directors are their representatives alike in conducting the business in conformity with the incorporation and mutual agreements. It is true that the stockholders cannot interfere in such operation and use within the purposes so delegated, but we are of opinion that they have not parted with their title as shareholders and owners, so that no foundation exists for the application of the well-recognized cy pres doctrine, invoked on behalf of the appellants, beyond the use expressed in the terms of the agreement and within the limits of the corporation. Their interest, therefore, is sufficient to support the bill and decree, if the allegations and admissions of fact as to the contemplated future use of the corporate property show that use within the incorporation limits is no longer available and that diversion therefrom is intended by the trustees and directors.

The final question thus presented is whether the incorporation extends to the conceded purpose of constructing and operating works to manufacture artificial gas from coal or other minerals, not the product of natural gas or petroleum wells owned or leased by the company, and supply such gas to consumers in lieu of the original supply of natural gas from its wells, now exhausted. While the answer does not in terms admit the precise allegations of the bill that the manufacture intended was from coal or other minerals, not the product of its wells, no other inference is admissible under the general statements contained in the answer and the rules applicable to the pleadings when the case is submitted thereon. The single issue then arising is whether the intended change to the manufacture of gas, as the exclusive or primary business, is an ultra vires undertaking. Its solution rests upon the legislation under which the corporation was created and the articles and acts of organization. Various facts aliunde are set up in the answer and pressed in the argument on the part of the appellants as affect-

g the interpretation of these creative acts, namely: (1) The blic want and movement of citizens which preceded the organiza- n; (2) preliminary expressions of purpose on the part of the ganizers and the exalted character and professional ability of sev- al; and (3) the obvious benefit to the community of a supply of ificial gas at cost with the corporate power so extended. We e of opinion, however, that neither of these allegations can be nsidered in ascertaining the powers conferred by the incorpora- n, which are necessarily limited by the legislative grant of au- ority and the specification and acts of the organizers within such ant. No extension beyond terms so authorized and adopted can ceive judicial sanction, either for the benefit of the public, a com- unity, or individuals. For interpretation of the legislative acts hich govern the incorporation, the decisions of the Indiana courts final resort are, of course, controlling, in so far as applicable to e case presented. The organization was made (as stated in the ief for appellants) "under the manufacturers' and miners' Act, apter 35, Rev. St. 1881," and the material provision appears as sec- n 3851 (section 5051, Burns' Ann. St. 1901), reading:

"Whenever three or more persons may desire to form a company to carry any kind of manufacturing, mining, mechanical, or chemical business, to furnish motive power to carry on such business; or to supply any city village with water; or to form union stockyards and transit companies, d operating, maintaining, and transacting the business incident to such mpanies, or to form grain elevator companies, and constructing, maintain- , and operating elevators, and transacting the business incident thereto; to form companies for the purpose of buying and selling dry goods, car- s, boots and shoes, millinery goods, fancy goods, or jewelry, in connec- n with the manufacture of such goods, and articles into any articles which they are suitable, and for the sale of such articles, when they e so manufactured—they shall make, sign, and acknowledge, before some icer capable to take acknowledgment of deeds, a certificate, in writing, hich shall state the corporate name adopted by the company, the ob- t of its formation, the amount of capital stock, the term of its existence ot, however, to exceed fifty years), the number of directors and their mes, who shall manage the affairs of such company for the first year, d the name of the town and county in which its operations are to be carried , and file the same in the office of the recorder of such county, which all be placed upon the record, and a duplicate thereof in the office of the cretary of State."

The purposes of the organization are thus stated in the articles:

"Art. 2. The objects of the formation of such corporation are to drill and ne for natural gas, petroleum, and other minerals, and to purchase, lease, d otherwise acquire gas and petroleum wells and the products thereof, and furnish the same to its patrons for use, and by manufacture to convert e same into gas for fuel and illuminating purposes, and other articles of mmerce, and the sale of the product to its patrons, to these ends to take, ld, convey, and mortgage real estate, by fee simple or lesser title, and to n, operate, and maintain such machinery, works, lines of pipe, and ap- ances as the carrying out of the objects above mentioned may require."

When organization was completed thereunder, the directors ac- pted the terms of an ordinance of the city of Indianapolis, which thorized any corporation "to pipe the streets and public places d supply natural gas to the people for both fuel and light" at fixed tes. Leases were then acquired of territory in natural gas fields

available for the purpose, wells were drilled which furnished a supply of natural gas, pipe lines to convey such gas to the city and a system of lines for its distribution therein were established, and the operations were carried on and exclusively confined to supplying such natural gas, until recently, when the gas fields became exhausted. Operations then ceased, except for incidental and occasional sales of petroleum which appeared in the wells when gas failed, and the company has disposed of certain leases in the gas fields and "part of its lines of mains and pipes." The original capital of the corporation was exhausted in the work, further means were borrowed, and the indebtedness, together with further investments in construction, were met by an increase of the capital stock, authorized to furnish "the means to complete and fully equip the plant of said company," and substantially all the capital is so invested. For resumption of business as proposed, an extensive manufacturing plant must be erected in the city to produce artificial gas, from coal or other minerals, with means obtained on the corporate credit or property, utilizing alone the pipe system within the city for distribution, and operating under such new license as may be granted by the city.

That the operations thus far in obtaining and supplying natural gas are not manufacturing businesses within the statutory meaning is unquestionable. That the undertaking "to drill and mine for natural gas" and furnish the product "to its patrons for use" was within the objects expressed in the articles is plain. If the business so declared and carried on were not otherwise within the classification of "mining," as employed in the so called "manufacturers' and miners' act" (section 5051, supra), it is clearly so established by the declaratory act of the Legislature of February 23, 1889 (section 5099, Burns' Ann. St. 1894), adopted at the instance of the organizers, which defined the term "mining," as used in the former statute, to "cover and include the sinking, drilling, boring, and operating wells for petroleum and natural gas," and made it applicable to the organization in question. Tested alone by the statement of the corporate objects contained in the articles, no purpose is indicated to manufacture artificial gas to be supplied to consumers, either as exclusive or primary business of the corporation. The contemplation "by manufacture to convert" the product of its gas and petroleum wells "into gas for fuel and illuminating purposes" is specified, but that is merely incidental to the primary "mining" object, and as such within its classification as the primary business. So that, under the established general rules for construing corporate powers, we are constrained to the view that neither the abovementioned provision nor the cognate term "works," subsequently mentioned, confers authority to erect works and manufacture artificial gas from materials not "the product of its gas and petroleum wells." With the "mining" object and powers thus expressed as primary, "the exclusion of all others not fairly incidental" is strictly implied. Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 48, 11 Sup. Ct. 478, 35 L. Ed. 55, 11 Rose's Notes U. S. Rep.

1135. Irrespective, however, of this construction of the articles under the general doctrine, the authorities in Indiana are decisive that the statute under which this organization was made limits the business to be adopted thereunder to a single class of the several classifications enumerated in the section, and that it was not competent to combine two or more of the purposes so classified in a single incorporation, as primary business. Burke v. Mead, 159 Ind. 252, 64 N. E. 880, and cases cited; Williams v. Citizens' Enterprise Co., 25 Ind. App. 351, 57 N. E. 581.

In Burke v. Mead the question arose in a suit for specific performance of a contract whereby Mead & Co. agreed to transfer certain property to Burke and another, in consideration of a transfer of certain paid-up capital stock in a corporation called the "Marion Electric Company." One of the defenses was that the alleged corporation was not a legal organization, so that the capital stock was worthless. The purposes of incorporation, as stated in the articles, were "of manufacturing, storing, selling, delivering, and distributing electricity for light, heat, and power, and for all such other chemical purposes as electricity can be applied to, and for the purpose of manufacturing and selling all kinds of electrical appliances, apparatus, and supplies." The court upheld the contention that it was not competent to combine these purposes in a single incorporation; that while the "generating of electricity is manufacturing, within our manufacturing and mining companies act," the manufacture and sale of "all kinds of electrical appliances, apparatus, and supplies is not a business incident thereto"—citing Franklin National Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302, and Williams v. Citizens' Enterprise Company, 25 Ind. App. 351, 57 N. E. 581. It was ruled accordingly that the articles "disclosed a purpose to engage in lines of employment and business more diverse than the statute authorized" and that the incorporation was invalid.

In Williams v. Citizens' Enterprise Company, supra, the Chief Justice delivered the unanimous opinion of the court, denying the right of the corporation to recover upon a subscription to its capital stock for like defect in the diversity of objects stated in the articles of association, under the same statute. After remarking, "It is conceded that several objects and purposes are stated in the articles for which a corporation may be organized under the manufacturing and mining act," and disposing of the contention that this was permissible under a former ruling of the court in Shick v. Enterprise Company, 15 Ind. App. 329, 44 N. E. 48, 57 Am. St. Rep. 230, the opinion states:

"To adopt appellee's view, we must change the reading of section 5051, supra, and wherein it specifies the classes of business set out we must use the word 'and' where the Legislature used 'or.' This would lead to the result that it was the legislative intent that all the businesses enumerated in the section might be carried on by one corporation; for it must be admitted that, if more than one class may be included in one corporate organization, then all the classes may be included. The Legislature has seen proper to provide in separate acts for corporate organizations to do banking, building and loan, railroad, and some other businesses. It is clear that under

these acts a corporation could not be organized to do both banking and railroad business. They have no necessary relationship with each other. Neither one is a mere incident of the other, and the Legislature has expressly separated them. And under section 5051, supra, there is no necessary relationship betwen supplying a city or village with water and maintaining and operating elevators; nor is either one a mere incident of the other. And the same may be said of all the classes of business named in the section. It is not to be inferred, from the fact that all these classes of business are included in one act, that they may be conducted by one corporation. The Legislature, by placing banking and railroad business in separate acts, and thus providing for separate corporate formations, has no more effectually separated corporate organizations for conducting those businesses than it has the classes of business enumerated in the above section. The use of the disjunctive 'or' makes a complete enactment as to each class of business named. * * * The act expressly requires that the certificate shall state the corporate name and the 'object' of its formation. This means that the certificate shall state the particular class of business to be carried on under one of the designated heads; that the limitation of the business must be shown by a statement in the articles."

Then, referring to the purposes stated in the articles under consideration, the opinion proceeds:

"We must, then, give to the articles the construction that the corporators intended to conduct these various enterprises under one organization. There is no statute in this state authorizing a single corporate organization for the purpose of carrying on all, or any two, of these businesses. The objects of neither are incidental or secondary to the objects of either of the others, but the objects and purposes of each are primary. Each is entirely separate and distinct from the others. Either would properly be the subject of corporate organizations; but the intention of the corporators, which must be gathered solely from the articles, does not indicate which was to be the exclusive purpose. * * * It is manifest, from the reading of the statute, that it was not the legislative intent to authorize a corporate organization for all the purposes named in the statute, nor for any two or more of the purposes named."

After reviewing and citing numerous authorities, the opinion concludes:

"As there is no statute authorizing the organization of a corporation for the purposes named, it follows that the articles of association are void."

The force of these decisions is not impaired by either of the suggestions to that end in the brief for appellants: (a) The validity of the incorporation for the primary object of supplying natural gas is neither questioned nor questionable, and it is diversion only to a manufacturing business that is declared ultra vires. (b) The case of Marion Bond Co., Trustee, v. Mexican Coffee & Rubber Co., 160 Ind. 558, 65 N. E. 748, cited as inconsistent with these rulings, impresses us as neither applicable, nor in any sense modifying the construction upheld in the previous cases. (c) An act of the Legislature, approved March 3, 1903 (Acts 1903, p. 147, c. 73), amends the statute in question in various particulars, so that several objects may be included in one incorporation; and then declares that prior incorporations stating several objects are thereby "legalized and validated." The contention that this and other enactments subsequent to the incorporation authorize the change of business is untenable in either aspect of the controversy. Under the foregoing construction of the articles, irrespective of the statutory power, the

endment of 1903 is inapplicable, as several objects are not stated. istruing the statute under which the incorporation was made as decisions require, no undertaking to engage in manufacturing, erwise than incidental to the primary "mining" business, can imputed to the organizers, and their contract rights so estab- ed cannot be impaired by subsequent legislation.

Ve are of opinion, therefore, that no error is well assigned, and decree of the Circuit Court should be affirmed.

ROSSCUP, Circuit Judge (dissenting). I concur in the opin- of the court to the extent that it holds that the Circuit Court jurisdiction of the cause. I agree, also, that the stockholders he Consumers' Company have an ultimate interest in the Com- y's assets—the trust to the people of Indianapolis first being austed—that would entitle them to bring this suit. My dissent ased solely on my view that under the articles of incorporation, l the statute of Indiana, the Company is not without corporate ver to manufacture fuel and illuminating gas.

n interpreting these articles and the statute, some general facts st not be overlooked. One of these is that the life of natural fields is a limited life. Natural gas does not replenish itself. other is, that gas and oil are so nearly related in origin, that en the natural gas supply fails, oil may be expected to follow. ll another is, that oil is readily converted into gas. And still ther, that upon calculations based on these facts, millions of lars have been invested in distributing systems and pipe lines, ich but for oil or other gas producing mineral, available as a stitute when the natural gas supply was exhausted, would not ve been invested at all. We must, I think, assume that these ll known facts were in the mind of the incorporators of the Con- ners' Company; and that they ought to enter into the interpreta- n that should be given to the Indiana statute. With this in mind, us look at the articles of incorporation, and the Indiana statute. The expressed object of the corporation is "to drill and mine for tural gas, petroleum, and other minerals; and to purchase, lease l otherwise acquire gas and petroleum wells, and the products reof, and to furnish the same to its patrons for use; and by nufacture to convert the same into gas for fuel and illuminating rposes, and other articles of commerce." Whether the power to nvert "the same," by manufacture, into gas for fuel and illuminat- purposes was intended to go back to the first clause, thus in- ding, as the material out of which the gas should be manufac- ed, both petroleum and other minerals; or was intended merely go back to the clause immediately preceding, thus including, as raw material, petroleum only; is a question we need not now cide. Unquestionably, the statutory power to manufacture out either or both existing, the articles of incorporation could, in this pect, be amended; for though stockholders have a right to stand on the contract, they have no right to defeat the paramount pur- se of the incorporation, even though to carry out that purpose amendment to the articles may be necessary.

The paramount purpose—the purpose that moved the subscribers to make an investment of a million dollars in the distributing system in the City of Indianapolis—was not to engage in mining or manufacturing as men engage in a business venture; but to furnish the people of Indianapolis with gas at cost, for fuel and illuminants. Doubtless the proximity of the natural gas fields gave to the enterprise its origin. Doubtless it was believed that for a time, at least, these fields would furnish the supply of gas needed. But the end sought was gas, not a mining or manufacturing venture; and mining or manufacturing was looked to only as a means to that end.

Will any fair reading of these articles disclose, that one means —natural gas—being exhausted, no substitute was to be accepted? Why, then, the clause "and by manufacture to convert the same into gas for fuel and illuminating purposes?" Can any reasonable construction of the articles omit that clause? Can the clause, in view of the general facts stated, be shunted off into some side or incidental meaning, such as that it referred only to the commercial products of petroleum or other minerals? I think not. I think that if this enterprise had been launched as an ordinary corporation for profit, there would be no doubt of what the promoters contemplated—a substitution of means when that became necessary; and I cannot agree to hold, considering what was plainly written into the articles, that the promoters of this public enterprise are to be considered as less far sighted than would have been the promoters of an enterprise strictly for profit.

The opinion of the majority does not expressly, at least, controvert this interpretation of the articles. That opinion turns on the point that under the statute of Indiana, a corporation could not lawfully be organized that would include both the power to mine and the power to manufacture, where neither power is strictly incidental to the other. Generally speaking, the point is perhaps well taken. But applied to this case, it ignores the salient facts of the case. The salient purpose of the incorporation, as already stated, is to furnish the people of the city with a fuel and illuminant. The sole contribution of natural gas to that purpose is that natural gas brings to the consumers' burner the carbon needful to a fuel or illuminant. But petroleum and coal contain this carbon also. The only difference between natural gas and petroleum or coal, in this respect, is, that in the case of natural gas the carbon comes to the burner in its natural state—on the back of its own horse—while in the case of coal or petroleum, the carbon must be carried by a gas evolved, by manufacture, out of the coal or petroleum. But in either case, the carbon is mined, and, in either case, it performs the same function when the burner of the consumer is reached. Now does the mere fact, that in one case the carbon reaches the burner in almost precisely the state it left the mine, while in the other it must be transferred, in transitu, to a carrier that will bring it up to the burner, make any difference in the incorporability of the enterprise as a whole? Is the mere converting process, pursuant to the ultimate end in view, a thing essentially separate from, and,

ithin the meaning of the Indiana decisions, not incidental to, the ractical general purpose for which the corporation was organized? cannot think so. I cannot believe that the people of Indianapolis re to be deprived of an investment, into which a million of dollars ave gone, upon a technical distinction carrying so little substan- al difference. The Indiana cases relied upon (Burke v. Mead, 159 nd. 252, 64 N. E. 880; Williams v. Citizens' Enterprise Co., 25 nd. App. 351, 57 N. E. 581) do not seem to me to maintain the posi- on taken. Those decisions were based not on technical, but on ubstantial distinctions.

Take Williams Company v. Citizens' Enterprise Company, for lustration. In that case the articles of incorporation stated the urpose of the company to be "to promote and aid the growth of ne City of Muncie and vicinity in Delaware County, Indiana; to ocate, establish, carry on, maintain and assist all kinds of mining nd manufacturing companies, and to furnish power, motive power, achinery, and buildings therefor; to buy, sell and manufacture l kinds of merchandise; to sink, operate, buy and sell gas wells; o take stock in other corporations, loan and donate money, etc."

It would be supererogation to comment on that case. In those rticles it was attempted to consolidate into one corporation the usiness of mining, the business of manufacturing, the business of ecting buildings, the business of machinery making, the business f merchandising, the business of loaning money, and the business f a holding corporation, that is, a corporation whose function is to old the stock of other corporations. Of course Indiana has granted o single corporation any such omnibus authority.

The other case—Burke v. Mead—was a case where a corporation rganized to manufacture, store, sell, deliver and distribute elec- icity for light, heat and power, sought power also to manufacture nd merchandise all kinds of electrical appliances, apparatus and upplies. Between the power to manufacture and merchandise elec- ical appliances, apparatus and supplies, and the power to install nd operate an electric light, heat and power plant, there is no in- rdependent or functional connection. Neither power, in any just nse, is essential to the full exercise of the other. They are as eparate from each other, functionally, as is the corporation that akes glass lamp chimneys from the corporation that pumps and efines lamp oil; or the corporation that manufactures steel rails, om the corporation that operates a steam railroad. True, they elate to each other, as matters of convenience—as businesses that ight profitably be carried on together—but in no appropriate sense an they be said to be co-operative means to the same end.

I cannot believe that the Supreme Court of Indiana will ever mploy these cases as a pre-judgment, that though gas in its natural ate, and gas bound up in petroleum, or coal, are to the business f supplying carbon to the burners of the consumers, means pretty early the same, to an end exactly the same; and though in financing n enterprise involving an outlay of a million dollars, these means ust have been calculated upon interchangeably, as substitutes for ach other; a mining of these means, and the incidental conversion

by manufacture of one of them to the practical end in view, may not be undertaken by a single corporation, because it so happens, that in previous applications of a substantial and healthful distinction of the law, a banking institution was refused permission to corporately hitch up with a gas well, and the merchandising of electric bulbs was not regarded as an essential part of the operation of an electric lighting plant.

"We know of no rule or principle," says Chief Justice Bigelow in Brown v. Winnisimmet Company, 11 Allen, 326, approved by the Supreme Court of the United States; Jacksonville Company v. Hooper, 160 U. S. 525, 16 Sup. Ct. 379, 40 L. Ed. 515, "by which an act creating a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly, the main business of a corporation is to be confined to that class of corporations which properly appertain to the general purposes for which its charter was granted, but it may also enter into, and engage in transactions which are auxiliary or incidental to, its main business, which may become necessary, expedient, or possible, in the care and management of the property which it is authorized to hold under the act by which it is created."

To the extent of the doctrine thus laid down, we need not go. We need apply only what appears to me to be the most obvious principles of interpretation. The laws of Indiana provide that whenever three or more persons may desire to form a company to carry on any kind of manufacturing, mining, mechanical or chemical business, they may, upon following the formula therein prescribed, become a corporation. Under that authority the Consumers' Gas Company was incorporated. Its business purpose, as already stated, was to furnish the people of Indianapolis with gas—its corporate purpose, as a means to that end, to mine natural gas, petroleum, and other minerals, and by manufacture to convert them (at least petroleum) into gas. To attain the end in view, the power to manufacture was just as essential as the power to mine. The manufacture was indeed only a treatment or modification of the product mined—a treatment and modification essential to the purpose for which the product was mined. Without the co-operation of both of these powers—the mining, and the modification, by manufacture, of one of the products mined—the whole investment would have been precarious. Could there be a case stronger for the unification, in one corporation, of these related powers? Has Indiana said that no corporation that mines, shall, even incidentally to the purpose for which it is organized, manufacture also? A prohibition so broad as that is not claimed; that mining and manufacturing may, in related instances go together, in one corporation, is conceded; and any such concession must necessarily include, in my judgment, the case now before us. Not to include it would, I cannot help thinking, be to apply to this corporation, organized to subserve a public trust, less latitude of interpretation than would be given to cases involving in the ordinary way purely vested interests.

My judgment is, that the decree of the lower court, enjoining any manufacture of gas, and winding up the corporation, ought to be reversed, with instructions that the Circuit Court give to appellant, the Consumers' Gas Company, reasonable time in which to elect what it will do, that the company can lawfully do, in accordance with the views herein expressed.

The decree is affirmed.

CANADIAN PAC. RY. CO. v. ELLIOTT.

(Circuit Court of Appeals, Second Circuit. April 11, 1905.)

No. 165.

1. MASTER AND SERVANT—RAILROADS—INJURIES TO SERVANT—RULES—FAILURE TO OBSERVE—ASSUMED RISK.

Where a car repairer failed to observe a reasonable rule requiring a blue flag by day and a blue light by night to be displayed at one or both ends of a car, indicating that workmen were under or about it, and providing that, when thus protected, the car shall not be coupled to or moved, etc., and such failure resulted in his death by another car being pushed against the car on which he was working, he assumed the risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 562, 773.

Assumption of risks incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. SAME—CUSTOMARY VIOLATION—EVIDENCE.

Where a car repairer was killed while working about a car which he had failed to protect with a signal, as required by rule providing that a signal should be displayed on one or both ends of a car to indicate that "workmen are under or about it," evidence of a witness that, in case of work being done "under a car," it would be flagged, but that, if the workmen were simply going to step behind the car for "a half a minute or so," they would not flag it, he having been employed prior to the adoption of such rule, and having worked under a rule only requiring cars to be protected in case of necessity for car repairers to work "under the car," was inadmissible to show a customary violation of the later rule.

3. SAME.

In an action for death of a car repairer while working about the same without having protected it, as required by rule, evidence *held* insufficient to establish that the rule had become functus officio by frequent violation.

In Error to the Circuit Court of the United States for the District of Vermont.

For opinion below, see 129 Fed. 163.

This cause comes here upon writ of error to review a judgment of the Circuit Court, District of Vermont, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. The action was brought to recover for the death of a car repairer in the service of the defendant company, who was run over and killed by a car which he was inspecting at Richford Station, Vt.

F. E. Alfred and W. B. C. Stickney, for plaintiff in error.
W. L. Burnop, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. Besides the main line, there are at Richford several sidings, numbered, respectively, 1, 2, etc. A few minutes prior to the accident a through freight train from Montreal had pulled into the yard. It was necessary to cut some cars out of it. Two cars, which had been in the middle of the freight train, were first sent down siding No. 1 in charge of one Sears as rear brakeman. After they were brought to a standstill, he returned to the train, and five cars located just in front of the caboose were cut out and kicked back on the same siding. Sears rode those also, and they came with great force against the other two cars, driving them back a considerable distance. Deceased and a car inspector, Green, had been examining a freight train which had drawn into the yard on the next siding, No. 2. They had finished that job, and were on their way back to the station to await the next job, when they drew near to the rear of the two cars on siding No. 1. Elliott (the deceased) suggested that they should test the "knuckle"—a part of the coupling—of the rear car. Both of the men thereupon stepped in behind the car, where they would be hidden from the view of any one "riding down" any cars moving towards them on siding No. 1. The testing of the knuckle is an operation very quickly performed, but before they had finished it the five cars struck the two, and, as the latter moved backward under the impact, deceased was knocked down, run over, and killed.

The court left several questions to the jury: First, to determine whether the five cars were properly and prudently controlled in being sent down on the two; second, if they were not so controlled, was that because Sears was not a prudent, proper, efficient, and competent brakeman, such as a prudent man would put in that place? He charged them that the defendant would be liable only if he were short of the proper competency and efficiency as a brakeman; that, if he was a good brakeman, but was at the moment not paying attention, not doing his duty, that would be his fault, and not the fault of the company. The court also left it to the jury to determine whether the deceased was guilty of contributory negligence; to determine what a prudent man would do in view of the whole situation—the rules as they were understood in the yard, the situation of the switch engine and cars up above the highway crossing, the chance deceased had to look and see if the car was coming, and what he had a right to expect as to how much time would be consumed, assuming that the cars would be run down in the usual way. They were to take him as he stood there, knowing the switching crew was where it was, knowing how long it would take to test the knuckle, knowing that his superior was with him, knowing the rule as it was understood in the yard, and to say whether, taking everything into account, he was lacking in prudence in stepping in behind the car to test the knuckle.

These instructions assumed that the testimony would justify the jury in finding that deceased might disregard the rule referred to, speculating on his chances of escaping injury as a consequence of such disregard. The record does not warrant such a finding. For a considerable time prior to August 10, 1901, the company's book of rules and regulations for the guidance of its employés contained the following:

"Rule 14. When necessary for car inspectors to work under a car, they must protect themselves by attaching to the car a red flag by day or a red light by night. The car thus protected must not be coupled to or moved, until the red signal is removed by the car inspector. When a car standing on a siding is protected by a red signal, other cars must not be placed in front of it, so that the red signal will be obscured, without first notifying the car inspector, so that he may protect himself."

This rule was in force down to the time of the adoption of rule 26, on August 10, 1901, when rule 26 became a substitute for and superseded rule 14. Rule 26 is as follows:

"Rule 26. A blue flag by day and a blue light by night, displayed at one or both ends of a car, engine, or train, indicate that workmen are under or about it. When thus protected it must not be coupled to or moved. Workmen will display the blue signals, and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track, so as to intercept the view of the blue signals, without first notifying the workmen."

It is manifest, upon a comparison of the two rules, that the changes introduced by the new are all in the direction of more carefully safeguarding the employés. Engines and trains, as well as cars, may be put under the danger signal. The old rule protected only car inspectors. The new rule covers all workmen, whether their work be inspection or repair. The old rule protected those covered by it only when at work "under a car." The new one protects them when "under or about" a car. Of a rule which required section foremen to carefully flag their truck and hand cars, the Circuit Court of Appeals in the Eighth Circuit, per Caldwell, Circuit Judge, said:

"These rules are reasonable. They are founded on the experience and observation of those who have had the management and operation of railroads from their creation down to the present time. They are essentially for the protection and safety, not only of the property of the company, but of passengers and of the employés of the company, more especially of section foremen and their men. * * * These rules are not incapable of observance; and obedience to them imposes no unnecessary hardship or burden on section foremen or their men, while it protects them from injury. The time of the men required to comply with these rules is the company's. No loss of wages ensues, no matter how much time is taken up in the observance of the rules. It is no loss or hardship to the men, therefore, to require them to obey rules made in great measure for their own protection. * * * Their nonobservance contributed to, if it did not occasion, the accident. The section foreman was clearly guilty of contributory negligence, which precludes a recovery in this case." Kansas & A. V. R. Co. v. Dye, 70 Fed. 24, 16 C. C. A. 604.

"A company being under a duty to make reasonable rules, it needs hardly be said that there no longer exists any question of its right and power to do so; and that a servant, accepting employment with knowledge of such rules, and especially when his attention is

directed thereto, is under obligation to fully conform to such rules when and so long as they are really maintained in force, and that a servant or employé failing or refusing to observe such rules takes upon himself the risk of the consequences of such disobedience, and is, as matter of law, guilty of negligence, which defeats his right to hold the master liable for an injury of which such negligence is the proximate cause." C. C. A., Sixth Circuit, Lake Erie & W. R. R. v. Craig, 80 Fed. 488, 25 C. C. A. 585.

See, also, C. C. A., Fourth Circuit, Richmond & D. R. Co. v. Finley, 63 Fed. 228, 12 C. C. A. 595; C. C. A., Eighth Circuit, per Brewer, Circuit Justice, Atchison, T. & S. F. R. v. Reesman, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768.

In the case at bar the failure to display the blue flag at the end of the car nearest to the shunting train must be held to have contributed to the accident. No one can say that, with that danger signal in view, either the conductor who cut them out or Sears, the trainman who rode them down, would nevertheless have brought them into violent contact with the cars thus protected. That deceased knew of the rule is indisputable. He had been working as car inspector for several years, and is chargeable with knowledge of the rules contained in the book furnished to him for his guidance. One of plaintiff's witnesses, Green, the car inspector who, in conjunction with deceased, had just finished the inspection of the train on siding No. 2, testified that Elliott had knowledge of the rules because he had heard him talk about them; that he and Elliott knew of the change of rule, because they had blue signals, instead of red; that he had heard Darrow, foreman of the yard, give Elliott instructions in reference to following rule 26, telling him that, "if we went to do anything about a car, to be sure and protect ourselves; if we did anything about a car without protecting ourselves we did it at our risk"; that he had heard Elliott himself give these same instructions to other workmen. Darrow, the foreman, also called for the plaintiff, testified that he had given Elliott those instructions upon an occasion when he had omitted to do something. That the rule was wholly disregarded on the occasion in question is conceded. No blue flag was displayed. Green testified that they both stepped in behind the car upon Elliott's suggestion that they test the knuckle, and that no flag was put upon the car, because the test would be but 10 or 15 seconds' work, and he did not bother with it.

Although an employer may prescribe a printed rule for his workmen to follow, he may nevertheless abrogate or waive it, otherwise than in print. He may knowingly tolerate such a widespread and continuous disobedience to its terms as to make it a dead letter. "To hold that defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it on one day, and know and acquiesce without complaint or objection in the complete disregard of it by the plaintiff and all its other employés associated with him on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty towards the plaintiff

because he disregarded this rule, would be neither good morals nor good law." Northern Pac. R. Co. v. Nickels (C. C. A., Eighth Circuit) 50 Fed. 718, 1 C. C. A. 625. See, also, Lake Erie & W. R. v. Craig (C. C. A., Sixth Circuit) 80 Fed. 488, 25 C. C. A. 585; Whittaker v. D. & H. Co., 126 N. Y. 544, 27 N. E. 1012. In one of these cases it appeared that none of the employés, so far as the knowledge of the witnesses (who were all brakemen and affected by the rule) went, ever obeyed the rule; that at the place where the accident happened they constantly violated it; and that the division superintendent, whose office was located there, had frequently seen them violate it and made no complaint or objection. In another, the rule was not generally observed in the yard where the accident happened, and these violations of the rule were known to the division superintendent and the yardmaster; the former admitting upon the stand that the rule was not always observed. In another case the engineer and others, for a period of at least one year, had been in the habit of disobeying a rule which forbade their placing their engines on the main track and leaving them there while awaiting orders. Where, however, it was testified that it was customary for switchmen to violate a rule, but there was no evidence to show that the custom was known to the officers of the company, a different conclusion was reached. Gleason v. Detroit, G. H. & M. Ry. (C. C. A., Sixth Circuit) 73 Fed. 647, 19 C. C. A. 636. See, also, Atchison, T. & S. F. R. v. Reesman, supra. That the evidence in the case at bar falls far short of what has been held sufficient, in such reported cases as we are referred to or have been able to find, to warrant a finding that an express rule of the company has been abrogated or has become a dead letter, will be evident from the following analysis of the testimony:

On this branch of the case, the first witness called by the plaintiff was Whitman, who had been employed as a car repairer in the Richford yard in the winter of 1888–89, many years before the adoption of rule 26. He testified that, "in case we were going to do any work under a car, we would flag it; but, if we were going to step behind a car for half a minute or so, we wouldn't." This testimony was duly objected to and exception was reserved. It was error to admit it, because it was in no way competent to show practical construction or disobedience of a rule which provided for signaling the doing of work "about a car" by proof of what was done under a rule which was applicable only when the person doing the work was "under the car." And we are not satisfied that the error was harmless. Much more of the same sort of evidence was admitted, but the jury did not have their attention called to the difference between the two rules, nor to the necessity of confining their attention to what was done under the later one. It is a reasonable inference that they understood that the entire body of evidence as to putting danger signals on cars was to be considered by them in determining whether rule 26 had been so uniformly and continuously disregarded in the Richford yard as to warrant a conclusion that the officers of the road acquiesced in its violation.

Plaintiff's next witness was Green, deceased's fellow car inspector,

above referred to. He testified that if they went to do anything about a car, except walking along beside a train that had come in, looking things over, it was the practice and custom to place a flag on the car, even if the job were only to test a knuckle, ten or fifteen seconds' work. "It was our custom," he said, "to put a flag up for five seconds' work." Asked why it was not done this time, he said: "I couldn't tell you why we didn't do it; but we didn't do it." Asked if he ever did it, he said: "Sure we did; sure, yes, sir." Later on, when pressed by counsel, he admitted that two or three times before he might have stepped in to test a knuckle without using the flag, "calculating to protect himself."

Plaintiff's next witness was Braman, who had worked in the yard as a car repairer. He testified that they never used the flags if they were inspecting a car, or simply looking over a car; only used them when working under a car. But the witness stated that his employment of six years or so was somewhere along in 1890, and that he worked only under the old rule 14, and did not have the new rule 26 in his time.

Plaintiff's next witness was Currier, a laboring man, not at the time of the trial employed by the company. He had worked for them as a car repairer. His testimony is very unsatisfactory. On the direct he testified that he had tested himself, and seen many knuckles tested, and never put up a flag, nor knew of one being put up, for knuckle testing; that he never saw a book of rules; he could not read or write. On cross-examination he admitted that from the instructions he received he would feel obliged to use a flag if he was required to go behind a car when a shunting engine was at work. His last service with the company was a year and a half before the trial. This would bring it no further back than August 23, 1902, subsequent to the accident. His other term of service with the company was six years before the trial, which would be in 1898, a considerable time before the rule was changed. There is nothing to show that his narrative deals with operations conducted under rule 26, prior to the accident.

Plaintiff's next witness was Darrow, the yard foreman. He described the method of inspecting a train which has just hauled in, two inspectors commencing at one end of the train and walking alongside of it, one on each side—the same operation which Green described as looking things over, reporting anything they see wrong to the engineer—and testified that in inspecting a train in that way, it was not customary to put up a flag. Further on he testified that the instructions were to use the flags on cars "when doing anything about them, inspecting them, or putting bolts into them, or anything about the car that was in the shape of repair. * * * When they are inspecting, they usually have occasions to repair, and it is necessary to have their flags on them while they are under inspection." He added that he had himself given such instructions to Elliott, and concluded his testimony with the statement that it was the custom and the practice in that yard to put a flag on a car standing alone, when all there was to be done was to test a knuckle. Asked if this was the invariable custom, he said, "I want to make

the exceptions that I caught them once in a while not doing it," on which occasions he reprimanded them and renewed his instructions to them.

Plaintiff's last witness was Martin, who had been a brakeman, and had acted as conductor in the yard several times. Apparently he had never been a car repairer nor a car inspector. He testified that he had often seen knuckles tested, and that he did not know of the flag ever being used in simply testing the knuckle of a car; that he had seen knuckles tested without using flags, "I presume hundreds of times; that is, in my last six or seven years—eight years, something like that." He was in the service of the company 17 or 18 years, and his employment terminated July 4, 1902, not quite a year after the new rule 26 had superseded the old one. Of these "hundreds of times" he makes no discrimination between those which occurred under the old rule and those under the new. His answer would be truthful, although as matter of fact he had not observed more than a half dozen knuckle inspections during his last year of service. His duties did not require him to inspect or repair, or to oversee inspection or repairs. He was a casual observer only, the dates of whose observations were not so specified in the proof as to make them helpful to a conclusion.

No other witnesses to this branch of the case were called by plaintiff, and nothing on this subject was developed from defendant's witnesses. In our opinion there was not sufficient testimony to take the case to the jury on any theory that rule 26 had been waived by the company, or had been so frequently disobeyed, without effort to enforce it, as to have become a dead letter, which the deceased could disregard without assuming the risk resulting from his disobedience of its provisions. The court should have granted defendant's motion to direct a verdict in its favor on the ground that "plaintiff's intestate was acting, at the time of the injury complained of, in disobedience of the rules and instructions of the defendant, which disobedience directly contributed to the injury complained of."

The judgment is reversed, and cause remanded for a new trial.

DIAMOND STONE SAWING MACH. CO. OF NEW YORK v. BROWN et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1905.)

No. 132.

PATENTS—INFRINGEMENT—STONE SAWING MACHINE.

The Williams patent, No. 429,874, for a stone sawing machine, was not anticipated, and discloses invention. Claims 1, 2, and 3 also *held* infringed.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

On appeal from an interlocutory decree for an injunction and an accounting, entered April 26, 1904, sustaining claims 1, 2 and 3 of letters patent, No. 429,874, granted June 10, 1890, to George N. Williams, Jr., for improve-

ments in diamond stone sawing machines. The questions involved in the present controversy have twice been decided by Judge Thomas. The opinion in the present case is reported in (C. C.) 130 Fed. 896. The opinion in the action against Dean is reported in (C. C.) 111 Fed. 380. The opinion in the case of Rudolph v. Williams, involving a consideration of the interference proceedings between the parties to that action, is reported in (C. C.) 62 Fed. 577.

Seabury C. Mastick, for appellants.

Benjamin F. Lee and Charles C. Protheroe, for appellee.

Before TOWNSEND and COXE, Circuit Judges.

PER CURIAM. The judge of the Circuit Court had an unusual opportunity for the thorough understanding of the questions involved in this controversy, for they were fully argued before him upon two occasions and on records substantially similar. We agree with him in the conclusions reached and his careful and exhaustive treatment of the issues involved makes further discussion unprofitable and unnecessary.

The decree is affirmed.

CURTAIN SUPPLY CO. v. KEELER.

(Circuit Court of Appeals, Second Circuit. April 19, 1905.)

No. 178.

PATENTS—INFRINGEMENT—SHADE-HOLDING DEVICE.

The Forsyth patent, No. 559,446, for a shade-holding device, claims 3 and 4, construed, and *held* valid, but not infringed by a device in which the head or contact part is made throughout of one material.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 131 Fed. 871.

This cause comes here on appeal from a decree of the United States Circuit Court for the Southern District of New York dismissing the bill alleging infringement of complainant's patent No. 559,446, granted May 5, 1896, to Henry H. Forsyth and Henry H. Forsyth, Jr., for a shade-holding device.

Charles C. Linthicum, for appellant.

F. S. Duncan, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The patent in suit relates to the class of devices employed on railway cars for holding sliding window shades in the position of adjustment. The prior art provided fixtures which were capable of adjustment by means of friction tips which were usually short and spring-pressed outwardly against the sides of grooves in the window frame. The patentees say as follows:

"The principal difficulty to be overcome in the use of these devices is their tendency to frequent displacement and the liability of the friction ends to

ome out of the grooves owing to the manipulation of the shade by grasping its ower edge by the hand and forcing it up or drawing it down without withrawing the locking-rods against the action of their outwardly-forcing springs. hould the bottom of the curtain be merely displaced and the ends of the xtures remain in the grooves, the shade will retain its angular position with ie older types of tips.

"It is one of the chief objects of this invention to construct a shade-holding echanism which will not only firmly hold the shade against the action of the pring shade roller, but which will also be self-righting or capable of reirning to its proper position when moved therefrom by grasping the end of ie shade either in raising or lowering.

"Another object of this invention is to render possible the use of a leather rictional holding shoe without employing an excessive spring-pressure."

These objects were accomplished by means of a tip holder of conideral length, provided with a plurality of bearing points adacent to the curtain rod, the ends of said tip holder extending beond said bearing surfaces and serving to permit the bottom of he shade to automatically right itself when forced into an angular osition. The means devised to provide this capacity for self-ighting involved invention, and the patented construction is a narked improvement upon those of the prior art and is of great tility. That the patent in suit did not first describe a self-righting xture is shown by the Bailey patent of 1894, which, however, was or a fixture balanced by a weight, and was not practicably operaive. Defendant's fixture is mechanically within the terms of claims and 4, the ones in suit, because it has "heads whose outer faces xtend at right angles to the lower margin of the shade, friction ips carried by the heads and normally projecting beyond the plane f the edges thereof, and said heads having bearing points above and elow the tips, and on which the fixture may rock when force is aplied to the shade near one side thereof," of claim 3, and the "pluality of friction tips * * * providing separated bearings," etc., f claim 4. If the statement in the specification that "the tips nay be made of some other material than leather—e. g., a harder ubstance, which would have of itself less frictional power and a eavier spring pressure"—be applicable to the construction shown n Figs. 2 and 4 of the patent, the claims in suit might be so conrued as to cover defendant's heads. This will more clearly apear by considering the friction tips in Fig. 4 vertically extended o the extreme limit of the head, the result of which is a device dentical with that used by defendant. The construction quoted bove, however, is only suggested in connection with the use of nti-friction rollers. The patentees, after fully describing the genral features of their invention, say, in a separate paragraph, as ollows:

"In some cases * * * it may be found expedient to journal anti-friction rollers in the extended ends of the tip-holders. * * * When these ollers are employed, the friction of the extended ends upon the walls of the roove when the shade is tilted into an abnormal position is reduced to a inimum and the shade will right itself, even though the spring pressure e excessive, owing to carelessness or unskillfulness in construction."

Then follows the statement first quoted. That the use of a harder naterial than leather is only contemplated when rollers are used

is clear from the concluding sentence of the foregoing paragraph, which is as follows:

"Thus the provision of the anti-friction rollers permits a wider range of selection of material and compensates for carelessness or lack of skill in construction."

The whole patent is predicated upon the accomplishment of "the feature of self-righting, which forms the important part of our invention"—a construction in which there is the antithesis between one set of friction tips normally in contact with the bottom of the grooves and another set of nonfrictional bearing points normally out of contact. Thus "the metal surfaces" of these latter points are described as "having small frictional holding power," the tips as "friction tips of leather," and the two are contrasted thus: "The metal has very slight frictional power as compared with the leather." And complainant's expert says:

"The instructions all through the patent are undoubtedly that by selecting a good frictional material for the holding tips and good anti-frictional material for the rocking extensions, good and satisfactory results are reached."

It is clear, therefore, as stated by defendant's expert, that "this difference in the frictional holding power of the two sets of contacts is the mechanical basis and essence of the invention of the patent in suit."

That the patentees did not conceive of or disclose a head formed out of solid projections of the same metal is further indicated by the provision in claim 4 that the tips shall be "mounted in said heads," and by the fact that every friction tip described or illustrated in the patent is stated or shown as made of separate pieces of leather or rubber inserted in the head. We conclude, therefore, that the defendant's fixture, comprising a head constructed throughout of one material, does not infringe the claims in suit.

The decree is affirmed, with costs.

AMERICAN ELECTRIC NOVELTY & MFG. CO. v. HOWARD ELECTRIC NOVELTY CO.

SAME v. STEIN & LANGLOS ELECTRIC MFG. CO.

(Circuit Court of Appeals, Second Circuit. April 19, 1905.)

No. 182.

1. PATENTS—INVENTION—ELECTRIC HAND LAMP.
   The Misell patent, No. 617,592, for an electric device used in a hand lamp, is void for lack of invention.

2. SAME—ELECTRIC BATTERY.
   The Hoggson patent, No. 520,429, for an electric battery which is portable and adapted to a number of uses where a small battery is desired, was not anticipated, and discloses patentable invention. While the invention is not a fundamental one, the device is useful, and within the narrow sphere of its usefulness the patent is entitled to liberal treatment and a limited range of equivalents. Also *held* infringed.

Appeals from the Circuit Court of the United States for the Southern District of New York.

On appeal from final decrees of the Circuit Court of the Southern District of New York, dismissing bills for the infringement of letters patent, No. 520,429, granted to Hoggson, May 29, 1894, and No. 617,592, granted to Misell, January 10, 1899, for an electric battery and an electric device, respectively. The opinion of the Circuit Court will be found at 131 Fed. 495.

Arthur v. Briesen, for appellant.

John T. Booth, Edward S. Beach, and N. L. Frothingham, for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. We fully agree with the judge of the Circuit Court in thinking that the prior decisions of this court and of the Circuit Court in the Newgold Case, 108 Fed. 957; Id., 113 Fed. 877, 51 C. C. A. 501, are conclusive as to the invalidity of the Misell patent. In that case the third claim only was involved. In the present case the first, second and fourth claims are involved, but these claims contain no element which is not directly or by implication found in the third claim. That claim having been declared invalid we think the other claims must fall with it. No patentably novel feature is disclosed in any of them.

The Hoggson patent for an electric battery remains to be considered. The object of the patentee was to provide a light, portable, cheap and easily constructed receptacle for holding a battery having a number of cells. Other features of the device are that it can be handled readily, transported and used in various ways as, for instance, in the leg of a table or other similar upright, without a special support therefor. An alleged novel feature is that electrical connections between the battery cells is provided without the use of bolts, screws or wires so that the cells may be removed and fresh ones substituted expeditiously and without interference with the work of the battery. The cells may be wet or dry, with metallic or carbon jar, thus enabling the positive pole of one cell to be connected with the negative pole of the next cell by means of a metallic clamp of springy material, which rests upon the terminal of the cell beneath. The lowermost cell rests upon and is in contact with a spring plate, which is secured to a metallic spider, which constitutes the bottom of the battery holder. A rivet unites and electrically connects the spring plate, spider and one or more conducting wires. The battery holder consists of a tube of insulating material, the metallic spider and a top ring. The conducting wires extend from the rivet to the periphery of the spider and from thence on the opposite side of the holder to the ring at the top, thus acting as conductors of electricity and also serving to unite the parts. The top ring is provided with a terminal, which, with the terminal of the top cell, are the points with which the wires which conduct the current connect with the battery. One of these wires is provided with a thimble-shaped part, which can be readily slipped on the terminal on the top ring and the other wire is provided with a spring clamp which is sprung on the

other terminal. The spring clamps are said to be desirable because they form good connections and are not likely to get loose when expanded, contracted or vibrated, which is apt to be the case when nuts, bolts or screws are employed.

The patent has four claims, all of which are involved. They are as follows:

"1. The herein described electric battery the same consisting of the vertical series of cells, the containing-tube of non-conductor material, the plates at the ends respectively of said tube, and the wires on the opposite sides of said tube electrically connected to the upper case-plate, said cells being electrically connected with each other in series, the lowermost cell being electrically connected with said wires, and the uppermost cell and the upper case-plate being respectively provided with terminals, substantially as described.

"2. The combination of the cells arranged in a vertical series and electrically-connected as described, the case C having the tubular part c^1 and the end plates c and c^2, the spring plate B, secured to plate c by the bolt, D, and the wires E, E, on the opposite side of the tube substantially as described.

"3. A battery tube of non conductor material, the plates at the end of said tube, the upper of conducting material, and the wires uniting said tube and plates, said wire made of conductor material and electrically connected to the upper plate and provided with means for engaging the terminal of the lowermost cell.

"4. In an electric battery having cells arranged in series and connected by adjacent terminals the combination of the spring-clamp a the cell above or beyond said clamp, and the terminal a^1, of the adjoining cell, substantially as described."

The defendants insist that the claims are invalid for lack of patentability and that in no event do the defendants infringe. No reference was cited against the application in the Patent Office. The only changes were in compliance with the suggestions of the examiner to make the claims more perspicuous and complete. The complainant is not seeking to include anything which the applicant abandoned in the office in order to secure the granting of the patent.

The prior art, so far as appears from the record, is confined to three patents; one United States patent and two English patents. The first of these was granted to Roovers, December 29, 1891, for an electric trick cane or toy. The patentees say:

"To make the electrical apparatus operative, the cane will be placed upon the ground and the pin pulled upward. When this is done a shock will be obtained from the induction-coil. Of course it will be better to place the bottom of the cane in some moist place to obtain good contact."

The ambition of the inventors, though not particularly lofty, culminated in seeming failure and disappointment. The electric cane was not a success and the public concluded to get on without it. The price was prohibitive and only about half a dozen canes were made in all. The specification describes an exceedingly complicated device and we think the preponderance of the testimony is to the effect that it was an inoperative device; certainly so, if applied to the lamps in controversy. It does not have the non-conducting containing holder, the end plates, the terminals, the spring clamps or the wires on opposite sides of the holder, as shown in the Hoggson patent.

Levi's English patent of 1892 is also for a walking stick and other similar articles, such as alpenstocks, riding whips and umbrellas. This is a much closer reference than the Roovers patent, but it falls far short of anticipating, for the reason that it shows the old wire and binding post connections. As stated by complainant's expert:

"A mere glance at the drawings of the Levi patent will show that the Levi battery cells with their surrounding paper wrapper could not be placed into the handle part of a hand lamp and there perform their functions, unless the wire connections were first made. How these are to be made, is not stated."

Von Horvath's patent was also granted in England, in 1892, for a walking stick having an incandescence lamp in its head. This construction is sufficiently described by the first claim, which is as follows:

"1. A walking stick having in its head or knob an incandescence lamp whose filament connects together the poles of a galvanic cell or battery arranged inside the stick, the parts being so arranged that when the stick is carried in an upright position, the liquid conductor does not reach the electrodes but when the stick is inclined or inverted the liquid will come into contact with the electrodes whereby the incandescence lamp will be caused to glow substantially as described and illustrated."

That this is not the structure in suit is apparent even to a layman. We cannot resist the conclusion that Hoggson has made a new, useful and patentable advance in the art; he has constructed a compact, durable, cheap, efficient and simple battery which can be safely transported and easily connected with the desired translating device. When this is accomplished it operates at once. It is a device which without any change can, for instance, be placed in the lamps of the complainant and defendants and immediately perform its functions. We are unable to find a structure containing such a combination in the prior art. It is in no sense a fundamental invention but within the narrow sphere of its usefulness it is entitled to liberal treatment and a limited range of equivalents.

The combination of the first claim contains the following elements: First. The vertical series of cells. Second. The containing tube of nonconductor material. Third. The plates at the ends respectively of said tube. Fourth. The wires on the opposite sides of said tube, the cells electrically connected with each other in series. Fifth. The lowermost cell being electrically connected with said wires. Sixth. The uppermost cell and the upper case-plate being respectively provided with terminals. That the defendants' batteries embody this combination cannot be controverted unless the claim be destroyed by limitations not required by anything in the specification, or the prior art. The same is true of the other claims of the patent. We think the assignments of error sufficiently present the complainant's contention that all of the claims of the Hoggson patent are valid.

It follows that the decree of the Circuit Court must be reversed without costs, and the cause is remanded to the Circuit Court with instructions to enter a decree upon the claims of the Hoggson patent for an injunction and an accounting, but without costs.

THOMSON-HOUSTON ELECTRIC CO. v. DAYTON FAN & MOTOR CO. et al.

(Circuit Court, S. D. Ohio, W. D. November 2, 1903.)

No. 5,209.

1. PATENTS—INFRINGEMENT—ELECTRIC MOTORS.
The Thomson patent, No. 363,186, for an electric motor, *held* valid, as against the defense of insufficiency of description, and also infringed.

2. SAME.
The Thomson & Wightman patent, No. 399,801, and the Thomson patent, No. 428,650, both for improvements on the electromotor of the prior Thomson patent, No. 363,186, construed, and both *held* infringed.

In Equity. Suit for infringement of letters patent No. 363,186, for an electric motor, granted to Elihu Thomson May 17, 1887; letters patent No. 399,801, granted to Thomson & Wightman March 19, 1889, and No. 428,650, to Thomson, May 27, 1890—both for improvements on such motor. On final hearing.

Fish, Richardson & Storrow and Morrison R. Waite, for complainant.

Albert H. Walker, for defendants.

THOMPSON, District Judge. This is a suit to enjoin the infringement of letters patent Nos. 363,186, 399,801, and 428,650.

1. Letters patent No. 363,186 were granted to Elihu Thomson, for an alternating-current motor device, May 17, 1887, upon an application filed January 26, 1887. The claims of this patent, known in this litigation as the first Thomson patent, alleged to have been infringed by the defendants, are as follows:

"(1) An electromotor device for producing continuous movement in the same direction, consisting, essentially, of a closed circuit conductor such as described, and an inductive agent of alternately opposite polarity acting on said conductor, said conductor and inducing agent, one or both, being movable, as and for the purpose set forth.

"(2) An electromotor device consisting, essentially, of an endless conductor of copper or other diamagnetic material, as described, and an inductor acting on the same in the manner described to set up rapid induced alternations of current, whereby a continuous repulsion and consequent movement of the parts away from one another may be produced.

"(3) An electromotor device consisting, essentially, of a means for producing rapid alternations of electric or magnetic polarity, and a closed-circuit conductor arranged in inductive relation to the same, and adapted, as described, to carry induced currents, whose self-induction will cause them to be carried over to the phase of active repulsion by the inductor.

"(4) An electromotor device consisting, essentially, of a coil carrying an alternating electric current, a closed-circuit conductor arranged within the inductive influence of the magnetic field excited by said alternations, and an iron core for said exciting-coil.

"(5) The combination, with an alternating-current conductor, of a laminated or subdivided closed-circuit conductor of high conductivity and self-induction, arranged in inductive relation to the magnetic field excited by the conductor carrying the alternating current one or both of said conductors being properly mounted to move with relation to one another under the repulsive action produced through the alternating and induced currents."

These claims, and paragraphs 2, 3, 4, 5, 7, and 8 of the specification of the patent, fully describe the invention. The paragraphs of the specification referred to are as follows:

"My invention relates to a means for producing motion by the agency of alternating electric currents or alternating magnetic fields.

"I have discovered that, if a closed-circuit conductor of sufficiently low resistance and sufficient self-induction be placed in such relation to an alternating-current circuit or to an alternating magnetic field, alternating currents of considerable self-inductive power will be induced in said conductor, and if said conductor and the device, whether coil or magnet, acting inductively on the same, be properly mounted, so as to be movable, a continuous motion in the same direction may be produced, similar to that produced by the attraction of a core or armature by the agency of a continuous current, to the deflection of an iron needle by a continuous current, or to the continuous rotation of an armature-coil, as in the case of a continuous-current electric motor.

"My invention may be carried out by the employment of an alternating-current coil acting directly to induce currents in the closed-circuit conductor; or said alternating-current coil may be utilized in producing rapid alternations of magnetic polarity in a mass of iron, which mass, or the alternating magnetic field produced by said mass, may act on the closed-circuit conductor in proper way to set up alternating currents in the latter, the resultant motive effect of which I find to be a tendency to continuous movement of the two parts with relation to one another, instead of a movement first in one and then in the other direction; or the alternations of magnetic state in the inductive field of the closed-circuit might be produced in any other way, instead of by a coil directly or a stationary core of iron, the only conditions being that the magnetic fields of alternately-opposite sign shall be of proper kind to set up strong induced currents in the closed conductor, and that the alternations shall be of sufficient rapidity to result in a considerable lapping of each induced current through self-induction upon the magnetic field by which the succeeding induced current is set up.

"In the simplest form of my invention, I employ a coil of wire carrying an alternating current, and a closed-circuit conductor placed in proper relation to the coil to have alternating currents set up in it. I find that the effect of the alternating currents in the coil of wire is to cause a continuous strong repulsion of the closed-circuit conductor, due to the self-induction of the induced currents and their consequent tendency to be prolonged beyond the point of change of the inducing agent.

* * * * * * * * * * * * *

"Referring to Fig. 1, P indicates a coil of insulated wire arranged to be traversed by alternating currents of moderate rapidity. C indicates an outer cylinder or tube of good conducting material, such as copper. The conductor, C, or the coil, P, being mounted so as to be movable, it will be found that the passage of the alternating currents in P will cause a mutual repulsion in the directions indicated by the arrows. Such repulsion will be absent only when the center of C is exactly coincident with the center of P, so that there will be an equality of repulsive effects in both directions. The closed conductor or casing, C, may be made quite thick, so as to carry a very strong induced current. A vigorous thrust may then be obtained by the employment of strong alternating currents in the coil, P.

"The action is, I believe, due to the self-induction of the currents induced in the conductor, C, C, whereby such currents are continued beyond the point of change of intensity and polarity in the inducing alternating currents circulating in coil, P, so that where attraction would result repulsion is produced, such repulsion occurring at and near the time of maximum currents in the coil, P, and conductor, C, while whatever attractions occur exist near the zero of currents in both C and P. If an iron core, I, of iron wires or sheet iron, be added, as indicated in Fig. 2, the effects will be greatly intensified."

The remainder of the specification points out how the device may be made and used.

Of the defenses set up in the answer, but two are relied upon, namely, first, that the description of the invention in the specification of the patent is insufficient to enable any person skilled in the art to make or use the same; second, noninfringement.

In support of the first of these defenses it is urged that the case, so far as it is founded upon letters patent No. 363,186—

"Rests upon the device shown in figure 15 of the drawings of the patent, and upon claims 1, 2, 3, 5, and 6 of the patent, and upon the following paragraphs of the specification of the patent:

"'A motion of rotation may be obtained by the devices already described by mounting the inducing coil, or the coil or the conductor in which the induced currents are excited on an axis, as indicated in Fig. 15, where the closed-circuit-conductor, C, C', is mounted on an axis (indicated at T).

"'When alternating currents circulate in coil, P, the conductor, C, will be deflected to a position at right angles to the plane of the coil, P, as indicated by the dotted lines, K, K. The coil, P, might be used as a closed-circuit conductor, and alternating currents passed through the coil, C, with a similar result.'

* * * * * * * * * * * * *

"If the alternating-current coil and the closed-circuit conductor or coils or their current planes exactly coincide, they will remain at rest; but a very slight displacement will give rise to a deflection to one side or the other, which will be continued until the coils are at right angles to one another."

It is further urged that a device made in conformity with that of figure 15 will not be operative, and that the armature, if put in motion by external means, will not revolve continuously under the influence of the alternating current in the magnet coil, P, but will turn only through a quarter of a revolution, and then stop. On the other hand, the claim of the complainant is that, if given a start sufficiently strong to carry it past the "dead point," it will continue to run and rotate indefinitely under the influence of the alternating current in the magnet coil, P. To determine the fact thus put in issue, the defendants caused three machines to be made in substantial accordance, as it is claimed, with Fig. 15 of the patent, and these machines were introduced in evidence, and the makers thereof testified that when tested they were found to be inoperative; that, although given a strong start, they would rotate only for a short time, and then stop. The complainant made four such machines, and the maker testified that, when given a sufficient start, they ran continuously as long as the alternating current was maintained in the field coil. Two of these machines (complainant's Exhibit Motor No. 4 and defendant's Exhibit Parry's Apparatus) are conceded by both parties to be "made in undebatable conformity with that of figure 15 of the patent"; and at the hearing these machines were exhibited to the court, and, the current being applied, both were successfully operated at a high rate of speed. The evidence therefore fails to support this defense.

But the defendant denies that its device, complainant's Exhibit Defendant's Motor, infringes letters patent No. 363,186. The device of the defendant is an alternating current electric motor of the induction type. It has a coil carrying an alternating electric current; a closed-circuit conductor of copper, or, rather, a series of such conductors, within the meaning of claim 5 of the patent;

ductive agent of alternately opposite polarity acting on such ictor, the conductor being movable rotatably; and these are s for producing induced circuits of rapid alternations, whose nduction will cause them to be carried over to the phase of repulsion by the inductor. The iron core for the exciting vill be found in the polar projections of the field magnet. In , it embraces all the elements of claims 1, 2, 3, 4, and 5 of the t, and there can be no classification of induction motors, such suggested by counsel for the defendant, which would relieve efendant from liability for the infringement of these claims.

t it is alleged that the facts relied upon to show infringement equally show infringement of the Tesla patents, Nos. 511,559 511,560, and that this court has heretofore found that the de- nt's device infringes these patents; the suggestion being that ling in favor of the complainants in this case would be incon- nt with the former finding. No defense is set up in the answer rrant this suggestion, but it could not be entertained if it were erly before the court. Letters patent Nos. 511,559 and 511,560 ot necessarily employ the Thomson invention. The purpose of of these patents is to start a single-phase motor by employ- he Tesla field of rotating polarity, and, when given speed is ned, to continue the rotation by alternating the poles; and in ther, to distribute the currents to the motor circuits by the a method of derivation from a single original source—a single of transmission from the generator—and these purposes can ccomplished without infringement of the Thomson patent.

Letters patent Nos. 399,801, issued to Thomson & Wightman, 428,650, issued to Elihu Thomson (the first dated March 19, and the second dated May 27, 1890), in the language of com- ant's counsel—

te to appliances auxiliary to, or improvements upon, those used in ef- g rotation in accordance with the invention of the first Thomson patent it, and adapted to act to give a directive start to the rotation of the ble member of the motor."

he claims of these patents alleged to have been infringed are ns 12 of No. 399,801, which reads as follows:

2) The combination, with an alternating inductor, of a local phase dis- or or modifier and an armature subjected to the simultaneous action of the tor and the distorter or modifier."

nd claims 1, 2, 5, and 6 of No. 428,650, which read as follows:

) The combination, with an alternating inductor, of an induction modi- r retarder located to one side of the general magnetic axis, and serving oduce a compound field of alternating induction whose parts differ or are aced in phase.

) The herein-described method of producing two sets of magnetic alter- ns differing in phase at the free pole of an alternating coil or magnet, sting in shading or inductively retarding the alternations in a part of magnetic field to one side of the general magnetic axis, as and for the ose described.

* * * * * * * * * * * *

) The combination, with a magnet producing an alternating magnetic having parts lying in the same general plane transverse to the general

magnetic axis, differing or displaced in their phases of alternations, of an armature in the field of inductive influence of said magnetic field, as and for the purpose described.

"(6) The combination, with an alternating magnetic field, of a modifier or retarder operating upon a portion of the field to one side of the magnetic axis to produce a lagging in the alternations, and an armature placed within the compound field thus produced, which field has, as described, adjoining portions in which the alternations have their phases displaced."

The Thomson & Wightman device employs two field currents, alternating currents, one transmitted from an external source to coil, P, by which the other is induced in closed-circuit coil, S. The coil or magnet, P, is designated as the inductor, and the coil, S, as the modifier or retarder. Both coils are wound on the same pole-piece. The two currents differ in phase, owing to the self-induction of the induced current. "The consequence of this is that the alternations of the inductive field, of whatever nature that field may be, over or in proximity to the conductor, S, will be retarded from the time of development of the field of the inductor at those points not influenced by said conductor, S, or where the coil, S, is not applied, so that in effect there is produced in juxtaposition a compound field of induction, having alternations with a displaced development of field or phase. The retarder, S, is preferably applied, as shown, at or near one end of the inductor, P. The effect of the retarder applied to a part of the inductor as shown may also be considered as resulting in the production of a consequent pole or magnetic pole, which is the resultant of the currents in the inductive band or circuit, S, and in the coil, P, such magnetic pole, however, changing constantly in intensity or position, while at the same time the magnetic effects develop themselves during the flow of alternating currents in the coil, P, in different times or intensities at various parts of said coil." Now, if an armature, such as is employed by the defendants in their device, "be mounted so as to be free to turn in a position where it will be subjected to the action of the two parts of alternating field produced by the modifying action of the conductor, S, and by the operations of the portions of conductor, P, not subjected to the action of S, or subjected in a less degree to such action, currents will be induced" in the armature, which will result in the rotation of the same. By this method the equivalent of the Tesla field of rotating polarity, or progressive shifting of the poles, is produced; but the Tesla method, as shown in letters patent Nos. 382,279 and 555,190, for the individual and independent action of the field currents upon the armature, is not found in the Thomson & Wightman device, nor is the compound simultaneous action of the field currents upon the armature of the Thomson & Wightman device found in the Tesla method, nor is the winding of the coils on the same pole-piece found in the Tesla method.

The characteristic and essential features of the Thomson & Wightman invention are the overlapping or superposition of the two coils on the same magnet, and the compound simultaneous action of the fluxes upon the armature, as distinguished from the winding of the coils on separate pole-pieces, and the individual and

dent action of the fluxes in the Tesla devices. The Thom-
Vightman method is used in the defendants' device, and they
secure a material advantage, by being able to employ all
es after the starting circuit referred to by complainant's
as the "green circuit" is cut out, whereas, if they followed
la method, they would be able to employ but one-half of the
The defendants' device employs the Tesla field of rotating
, or the equivalent thereof, but uses the Thomson & Wight-
ethod of obtaining it; and the defendants thereby secure
ial advantage not known to the Tesla method, and cannot
iability for the infringement upon the ground that they have
ore been held liable for the infringement of the Tesla patents.
cond Thomson patent is for an improvement upon the
on & Wightman invention, which consists essentially in
g an induction modifier or retarder to a part of the field of
on lying to one side of the general magnetic axis of the in-

defendants seek to distinguish the method of their device
at of the Thomson & Wightman and the second Thomson
upon the ground that the current in the starting coils is
uced by the current flowing in the primary coils, which com-
's expert designates the "blue coils," but is derived from
rrent by the Tesla method, whereas in the device of the
on & Wightman and the second Thomson patents the current
nodifying coil is induced by the primary current from the
or. This method of supplying the current for the modifier,
r, is not an essential feature of the invention of Thomson
ntman and the second Thomson patents. The inventions
by these patents assume the presence of the current in the
r through some or any of the then well-known methods of
ng it, and the choice of one rather than another will neither
nor detract from the invention. The methods by induction
derivation were then known to the art, and the inventors
ee to choose either one.
cree will be entered for the complainant as prayed in the

WEST BOYLSTON MFG. CO. et al. v. WALLACE.

(Circuit Court, D. Massachusetts. May 10, 1905.)

No. 1,725.

—TENTING CLOTH—VALIDITY—NOVELTY.

tent No. 718,499, for tenting cloth, to be used to cover tobacco and
plants, *held* void for want of novelty, both in the elements used
nstitute the product, and in the combination thereof.

e E. Hart, for complainants.
rdson, Herrick & Neave, for defendant.

E, District Judge. This suit in equity is brought for the
ment of letters patent No. 718,499, issued to Ariel Mitchelsen

on January 13, 1903, for tenting cloth. The invention relates to the growing of tobacco, an industry which is now carried on in the Connecticut Valley. In this industry, it becomes necessary to cover the tobacco plants with tenting cloth. It has been found that the soil of certain parts of the Connecticut Valley is adapted to the raising of a tobacco leaf for wrapper purposes. To get the best results, it has been found necessary to grow the tobacco from which this leaf is produced under a cover, in order to afford a protection to the crop against the effects of the severe wind, hail, and rain storms which frequent the Connecticut Valley. A cloth was required to cover a large field of tobacco. The principal requirements of the cloth were that it should permit free access of the sun and moisture to the plants underneath; that it should distribute the moisture evenly over the ground, and at the same time be strong enough to act as a substantial protection to the crop in times of storm. For this purpose cheese cloth was first used. This was not heavy enough, and afterwards a cloth known to the trade as "G. B. Cloth" was used, which was somewhat heavier and stronger than the cheese cloth, and of more open mesh. This G. B. cloth was a staple article of manufacture used by buckram makers in manufacturing hats and caps, and was not altered in any way when used to cover tobacco fields. The method of covering the field with tenting cloth is substantially as follows: A framework is erected, comprising rows of wooden posts set 16½ feet apart, and extending 9 feet above the ground. Stringers set on edge are secured to the tops of the posts in each row. The cloth is woven of such a width that when drawn taut its edges will come on the tops of the stringers, where they are secured by staples or by looping the edges over hooks. Around the sides of the field a baseboard is provided, and cloth is run from the top of the tent to this baseboard, forming side walls.

The patent in suit is described in the specification as being for "certain new and useful improvements in tenting cloths, by which term is meant cloth adaptable for use as a protecting cover over fruits, vegetables, etc., which are grown out of doors, and particularly for a cover for growing what is known as 'shade-grown tobacco.' * * * The cloth, which is especially prepared for these uses, is manufactured specially of extra width, and is put up in considerable lengths, supported on a framework of some sort."

To show precisely to what end the patentee was working in order to produce the product which he has patented, we quote quite fully from the specification:

"The cloth which up to this time has been used for this purpose is in a majority of cases what is commonly known as 'cheese cloth,' being a loosely woven fabric. It has been found in practice that this cloth is not practical for such uses, for the reason that it is not strong enough to resist the excessive strains put upon it in times of wind, rain, or hail storms. The covers, when made of this material, have in many cases been entirely ruined, for the reason that, if a small tear is started, there is nothing to stop its being enlarged when the wind gets under the cover. * * * But in addition to the storm-resisting feature, which is necessary in tenting cloths, there are other important qualities which it is absolutely essential the covers shall have to be adaptable for this use. They must be loosely woven, so as

the penetration of the sun and the sieving of the water equally over
d, and also hold the sun's warmth, in order to bring about, as near
le, tropical conditions. * * * These serious defects in the fa-
ch are used at the present time as tenting cloths have deterred
m undertaking the growing of plants under cover, because of the
of the destruction of their covers, and those who have undertaken
ng under covers have been subject to so much extra expense on ac-
the destruction of their covers that the profits on their labors have
erially reduced. Having knowledge from actual experience of the
fects of the cloth used at the present time for tenting purposes, I
ised the herein described and illustrated tenting cloth, which has
necessary features as to the admission of sun, rain, etc., and which
y strengthened, so that it will successfully withstand unusual strains
it in times of storms. * * * The main body of my fabric is
oven, as shown at C, in order to permit of the admission, under
nditions, of sun and rain. * * * One part of my invention re-
the peculiar construction of the selvage edges, as is clearly illus-
the drawing. Instead of the ordinary selvage, as the term is
used, I make a selvage of substantial breadth at each edge of the
in this selvage I incorporate a number of cords or threads, which
bstantially larger size than the threads of the fabric. These cords
rably arranged near one another, as shown at E, and are woven
fabric. It should be understood that these cords are distinct and
from the selvage proper. At intervals along the fabric it is strength-
ncreasing the number of weft threads as indicated at G. The ends
veft threads are woven about the cords, E, which form a substantial
support and hold them. The effect of this construction is to pro-
bric which in the main is loosely woven for the purposes already
-especially for the diffusion of light and the spreading of the rain
ich is strengthened in a peculiar manner in rectangular sections.
icular advantage derived in the use of such a tenting cloth arises
fact that when a small tear occurs in any one of the rectangular
and is enlarged by any extraordinary strain, it can extend only as
e selvage edges or the strengthened weft sections. When the tear
he strengthened weft sections, of course there is considerable strain
on these weft threads; but they, being woven about the cords in
ge, are firmly anchored and capable of withstanding the strain."

ole claim in the patent is as follows:

erein-described improved tenting cloth, having a body part formed
woven warp and weft threads, said weft threads being increased
r at intervals, the warp threads being increased in number at the
the fabric, and strengthening cords of greater size than the said
eads arranged at the edges of the fabric."

our elements of the claim, then, are, first, the body por-
loosely woven warp and weft threads; second, the weft
increased in number at intervals, so as to form strips of
strength than the body of the material; third, the warp
increased in number at the edges of the fabric to make a
ial selvage; fourth, the strengthening cords of greater size
warp threads, arranged at the edges of the fabric.

rincipal defense relied upon is that the patent is devoid of
The patent is upon a product or structure. It is urged
s structure does not present any features which are novel,
of the cloths which had been in use at the time of the issue
atent. The testimony tends to show that there had been
the neighborhood of the patentee, and with his knowledge,
woven cloth with increased warp threads, forming a selvage,
t this selvage was sewn around a strengthening cord.

This selvage was of a narrow character, but it is urged that the patent does not call for any particular width of selvage. The testimony shows that the cloth in use contained every substantial feature of the patentee's cloth, excepting the strengthening strips across the weft. Another feature of the tenting cloth which constitutes the product of the patent is the strengthening cords in the selvage, of larger size than the warp threads. It is urged that these strengthening cords have no other function than the strengthening cord around which the selvage was sewn in the cloth in use before the issue of the patent.

By examination of the progress of the patent through the Patent Office, it appears that the claim as originally presented in the patent was at first rejected on reference to a former British patent. The words upon which the rejection was based were in claim 3:

"A loose woven textile fabric having cords incorporated in the selvage, and also having at intervals an increased number of weft threads engaging such cords, substantially as described."

The claim was finally approved and the patent granted upon the claim being amended so as to specify that strengthening cords are of "greater size than the said warp threads." It is urged in behalf of the defendant that this action of the Patent Office makes it apparent that an increase in number or density or closeness of the warp threads, without an increase in size, as compared with those used in the main body of the fabric, is not patentable, especially in view of the state of previous knowledge upon the subject, as shown by former patents, and as shown by the examination of former fabrics. It is urged that such increase in number or density or closeness of the warp threads is not the same as cords of greater size than the warp threads, even though the increased number or density of the warp threads may serve functionally the same purpose of increasing the strength of the fabric at the point where they are used. In reference to the use of strengthening cords in the selvage, the testimony shows that Mr. Mitchelsen, the patentee, was fully advised before obtaining his patent that the use of a cord in the edge of tenting cloth was old. There can be no doubt but that one Pinney used the G. B. cloth with cords arranged at the edge as early as April, 1901.

With regard to the increase in number and density or closeness of the weft threads, thereby making strips or bands of increased strength across the cloth, it is insisted that this use is old, it being found in mosquito netting and in other fabrics brought before us.

We cannot escape the conclusion that every element of the tenting cloth which constitutes the product for which the patent in suit is obtained is old. Is there such a combination of old elements in the product brought before us as to produce a new result?

In the history of the art of growing tobacco under cover, cheese cloth was at first used. Afterwards the G. B. cloth was the fabric employed by tobacco growers for this purpose. This cloth was an improvement upon cheese cloth. The fabric brought before us in the patent in suit is an improvement upon G. B. cloth. But

mprovement in an article is not patentable. Such improve- nust be the product of an original conception and of an in- thought. Is the fabric before us the product of an orig- nception and of an inventive thought? In this case, a com- n patent for a product is claimed. The combination is, as e said, first, the loosely woven warp and weft threads form- e body of the fabric; second, the weft threads increased ıber at intervals, forming strengthening bands across the third, the warp threads increased in number at the edges, g a stronger selvage; and, fourth, the strengthening cords ter size at the edges of the fabric. It is apparent that every t in this combination is old. Do the old elements, when t together, produce a new result? This test may be ap- o a patent on a machine more readily than in case of a t patent. It can generally be decided whether any old ele- n a machine, when brought in combination with other ele- continues to perform its old function, or whether it pro- a new result. But in case of a product, namely, of a constituting a patent, it can never be invention to add an t like a strengthening cross-band which simply performs its ıction. Such strengthening bands across a fabric were un- ɔnably old. It is difficult to see how they achieve any new in the combination in which they are placed in the patent

So with reference to the larger strengthening cords in the . This introduces no new element; and we cannot see how mbination of this element with the other elements of the produces any new result. Undoubtedly an improvement e in the cloth, in that it is made convenient for use over elds, covering many acres. In Dalton v. Jennings, 93 U. S. L. Ed. 925, the patent was for an alleged improvement in hair nets. The court said:

> "e netting patented by appellant had been produced by him for the ne, it would be difficult to find in it, or in the process by which it , anything deserving the name of invention, within the meaning of ent law. If the spaces between the threads of the netting were too hereby permitting the escape of the hair, there is nothing new in that making them smaller would remedy the evil. If the size of ads then in use was too large for beauty, neither discovery nor in- were necessary to reduce it. There is nothing new in the number of ıreads, in their size, nor in the manner in which they are crossed nected. Where, then, is the invention? Is it in the fact that some threads are coarser and some of finer size? This can hardly be in- since gauze and netting have been made with threads or cords ual size time out of mind, and with varying and equal or unequal between them. * * * It is impossible to call the hair net or net- which the appellant claims a patent a new invention, or any inven- his."

Iailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241, the struc- efore the court was a stove; and the court held that it ɔt invention to merely bring together old devices in a stove, ıt it was mere aggregation. Mr. Justice Strong, speaking for urt, says:

> "w combination, if it produces new and useful results, is patentable, all the constituents of the combination were well known and in com-

mon use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. * * * Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without the production of something novel, is not invention."

In the Faber India Rubber Pencil Case, 92 U. S. 357, 23 L. Ed. 724, Mr. Justice Hunt says:

"The combination, to be patentable, must produce a different force or effect or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements. An instance and an illustration are found in the discovery that, by the use of sulphur mixed with India rubber, the rubber could be vulcanized, and that without this agent the rubber could not be vulcanized. The combination of the two produced a result or an article entirely different from that before in use."

This illustration made by Mr. Justice Hunt affords a typical instance of a product patent, where a combination is found to be patentable because it produces an entirely different result or article from anything which had been before in use. In Florsheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574, the Supreme Court held that an improvement in corsets, bringing together various old elements, was not a patentable invention. Mr. Justice Lamar says:

"The argument is advanced that the combination in this corset of the prior inventions secured and put into use by prior patents, making it a superior and cheaper article, is itself a patentable invention. We are unable to agree with appellant's counsel on this point."

The court in that case cites Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647—a leading case upon a patent for a structure, where the court held an aggregation of old parts not to involve any new principle, and not to be patentable. In Dalby v. Lynes (C. C.) 64 Fed. 376, Judge Putnam, in this circuit, held a patent for an improvement in underwear to be invalid for want of invention. He says:

"A novelty involving a state of art so universal and common as the making an adjustment of clothing must be of a radical character to overcome the presumption against its patentability."

In Gandy v. Main Belting Co., 143 U. S. 587, 12 Sup. Ct. 598, 36 L. Ed. 272, a patent was sustained by the Supreme Court upon an improved belt for driving machinery, and on an improved mechanical process of manufacturing the belt. Prior to the invention, ordinary sail canvas was used for belting. This was found to be impractical on account of its liability to stretch or crack in passing around pulleys. Soft canvas was found to stretch. A hard-spun, tight-woven canvas, specially manufactured for the purpose, was used. This did not stretch, but would wrinkle and crack when running around pulleys. This objection was obviated by saturating the belt with linseed oil; but an objection was disclosed in the unequal strain on the several thicknesses of the belt when passing around pulleys, which tended to break the stitches and permitted the plies to separate. The patentee's invention consisted in changing the structure of the canvas itself. He used a tightly woven

having its warp threads larger than the weft threads; the
eing folded and stitched. By this construction, strain was
d on all parts of the belt, and the tendency of the plies to sep-
wrinkle was diminished. Mr. Justice Brown, in speaking
court, said:

ew of the fact that previous attempts, of which there appear to
n several, to make a practical canvas belt, had been failures, and
dy had been experimenting with the subject for several years before
rered that a change was necessary in the structure of the canvas
do not think his improvement is a change in degree only, or such
would have occurred to an ordinary mechanic, and our opinion is
es involve an exercise of the inventive faculty."

case has been brought before the court, with great insist-
an authority in the case at bar. But the court found in
dy Case that there was a new result produced by the union
nbination of old elements. It found that there was a pat-
combination, and not a mere aggregation of separate ele-
that the inventive thought of the patentee had produced
entirely different from that before in use, precisely as in
stration given by Mr. Justice Hunt, in the Faber Case.
earned counsel for defendant has brought before us other
cases involving patents upon fabrics and structures, where
nave sustained patents upon products. Without discussing
ases in detail, we think that the court has held the patents
cases to be valid for reasons such as were present in the
Case, and such as met the illustration of the Faber Case.
not find in the case at bar such reasons for holding the patent
ent a patentable invention. After a careful study of it, we
find that it presents anything further than an aggregation of
nents, each element working out its own effect without the
ion of anything novel.
ving the principles of the cases cited, and calling to our aid
l-known principles of patent law as applied to patents upon
we come to the conclusion that the patent in suit does not
any original conception or inventive thought. The product
ting the patent is, in the opinion of the court, an aggre-
of old devices, each device maintaining its old function,
oducing nothing novel or patentable. In our opinion, the
rought before us in this patent cannot be held to be a new
on.
o be dismissed, with costs.

MICA INSULATOR CO. v. UNION MICA CO. et al

(Circuit Court, D. New Jersey. May 9, 1905.)

TS—INFRINGEMENT—MICANITE.

he Dyer patent, No. 483,646, for a process of making artificial mica
ts for electrical insulation, called "micanite," by uniting a series
yers of irregularly shaped mica scales, laid to overlap, by means of
ish, and under pressure, until a sheet of the required thickness is

formed, was not anticipated, and discloses patentable invention. Also *held* infringed as to claims 1 and 2.

2. SAME—VALIDITY—DEFENSE OF PRIOR USE.
Evidence considered, and *held* insufficient to invalidate a patent on the ground of prior use.

3. SAME—PROCESS OF MOLDING MICA SHEETS.
The Jefferson patent, No. 483,653, claim 2, for a process of molding an artificial mica sheet, is void for anticipation, if construed as a continuation of the Dyer process of making such sheets, being covered by claim 2 of the Dyer patent, No. 483,646, and for lack of invention if otherwise construed.

In Equity.

Kenyon & Kenyon, Wm. Houston Kenyon, and Richard Eyre, for complainant.

A. Bell Malcomson, for defendant.

GRAY, Circuit Judge. The bill in this case charges infringement by defendants of letters patent No. 483,646, issued October 4, 1892, to Arthur H. S. Dyer, and letters patent No. 483,653, of the same date, to Charles W. Jefferson. Claims 1 and 2 of the Dyer patent and claim 2 of the Jefferson patent are the ones here involved. Both complainant and defendant are corporations of the state of New Jersey, and the record shows that by legal assignment the complainant has become the owner of the patents in suit. There is no serious contest as to the jurisdiction, parties or alleged acts of infringement of the patents. The defenses are those of anticipation, lack of invention, and noninfringement.

The Dyer patent in suit relates to a process of making artificial mica sheets for electrical insulation. The evidence shows, and it is not disputed, that mica possesses, to a greater degree than any known substance, the qualities desirable for insulators of electricity. In its natural state, it is characterized by "perfect basal cleavage, in consequence of which it can be readily separated into extremely thin, tough, and usually elastic laminæ." In describing the forms in which mica was used for electrical insulation prior to the form produced by the process of the patent in suit, Mr. Wightman, an electrical engineer and an expert witness for complainant, says:

"Previous to that time there were three forms of mica that were used as an insulator in the designing of electrical machinery; that is, in its natural state, in the form known as 'built up' mica, and as a compound made up of a mixture of mica and cement. Natural mica was used where a thin flat sheet could be employed, but on account of its comparatively high price, could not be used to cover large areas. To overcome this objection, a form of mica known as 'built up' mica was employed; this came to my knowledge about the year 1887. It consisted in superimposing properly cut sheets of mica upon one another, in such a way that the joints in the different layers were broken, the pieces used in building up were obtained by splitting the natural mica at such places where a weakness in its structure was apparent; that is, the natural mica was not separated down to the limit, or to obtain the elementary laminæ. The pieces of mica so superimposed, were held together by a coating of shellac or similar adhesive material. This building up process resembled the placing of bricks in a wall. Care had to be taken that adjacent pieces in a layer were of the same thickness; the whole product was a comparatively crude makeshift, and served only as a cheaper substitute for natural mica. In some cases, however, such

e conical insulating rings of commutators, it was possible to obtain a
ure, which could not be obtained from natural mica, by this process
ilding up.
hers, about this time, sought to obtain the advantages of natural mica
rming a mixture of pulverized, or finely comminuted mica, with cement,
c or other plastic materials. The only advantage of this material was
it could be molded, but it contained none of the fundamental advan-
of mica as an insulator. It was more of a cement insulator, and its
sic) and electrical resisting properties were only those of the particular
material of which it was made.
e problem of providing a reasonably cheap, uniform, homogeneous, non-
mable insulating material, was not met by either of these forms of
tion."

ca sheets in their natural state could only be obtained in
l sizes of irregular shape, measuring one, two or three inches
hwise or across. Larger sizes were rare and correspondingly
nsive, five by six inches being nearly the extreme dimensions.
smaller sizes, and scrap or waste mica, had practically no value.
, in the specifications of his letters patent for the invention of
and useful means in the process of making artificial mica
s for electrical insulation, says:

eretofore it has been proposed and common to construct insulating
s of pulverized mica mixed with a hardening cement, the same being
r sometimes modified by being reinforced by coarse fabrics or me-
ally or chemically combined with other substances, such as pulverized
silica, and similar pulverized electrical insulating substances. Plates
d in this manner are much more imperfect as to durability and effi-
and more costly and difficult of manipulation than the sheets formed
y process.
order to understand the object of my invention, it may be stated that
e construction of electrical apparatus—such, for example, as armatures
ield magnets of dynamos and commutators—it is at present customary
ce natural plates of mica for the purpose of insulating the elements of
pparatus between which the said plates are placed.
he natural plate of mica is very costly, especially when large. It is
broken when handled or bent, cracks at the edges when cut or trimmed,
s accompanied by many other difficulties well known to electrical manu-
rers. These difficulties are removed by the process of my invention.
natural plates are employed, spaces exist between the laminæ and
pt to contain conducting liquids, such as moisture. This is another
tant defect overcome by my invention. It is difficult to find natural
plates of uniform thickness, rendering it unfit for use in separating
utator sections.
very important outcome of my invention is that I can form artificial
s superior to the natural by means of small scales formed from very
or 'waste' mica.
iefly described, my invention involves the combination of laminated
ntary scales of mica of any given sizes and shapes, fastened together
ularly by an insulating cement under pressure, and elementary scales
rger size similarly fastened to the sheet upon one or both sides or in
iddle as a core."

aims 1 and 2 of the patent are as follows:

) The method of manufacturing electrical insulating mica sheets, the
consisting in varnishing a large sheet of iron or similar foundation-
and placing thereon a series of smaller mica scales with their edges
apping each other, varnishing the layer of scales and applying a second
s of smaller sheets with their edges overlapping, continuing in the same
er until a plate of the required thickness is formed, heating the sheet
rtially evaporate the solvent of the varnish, rolling the same to remove

the excess of the varnish, subjecting the sheet to a heavy pressure, and finally cooling it, as hereinbefore described.

"(2) The herein-described method of building up electrical insulating mica sheets, consisting in varnishing a foundation-plate, placing mica scales thereon while the varnish is still wet or soft with their edges overlapping, varnishing the mica sheets, thus forming a second and third, &c., layer of mica in a similar manner until the required thickness of mica sheets is obtained, and chilling the sheet while rigidly held in a curved position."

The defendant contends that, in view of the prior art, there was no patentable novelty in the process here claimed, and that the essential principle of the process was anticipated in prior patents and in unpatented devices in prior use. The only ones of the prior patents cited that are discussed at length by defendant's counsel, are the Lee patent, of 1885, and the Thompson patent, of 1890. A reference to the Lee patent will show that its process relates to a composition of comminuted mica and shellac, or resinous gum; that is, to a *mixture* which, in a plastic state, is rolled into sheets. The essential character of this composition is clearly stated in the specifications of the patent, as follows (the italics being my own):

"In the form in which I prefer my composition it consists of mica comminuted so as to form scales or laminæ, varying in size from very small fragments to pieces one-eighth or one-quarter of an inch, or even larger, mixed with shellac in the proportion of about sixty-five parts of mica, by weight, to thirty-five parts of shellac. These proportions may of course be varied; but I prefer the proportions given for the best results. The mica is *incorporated* with the shellac by the aid of heat, which softens the shellac, after which any suitable method of *mixing* the substances may be employed. I prefer to mix them by means of a friction-roll mixer, of well known construction, consisting of a pair of heated rolls, one roll running at about one-third greater speed than the other roll. The pieces of shellac and mica are *mixed* and thrown together onto the hot rolls, which revolve side by side and may be adjusted relatively to each other, and as the *mixture* passes through into a trough or receiver placed underneath it is again put onto the rolls, and this working is continued until it *becomes a plastic mass*, when it will adhere to one of the rolls, whence it is skived off with the aid of a knife and laid aside in a flat sheet. To prepare these sheets for molding, in case they are allowed to cool, I prefer to place them on a steam table, and thus heat them until they become plastic and workable again, after which the sheets, or parts of them, of a proper size, are put into hot molds, molded under pressure, and allowed to cool. Such a composition will take a clear and fine impression in the molds, is comparatively light, very strong and durable, and may be used for a great variety of purposes. In mixing the mica and shellac to form a sheet of composition, the laminæ of mica *tend to a parallel position*, and as they overlap and interlock the breaking strength of the composition is very much greater than that of compositions in which laminated material is not used."

The defendant relies upon the language in this quotation, which speaks of the mica as "comminuted so as to form scales or laminæ, varying from very small sizes to pieces one-eighth or one-quarter of an inch or even larger, *mixed* with shellac," etc., and also upon the following statement, as above quoted:

"In *mixing* the mica and shellac to form a sheet of composition, the laminæ of mica *tend* to a parallel position, and as they overlap and interlock, the breaking strength of the composition is very much greater than that of compositions in which laminated material is not used."

It seems perfectly clear that a sheet of the material made by the process thus described is very different from that resulting

ne process of the patent in suit. It is a composition or mix- mica and shellac made into a plastic mass, and rolled into in which there is a tendency of the comminuted mica to minute parallel scales and overlap. This is not at all a mica from which the volatile parts of the shellac varnish have vaporated, and the remaining part reduced to the thinnest rable film between the layers of mica scales. It is unneces- quote from complainant's expert testimony on this point. lication of words would only tend to obscure what is in it- clear.

Thompson patent, according to its specifications, "relates to nstruction of an insulating septum or layer interposed be- electric coils and their core or carrier, or between two sets of coils, for the purpose of maintaining through insulation en the parts lying at opposite sides of such layer." The ee further on says:

nvention consists, essentially, of a compound insulating layer or sep- mposed of two or more parts, one of which is nonporous or of close or nature—such as mica, glass, or similar earthy or mineral sub- -and impervious to moisture, while the other part, forming a bolster or to which the first is bound, consists of some fibrous or nonlaminated l, preferably in the form of cloth woven or felted, and composed, ly, of noninflammable material, like asbestos."

sufficient to state roughly that this process consists, first, pping around a cylindrical core a fibrous coating of non- mable material, such as asbestos paper or cloth. "Next," e specifications "is applied the layer of insulating material orous) formed of some vitreous or earthy material, such as n the form of thin plates." We have already seen that it cult and expensive to obtain mica sheets of dimensions, dinal and transverse, greater than four by five or four by nches. If the core to be wrapped is of considerable size— ve or six or more inches in diameter, a number of these will be required to completely wrap it, so the process is ally to bend the small sheets on the surface of the core, g the end of one by the end of each succeeding sheet, g one or two layers in this manner. These layers "are bound " say the specifications, "by any suitable means," such as or linen cloth, and the coils of the armature wound di- upon it. It is perfectly obvious that this process and its are entirely different from those of the process of the patent t. It is true, the ends of the sheets overlap each other process of being wrapped around the core, but that does nstitute a continuous artificial sheet of mica, capable of be- und around such a core, as a sheet of paper is wound around dle. The resort to such processes to utilize the valuable ting qualities of mica for the electrical art, as is illustrated ese patents, tends to support the novelty and invention d for the process of the patent in suit.

method of the prior art as yet unconsidered, was the building

up of a mica strip, by using sheets of mica as large as could conveniently be obtained, and cutting them into rectangular shapes and sizes as nearly uniform as possible, then making a layer of these by butt-joining. Upon the top of such layer, with suitable varnish or shellac between, is superimposed another layer, in the same way, breaking or covering the joints of the first layer after the manner of laying bricks. The sheet thus produced, however, had various defects. Professor Anthony, in speaking of it, says:

"Such a built-up mica was serviceable in places where it could be built up in place, but was not suitable for making molded forms, because any attempt to bend it or shape it into irregular forms, would open up the joints. Furthermore, in the building up of this mica by the break joint (or butt joint) process, no one had conceived the idea of splitting the mica into its ultimate scales, so that, even if the joints were opened up, the opening of the joints would do little harm."

The expert testimony on both sides shows that a substantially new material has, by the process of the patent in suit, been supplied to the electrical art in the form of an artificial mica sheet, practically of any length, breadth or thickness required, thus overcoming the obstacle of the restricted limits as to size, within which natural mica could be obtained. The trade name "micanite," given to this material by the patentee, has established for itself a recognized place in the electrical art. Mr. H. F. T. Erben, an electrical engineer and an expert witness for the complainant, thus testifies as to the comparative advantages of micanite over natural mica:

"Micanite is cheaper, due to the possibility of its being composed of pieces of mica of less area than in the case of pasted mica. 2d. It is more uniform as to dielectric strength, has a less possibility of flaws. 3d. Micanite can be easily molded when heated, into various shapes; whereas, such molding is practically impossible with pasted mica. 4th. Micanite can be easily cut into any desired form by means of a knife or hand saw; whereas, pasted mica has a tendency to rip and tear under similar treatment. 5th. Micanite has rendered possible the construction of commutators having bars of 3 to 4 inches radial depth; such construction would be difficult, if not prohibitive, in the case of pasted mica, due to the impossibility of obtaining sheets of sufficient size. 6th. Micanite has allowed manufacturers to construct side mica that will prevent short-circuiting of adjacent commutator bars, as with this material there can be no pockets due to imperfectly butted joints, as in the case of pasted mica, such pockets becoming filled with a mixture of carbon dust, copper dust and lubricating oil, would give rise to incipient arcs, which would soon lead to short circuits between the adjacent bars. If such material did not exist, the construction of electrical apparatus would be much more difficult than at present, the danger from short-circuiting would be much greater; and the cost of repairs and renewals greatly increased. Q. Is it a matter of any great importance that a mica insulating material should be uniform throughout as to its dielectric strength? A. Such properties are of great importance, as with large exposed surfaces there is liable to be a defect in the insulation if it were constructed in accordance with the old method. In accordance with the new construction the splitting of the mica into very thin layers practically removes all foreign matter."

A very interesting exposition of the state of the art, into which this substance called "micanite" entered, is given in a paper read by Mr. Edward P. Thompson, a well-known electrical and mechanical engineer, before the American Institute of Electrical En-

, December 21, 1892. The following extracts from this ad-
re instructive:

ll substances, mica probably is the best material for use in arma-
it is desired to obtain not only efficient electric insulation, but also
y under the influence of heat. The highest temperature to which
ture is subjected, even by short circuit or bad construction, will have
ious effect upon mica. Mica, thick or thin, may be held in a gas
ithout cracking, burning or melting. It remains unaffected. The
f this is better understood when it is remembered that it consists of
silicate, containing also potassic, sodic and lithic silicates, and some
and ferric and manganic oxides. Its chemical constitution varies.
The insulating power of mica is superior to that of any other sub-
pplicable to armatures. An advantage, peculiar to itself, is its even,
d structure. How wonderful is the thinness of its individual layers!
of ordinary writing paper is about .005 inch. Mica layers have
ained of a thinness of .0003 inch. Mechanical difficulties prevent
split thinner. By pasting it upon a hard surface and splitting it
uch as possible, the remaining fragments are so thin as to become
lly iridescent. The builder of armatures can therefore split the
nto any desired and uniform thickness with great ease and accuracy.
resting property of mica and one not generally recognized, is its
eity of structure and clear transparency, although so black when
The writer used a piece one-quarter of an inch thick for observing
solar eclipse. The effect was better than with smoked glass and
ent as black glass much thicker. A valuable property of mica in
on with commutator insulation is its proper degree of hardness,
it does not wear away too rapidly under the action of the brushes.
r were used, for example, even if it did not burn, yet it would wear
sparking result, because the commutator surface would not be truly
al. The brushes would be set into vibration. * * *
ough so superior for armature insulation, mica is, in its natural
e, accompanied by certain objections, which, in trying to overcome,
ore serious than had been anticipated, as it was not until after a
ies of trials that a successful article was produced, and not until a
paratus for cheapening the process of manufacture was devised.
paratus is now in operation on a large scale. The description at
is confined, however, to the article, and to full information of its
e, manner of using and properties.
objections alluded to are:—Mica, as found in nature, occurs in flat
nly. It has a high degree of elasticity, so that when once bent and
it assumes its original form. If folded, its brittleness causes frac-
the natural sheets are compressed in a mold, to try to form arma-
ulator heads, for instance, it is completely broken up.
ndly. Natural mica sheets correspond financially to plate glass. The
he sheet, the higher the cost per square inch. Mica in small pieces,
to 6 square inches, is exceedingly abundant and very cheap. It is
alled waste mica, because very limited in its uses, and consisting
trimmings from larger and more useful sheets. In medium and
izes of armatures, the naturally built up mica is so expensive as to
tionable, although not so much so as to entirely prevent its employ-

lly. Between the hundreds, nay, thousands, of thin layers, damp air
r, and also water, accidentally, which cannot easily or effectually be
.
thly. Mica splits so easily that handling causes injury.
ly. Mica cannot be cut transversely to advantage. The edges are
nanlike, being ragged and jagged. Neatness in drilling, sawing and
is difficult.
ng the attempts which have been made to overcome these objections
se involving the use of pulverized or comminuted mica, which is
with a liquid cement and stirred into a paste. While still soft, the
is rolled or compressed into any desired form, as if consisting of
n plaster of paris. In order to give it sufficient strength, one-third

of the product is cement. The mica sparkles here and there on the surface, as it glitters on granite. This article should be called a cement insulator, and not a mica insulator, because the current can flow in a straight circuit through the plate without encountering any mica. The cement forms numerous rectilinear paths for the current, independently of the mica; and therefore the product is in no sense an equivalent of mica."

Speaking of micanite, he says:

"Any of the sheets may be cut up into any desired size and shape. The layers cling together much more tenaciously than in the natural plate. The path of least resistance from one side of the plate to the other is in a straight line, and a straight line intersects numerous mica sheets, and, therefore, the article is a mica insulator and not a cement insulator. * * * Further, they are superior to a sheet of mica as it comes from the quarry, in that they do not absorb water or damp air; in that they are stronger to resist either pressure or tension; in that they may be neatly and easily sawed and drilled; in that they are enormously less costly; and in that they are of about the same resistance."

Professor Thompson also remarks on the capability of micanite to be molded into curved forms and given a permanent set; whereas natural mica plates could never be given a permanent set or be molded into curved forms.

While it is possible, it would indeed be strange, that one who has contributed to an important art so valuable a material as that which is known as micanite, should have done so by a process which did not involve the inventive faculty to discover. As has been often remarked, what seems simple enough after it has been done, was not so simple or obvious before the "happy thought" occurred to the inventor. As I have already said, the fact that others had endeavored to solve the difficulty by compositions or mixtures of comminuted or pulverized mica, with shellac or other resinous substance, lends material support to the claim of invention for the process that has so completely solved the difficulties in the way of economically and efficiently utilizing mica.

The essential principle which characterized the method of the first claim of the Dyer patent, and distinguished it from the prior methods of constructing artificial mica sheets, whether by the mixture or incorporation of pulverized or comminuted mica with a quantity of shellac or resinous gum, as heretofore described, or by the brick laying method of butt-joining pieces of mica, cut into rectangular shapes and of uniform, or nearly uniform size, was simply this: The taking of small pieces of waste mica of irregular sizes and shapes, and scaling the same into what are mechanically their elementary laminæ, and placing the same (necessarily by hand) systematically with their edges overlapping each other, upon an iron surface or table which has received a thin coating of shellac or other substance, calculated to hold the first layer of lamina in place, as well as facilitate the removal of the sheet when completed; the result being a continuous layer of mica, the elementary thinness of the laminæ insuring this integral continuity and smoothness, the overlapping edges producing practically no ridges or inequalities. Over this smooth continuous surface, a thin coat of shellac is placed, and the process just described repeated, layer after layer, until the required thickness is attained.

re sheet is still wet with the adhesive liquid, it is laid on a
ated table, and the solvent alcohol of the dissolved shellac,
l and turpentine of the varnish, are evaporated. The sheet
assed between pressure rollers, which expel the superfluous
from between the layers, leaving only a thin film of the
hich maintains the adhesion. Afterwards, and before the
hardened, it is subjected to very heavy pressure by a
c or other press, which serves to produce a compact
d sheet. As a last step of the process, it is placed upon
late and chilled and hardened. The sheet can be milled or
hen to reduce it to uniform thickness, and can be cut into
quired. The advantages that this artificial mica sheet
s over mica in the natural shape and over the products of
ocesses, have been set forth in the expert testimony, from
uotations have been above made, and are practically not
. The process is thus characterized by a product unique
ittedly of the greatest utility. To have made a homo-
tough, insulating sheet of practically pure mica, by thus
arranging small scales of mica, reduced to elementary
layer upon layer, as above described, however obvious
ow seem to one familiar with the result, had not occurred
s skilled in the art, though the want of such a product
been felt, as proved by the prior practices of mixing
uted or pulverized mica with cement or shellac varnish,
ing the plastic mass into sheets. It cannot be said with
at this advanced step in the art of electrical insulation was
ous one to any one ordinarily skilled in such art. I have
ulty in finding that the process of the Dyer patent in suit
icipated, and that it involves patentable invention.

lition to the defense of anticipation by prior patents, the de-
alleges prior use, and produces witnesses in support thereof.
itnesses testified to what defendant claims was a prior
he process of the patent in suit by the Edison Company,
o Park, New York. A careful examination of this testi-
onvinces me that the witnesses' recollection, after 15 years,
fused what they then did, with the micanite process, with
hey were familiar at the time of testifying. The cross-
tion tended to show this confusion in the minds of the
es, and to suggest that what was done at Menlo Park was
struction of a mica strip by the butt-joint method we have
described. No specimen of the material thus said to have
nstructed by these witnesses was produced and no one else
d to testify that he saw this process practiced by the wit-
Another witness, named Cushing, testifies that at the age of
vorked with the Mather Electric Company, at Manchester,
for a period of nine months from September, 1888, to June,
n stating the manner in which mica was used, he says:

lding up the commutators of the smaller sizes, single strips of mica
d, when sufficiently thick, wide and long. In the larger sizes, when
e strips of mica were not of sufficient length, breadth or thickness,
trips were used, by overlapping them, and shellacing them, trimming

them roughly and placing them between the segments, which were finally clamped together and turned down in a lathe. In placing the binding rings on the end of the armature, circular rings were built up in the same manner, trimmed to size and clamped in position, thus preventing short circuits between the segments at the end of the commutator segments."

In answer to the question, "What was the shape of these pieces?" he says:

"Simply miscellaneous strips of mica, best adapted for the particular segment to be insulated. Q. Would that term be covered by 'mica scales'; would those pieces be covered by the term 'mica scales'? (Objected to as leading.) A. I never heard the term 'mica scales' used at that time, or since in practice. Q. Please state * * * how many thicknesses of the individual, or smaller pieces there would be in one completed piece forming the insulator? A. Two, or more, as the conditions required."

The method here described is evidently nearer akin to that of wrapping pieces of mica around a central core, or between the coils of a large electro-magnet, overlapping one piece with the succeeding piece necessary to continue the operation of wrapping already described, than in the process of making the artificial mica sheet of the patent in suit. Professor Anthony was engaged as consulting engineer at the Mather Electric Company, of Manchester, at the time of which Cushing speaks, and fully explains the practice referred to by him in the insulation of armatures, he (Anthony) being himself in charge of the Mather factory. He clearly shows that the practice referred to by Cushing was not correctly stated, and that it had no relation to the method of the patent in suit. The witness Traylor testifies that he was in the mica business in Richmond prior to 1888, and that while there, manufactured electrical mica insulation. He also testifies as to the manufacture of journals and valve sheets of mica, built up together with varnish and pressed and baked. His whole testimony lacks clearness as to what actually was the process practiced by him. Whatever it may have been, however, Professor Anthony clearly demonstrates the insufficiency of Traylor's testimony to establish any use of a process anticipating that of either of the patents in suit.

The only other testimony as to prior use, is that of one Ross, who worked with the Excelsior Electric Company for several years after 1887. His work appears to have been the repairing of armatures and commutators; that in so doing, he used fibre and mica as an insulating material. He says he used "the largest mica we could get." In answer to the question "How did you use it?" he says, "If we couldn't get mica large enough for the job, we would build it together, and if we could not get it big enough we would build it up." He says, "I would lay a piece of paper on the table, make a layer of mica the size that was wanted, and then overlap the pieces and work them together to build it up to the thickness required." His cross-examination makes it perfectly clear that this overlapping is not the overlapping of the edges of the several pieces in their respective layers, as in the patent in suit, but the covering by the pieces in a superimposed layer of the joints of the layer beneath. In answer to the question, "Do I

nd that the edges of the pieces in each layer came together
edges of bricks and the pieces of the different layers over-
joints of the adjacent layers?" he says "Yes," illustrating
er as follows:

ing we had three pieces of mica, one inch wide and two and a half
: you were to put two of those pieces in a line, which would make
nica one inch by five inches. The third piece we would put in the
cover up the joint, and make it appear a solid mass, and so we
tinue if we wanted to make a piece a foot long, and then we would
as not got a joint."

this testimony as to prior use is open to the criticism
witnesses speak from recollection after a considerable
time, that no specimens of the product of the supposed an-
use have been produced, and that there is no corroborat-
mony from any who have seen the method produced by
esses, as testified to. It is unnecessary to repeat here
rts have so often said in regard to this character of testi-
The Supreme Court of the United States, in Cantrell v.
117 U. S. 689, 696, 6 Sup. Ct. 970, 974, 29 L. Ed. 1017,

ly is the burden of proof to make good this defense upon the party
up, but it has been held that 'every reasonable doubt should be re-
inst him.' "

ind of the court must be fully satisfied of the existence of
use, before it will overthrow the presumption, arising
grant of letters, that the patentee is the first inventor
vice described, and that the letters patent were issued by
nt Office with full information as to what had previously
e in the art. A careful examination of the evidence as to
, set out in the record, fails to thus satisfy me.

e question of infringement of the Dyer patent, the testi-
ems to me clear and convincing. Walter L. Mitchell, a
produced by the complainant, testifies that he was in the
of the defendant company from February, 1901; that he
eral foreman of the insulation plant; that as such he "had
l to splitting, the pasting, and the breaking of the edges
nica, the making of the sheets and the mixing of the
ds, the steaming of the mica boards, and the pressing,
ming, the baking and the milling." He particularly de-
he training of the girls to split the blocks of mica into
imate or elementary laminæ, which were distributed to
rs, "after which the pasters would take and start to build
on a wooden table or portion of the table, first varnished
ating of oily compound, edges of scale mica overlapping
ner, the first row of mica scales, which would be larger than
wing ones, was then laid upon the varnished table with
verlapping, each lap being dabbed with a little liquid
After the first row was entirely laid, I would then cover
e layer of scales of mica with a liquid shellac, and then
ith the edges overlapping smaller pieces of mica scales.
keep this up, using mica scales and shellac compound

alternately, until I had about four or five layers of them, after which I would turn the entire sheet over and resume operations the same as I did before turning, namely, first a row of shellac, then a row of mica scales until said sheet attained required thickness, after which it would be removed from said varnished table and placed upon a steam table, the object was to evaporate alcohol, and should I at any time find that a sheet had too much shellac into it, which I invariably did, I would take aforesaid described roller to evenly lay and force out the excessive shellac. After same had been rolled with the hand roller, it would then be removed from steam table and placed between two sheets of tin, the tin having been first treated with a chemical compound and then placed in the steam press, and pressure put on the same of from fifty to one hundred tons, and steam turned on. After same had been steamed for about fifteen minutes, steam would then be shut off and cold water allowed to pass through hollow plates, the object of water was to cool it off or chill it, at the same time to set the sheet being held under pressure. After same had become thoroughly chilled, it was removed from there, and same was marked with an iron gauge, 18 by 30 inches, and rough edges trimmed off, after which it would go to the milling machine."

The various exhibits of artificial insulation sheets made by the defendant company were made under the supervision of this witness, and the process described as to each exhibit. Professor Anthony, complainant's expert, reviews this testimony of Mitchell at length, and gives his reasoned opinion, that the process by which the several exhibits were made, infringed claims 1 and 2 of the Dyer patent. I am satisfied from this testimony, as well as from the testimony of Mitchell himself, that as to these exhibits the defendant company has been guilty of the infringement of claims 1 and 2 of the Dyer patent, as charged in the bill. Mr. Becken, the defendant's expert, points out what he considers differences in the method practiced by Mitchell for the defendant company and that covered by the first and second claims of the Dyer patent in suit. It is not necessary to discuss here at length this testimony. The differences pointed out are in the main of minor and trifling character, and do not at all affect the substantial identity of the essential steps in the two processes.

The second claim of the Dyer patent, as already quoted, requires brief consideration. It continues the process described in the first claim a step further, that step being, in the words of the claim "the chilling the sheet while rigidly held in a curved position." The process covered by the second claim is clearly a continuous one, and consists in doing all the things set out in the first claim, and then immediately, while the mica sheet is hot and moist, curving it into a required form and then immediately setting it by a chilling and hardening process. This susceptibility of being curved or bent while in a green state, without breaking the texture of the sheet, is due, no doubt, to the capacity of the scales of mica to slide upon each other at their overlapping edges. The

each scale is, of course, very minute, but sufficient to per-
unction of "flowing," which occurs in the bending of metal

fferson patent, in the words of the patentee, relates to a
pecially adapted for molding the mica flanged rings for
ring armatures. The patentee claims, however, not only
cular molds, but also, in his second claim, "the herein-
scribed process of bending and setting mica sheets, con-
building a mica sheet by cementing together laminæ
cales with overlapping edges, compressing the sheet into
ed form while the cement is wet, drying the cement by
ng the solvent thereof, and finally chilling the molded
le under compression." It appears that Jefferson was the
friend and partner of Dyer, and that applications for the
nts were filed upon the same day, although the Dyer
as first issued. I am of opinion that this second claim,
ended to describe a continuous process, through the manu-
f an artificial mica sheet, under claim 1 of the Dyer pat-
the molding of the same while it is yet wet from the said
f manufacture, is covered by the second claim of the
ent. If, however, it is intended to extend further and
rocess by which an artificial mica sheet, after it had been
ured by the Dyer process and not as a part or continua-
at process, is taken and reheated or remoistened and then
hile under compression, the claim is void, as not involving
e invention. I think that any one is at liberty to pur-
artificial mica sheet from an authorized vendor, and mold
essure and compression into any shapes of which it is sus-
just as he may take any other material, such as sheet
n, that is susceptible of being so treated, and mold it into
at may be desired. For these reasons, I find the second
the Jefferson patent, No. 483,653, and issued October 4,
alid as to its second claim.
ecree be entered in conformity with this opinion.

ENNSYLVANIA GLOBE GASLIGHT CO. v. BEST et al.

(Circuit Court, N. D. New York. May 18, 1905.)

ALIDITY AND INFRINGEMENT—INCANDESCENT LAMPS.
Campbell patent, No. 447,757, for a method of using hydrocarbon
for illuminating purposes, and a portable lamp for practicing such
l, was not anticipated; and, while the lamp uses old elements,
mbination is new, and produces a new and useful result, and dis-
invention. The patent also *held* infringed.

ity.

injunction and accounting because of alleged infringement of
tes letters patent No. 447,757, granted on the 10th day of March,
arry C. Campbell. The complainant's title is admitted. It is con-
the alleged infringing lamp was and is being manufactured and
fendants, and also sold by its agent, Mack, one of the defendants,

at Rome, N. Y. The defendants insist that the complainant's patent is void for not disclosing patentable subject-matter, and also as being for a mere aggregation; also that such patent was fully anticipated in the prior art, as shown by a number of patents in evidence; and that defendants do not infringe.

F. G. Fincke (John R. Bennett, of counsel), for complainant.
Risley & Love (F. W. Bond, of counsel), for defendants.

RAY, District Judge. The patent in suit is for alleged "new and useful improvement in incandescent burners, and methods of using the same." The patentee says:

"I have discovered that by injecting hydrocarbon fluid in a heated and vaporous condition, and under considerable pressure, through a Bunsen burner, where it is mixed with a sufficient quantity of atmospheric air, into, through, or against a refractory body, which will become incandescent by the heat of the ignited hydrocarbon vapor, a very intense light is produced, very far exceeding in candle power any light which has been heretofore obtained by the burning of coal gas under ordinary pressure through the intervention of a Bunsen burner, and in contact with such refractory body."

This seems to be a full and fair statement of the discovery. Then follows a detailed description of the methods used, and of the devices by which the method is carried into effect. The claims are as follows:

"(1) The method of employing hydrocarbon fluids for illuminating purposes herein described; that is to say, vaporizing the hydrocarbon liquid by heat, and causing the heated vapor to pass in a fine stream, under considerable pressure, through an air-mixing chamber, and igniting the heated mixture of hydrocarbon fluid and air in presence of a refractory substance capable of incandescence, substantially as described.

"(2) The combination, in one device, as a portable incandescent lamp, of a Bunsen burner, an incandescent filamentary substance, and a self-generating and heating gas attachment, substantially as described."

In this method the hydrocarbon liquid, such as gasoline or naphtha, is vaporized by heat. This heated vapor, under considerable pressure, is forced in a fine stream through an air-mixing chamber. Then this heated mixture of hydrocarbon fluid and air is ignited in the immediate presence of some refractory substance—Welsbach mantle—capable of incandescence. The device is the combination, to form a portable incandescent lamp, of a Bunsen burner, an incandescent filamentary substance, and a self-generating and heating gas attachment. We are to have a portable incandescent lamp with three elements, viz.: Bunsen burner, which includes the air-mixing chamber; incandescent filamentary substance, such as a Welsbach mantle; and a self-generating and heating gas attachment. By reference to the evidence of defendants' expert on cross-examination, it is seen that he admits that defendants' lamp employs the method of the first claim, and that all the elements of the second claim of complainant's patent are found and used in the same. If complainant's patent is valid, it is infringed by defendants.

In considering the prior art, it has been considered as established that the date of Campbell's invention was March, 1886, as the evidence on that point is quite conclusive and satisfactory, and in fact not contradicted. The great value, merit, and utility of the inven-

such it is) is demonstrated by its commercial success and ead and general use. The court has gone through and ex- the long list of patents in evidence, and finds and holds that mpbell patent (complainant's) was not anticipated in and rior art. Attention is urged to the fact that to constitute on—

ust be something more than a change of form, or of the juxtaposi- arts, or of the external relation of things, or of the order or arrange- which things are used. The change or the new combination or rela- st introduce or embody some new mode of operation, or accomplish t not before produced. This is what is called, in the judicial sense, ng a new principle.' "

is elementary patent law, and well settled by many deci- But as said by the Supreme Court of the United States in ng v. McCullough, 104 U. S. 317, 26 L. Ed. 749, and Hailes Wormer, 20 Wall. 353–368, 22 L. Ed. 241:

st be conceded that a new combination, if it produces new and use- s, is patentable, though all the constituents of the combination were wn and in common use before the combination was made. But the ust be a product of the combination, and not a mere aggregate of esults, each the complete product of one of the combined elements."

, in Heald v. Rice, 104 U. S. 755, 26 L. Ed. 910, the court

invention could he claim? He uses Morey's device precisely as patent contemplated, and the Cornish boiler exactly as it was de- should be used. And in the combination each operates separately, g its own results. There was no inventive resource drawn upon to m together."

s that this case? The combination of the elements of the ell patent had not before been made. When the combination de the result was not that of the action of any one of the s alone, or that of the action of any one or more of the s in combination with other elements, but a result not pro- or producible by any one of these elements, however op- or, so far as known, by any combination of all the ele- The light produced is not a new or a novel light, or one ducible in other modes by other instrumentalities; but such from such materials in a portable lamp had not been pro- and, so far as known, could not be produced. In the nt of this court, the combination and its results disclose in- In Hailes v. Van Wormer, supra, the good features of stoves were gathered in one. But by being so brought r they did not perform any joint function, but each did had formerly done. This was held a mere aggregation. In ng v. McCullough, supra, Mr. Justice Matthews said:

patentable combination of old elements * * * it must form either achine of a distinct character and function, or produce a result due nt and co-operating action of all the elements, and which is not the ing together of separate contributions."

combination of the Campbell patent produces a result which to the joint and co-operating action of all the elements—a

useful result no one of them had produced before or can produce. Each element of the combination does qualify every other in the sense of the opinion of the court in that case. It is not necessary and was not intended by the court that the mode of operation of each element of the combination be changed in bringing them together. But they must so coact as to produce a useful result no one of them has produced before, and, of course, this action and result must be such as to disclose invention, not a result that would have occurred to any person skilled in the art to which the alleged invention relates. It is perfectly clear that the combination made by Campbell is not of this class. It is simple now that the combination has been made, and the result demonstrated. Before that the subject was shrouded in darkness. The way out was unknown, but Campbell, after long investigation and much thought, uncovered it.

Mr. Bates, expert for the defendants, said, in words or in substance, that the "Campbell patent is simply the device of the Ballard patent, with the tip, N, removed, and the gallery, with its chimney and Welsbach mantle, substituted." It was demonstrated in open court on the argument that this is not the fact. The witness Dr. Chandler says:

"In my opinion, the Keystone burner [and this is the Ballard burner] has been so changed and modified by Campbell's work that it has entirely lost its identity, and an entirely new device has been created, designed for a totally different purpose, radically different in its operation, and accomplishing an entirely different result."

The patent is valid and infringed. Complainant is entitled to an injunction and an accounting.

YEATES v. ILLINOIS CENT. R. CO. et al.

(Circuit Court, N. D. Illinois. May 11, 1905.)

No. 27,208.

1. RAILROADS—LIABILITY OF LESSOR FOR LESSEE'S NEGLIGENCE—FEDERAL RULE.

Under the holdings of the federal courts, a lessor of a railroad track is not liable for the negligence of its lessee in operating its trains on such track, and, the question being one of general law, a federal court is not controlled thereon by state decisions.

2. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—CONSTRUCTION OF PLEADING.

The question whether a declaration states a joint and not a severable cause of action against two defendants is to be determined from the facts alleged, and is not affected by an allegation that the act complained of was the joint and concurrent act of both defendants.

[Ed. Note.—Separable controversy ground for removal of cause to federal court, see note to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

3. SAME—JOINT CAUSE OF ACTION.

The declaration in an action in a state court against two railroad companies alleged that one was the owner of certain tracks which it leased to its codefendant, a portion of the trackage being used by the

ointly and a portion exclusively by the lessee; that the lessor
n employé in charge of a switch connecting the two, whose duty
s to switch the lessee's trains onto the exclusive track when the
was clear; that such employé negligently switched an engine upon
plaintiff was working onto such track at a time when there was
r train thereon moving in the opposite direction; that through the
nce of the lessee's employés in charge of such train a collision
ed between the same and the engine on which plaintiff was in
he was injured. *Held*, that such declaration did not state a joint
of action, but a separate and distinct cause against each defend-
nd the suit was removable by one defendant which was a citizen
ther state.

Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes,

tion to Remand to State Court.

C. McShane, for plaintiff.

on, Payne & Strawn, for defendants.

LSAAT, District Judge. The plaintiff heretofore moved
to remand said cause to the state court. On November
that motion was denied. Afterward, and on March 20,
intiff renewed his application to remand, and leave was
file briefs. The first count of the declaration, which
ally presents the facts of the case, sets out in substance
Illinois Central Railroad Company owned and operated
racks in this jurisdiction, certain of which, by agreement,
d jointly by it and the Michigan Central Railroad Company;
virtue of said agreement certain other of its tracks were
clusively by the Michigan Central Railroad Company;
ursuance of the further terms of said agreement said Illi-
tral Railroad Company employed a man whose duty it
hrow certain switches and regulate the movements of en-
d trains of the Michigan Central Railroad Company over
cks used in common onto said exclusive tracks, upon
e Michigan Central Railroad Company was required to and
and whose duty it was not to signal or permit a Michigan
Railroad Company's engine or train to pass northward
l common tracks onto said exclusive tracks at a time when
e was running southward on said tracks in coming out of
e; that plaintiff was then working in one of the engines
as running northerly from the joint tracks to the exclusive
hat the switch tender then negligently threw a switch
gnaled and permitted said switch engine and train to pass
e joint tracks to the exclusive track at a time when a
n Central engine was backing southerly on said exclusive
hat, when said switch engine and train was stopped or
topped, said Michigan Central Railroad Company so negli-
an its road engine that as a result, and in consequence of
and concurrent negligence of the switch tender and the
n Central Railroad Company, the first in opening said
nd the latter in carelessly handling said road engine and
id road engine collided with the switch engine, causing
ry complained of. The question submitted to the court

is, does the declaration disclose a severable controversy within the meaning of the statute? Plaintiff insists that: (1) The Illinois Central Railroad Company is jointly liable with the Michigan Central Railroad Company merely because it is the owner of the tracks and has leased them to its codefendant. (2) The declaration shows a joint cause of action.

While the decision of the Illinois court seems to hold that both the lessor and lessee companies can be held for the negligence of the lessee company, such has not been the holding of the federal courts in cases similar to that before the court. Hayes v. Nor. Pac. R. R. Co., 74 Fed. 270, 20 C. C. A. 52; Hukill v. The M. & B. S. R. R. Co. (C. C.) 72 Fed. 145; Kelly v. C. & A. R. R. Co. (C. C.) 122 Fed. 290; Willard v. Spartanburg R. Co. (C. C.) 124 Fed. 796; Arrowsmith v. The N. & D. R. R. Co. (C. C.) 57 Fed. 165; Hutchinson on Carriers (2d Ed.) 515, 516; Elliott on Railroads, §§ 468, 469; Baldwin's Am. Railroad Law, 460. The question is one of general law, and not controlled by state decisions. B. & O. R. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Gardner v. M. C. R. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; C., M. & St. P. Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Pelton v. Bullard, 94 Fed. 784, 37 C. C. A. 1; Murray v. C. & N. W. Ry. Co., 92 Fed. 871, 35 C. C. A. 62; W. U. T. Co. v. Sklar, 126 Fed. 298, 61 C. C. A. 281.

The facts set out in the declaration must control the court in determining whether a separable controversy exists. The mere fact that a suit might be brought against each one of the defendants separately or against them jointly does not determine the question whether a severable controversy exists or not. Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; C. & O. R. R. Co. v. Dixon, 179 U. S. 136; Powers v. C. & O. R. R. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 670. Nor do the allegations of the declaration that the act was the joint and concurrent act of the defendants add anything to the plaintiff's position. Coker v. Monaghan Mills (C. C.) 110 Fed. 898; McIntyre v. So. Ry. Co. (C. C.) 131 Fed. 985; Gustafson v. C. R. I. & P. Co. (C. C.) 128 Fed. 85. The allegation of the declaration amounts to an averment that the Illinois Central Railroad Company wrongfully permitted and signaled the switch train and engine on which the plaintiff was located to get onto the exclusive track, on which snow had fallen and over which hung great quantities of smoke and steam, so that an engine could not readily be seen any considerable distance, at a time when, in running northward, it was likely to collide with said road engine, as the switch tender knew or might have known, whereby the accident occurred.

In order that the injury shall be the joint and concurrent act of both defendants, there must be a community of wrongdoing. McIntyre v. So. Ry., supra; Coker v. Monaghan Mills, supra; Helms v. No. Pac. Ry. Co. (C. C.) 120 Fed. 389. Was there any commu-

wrongdoing in the case at bar? True, plaintiff might not een in position to be injured if the switch engine and train t been permitted to go upon the exclusive track. The Illi- entral Railroad Company was to blame, under the plead- or allowing this. On the other hand, the declaration al- such a complete cause of action against the Michigan Cen- ilroad Company as would make it liable even if the switch and train had been there without any negligence on the the switchman. Nor would it be necessary to show any neg- on the part of the Michigan Central Railroad Company in o hold the Illinois Central Company. The negligence of the Central Railroad Company was not the same negligence as f the Michigan Central Company. The cause of action is nt. "It is not enough," says Judge Amidon in Helms v. ern Pacific Railway Co., supra, "that the party injured has ain grounds a cause of action against one for the physical tort o himself or his property, and has on entirely different ls a cause of action against another for the same physical There must be something more than the existence of two te causes of action for the same act or default to enable him the two parties liable in a single action." In Shaffer v. Brick Co. (C. C.) 128 Fed. 97, it is said, "It is possible to sh the liability of the employé Ratliff in this case with- owing any connection between him and his codefendant." lain that the evidence tending to establish the negligence of nois Central Company is radically different from that required case of the Michigan Central Company. In the case of v. Monaghan Mills, supra, the owner and contractor of a g were joined in a suit for damages sustained by the plaintiff ng into an elevator shaft left unguarded by the contractor. ff entered the building at the invitation of the owner. The says:

yzing the above, it will be seen that the charge against the Monaghan that it invited the intestate of the plaintiff into its building to do ork for it. The theory is that under these circumstances it was bound ish a safe entrance and place. * * * The charge against the Building & Construction Company is wholly of a different char- This defendant did not invite plaintiff's intestate to the building; connection whatever with him, or with the machinery which instructed to put in place. * * * It is charged with having made act with the Monaghan Mills, and with having failed to perform said t, and for such failure it is held responsible to plaintiff. * * * estion of law upon which its liability depends or may be defeated is distinct from that upon which the liability of the Monaghan Mills e tested. The allegation of liability on the part of both defendants is usion of law, not of fact. Clearly, there is a separable controversy, e cause is removable."

refore, the causes of action not being the same, it is clear is a severable controversy, and the motion to remand is de-

OHIO POSTAL TELEGRAPH CABLE CO. v. BOARD OF COM'RS OF SANDUSKY COUNTY, OHIO.

(Circuit Court, N. D. Ohio, W. D. January 9, 1905.)

No. 1,816.

1. TELEGRAPHS—OCCUPANCY OF HIGHWAY—RIGHT OF STATE TO COMPEL REMOVAL.

A telegraph company which has built its line on a public highway, which is a post road, with the consent of the local authorities having jurisdiction, and has filed its acceptance of the provisions of Rev. St. § 5263 [U. S. Comp. St. 1901, p. 3579], cannot be required to remove such line without compensation, nor can it be removed by the authorities, because since its erection it has become an inconvenience to the public, by reason of the construction of a street railway which occupies a portion of the highway, also, by consent of the authorities.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 6, 7.]

2. FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

A federal court has jurisdiction of a suit by a telegraph company which has accepted the provisions of Rev. St. § 5263 [U. S. Comp. St. 1901, p. 3579], to enjoin the threatened removal or destruction of its line by the local officers.

[Ed. Note.—Jurisdiction of federal courts in cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.]

In Equity. Suit for injunction.

Weed & Miller and E. S. Cook, for complainant.
M. W. Hunt and S. S. Richards, for defendants.

WING, District Judge. From the proof in this cause, it appears that the complainant's line of telegraph, consisting of poles and wires, was placed in the road known as the "Maumee Pike" in the year 1893; that this was done under the authorization of a resolution of the county commissioners of Sandusky county; that the location of the poles was in accordance with the direction of the county commissioners of such county, and that such location of poles has not been changed since the erection of the line; that at the time of the erection of the line the Maumee Pike was a highway 120 feet in width, a portion of which was macadamized, and the line of complainant's telegraph poles was erected on the edge of the macadamized portion; that the road upon which the complainant's telegraph line was erected is a postal road; that the complainant has filed a written acceptance with the Postmaster General of the restrictions and obligations required by section 5263 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3579]. It further appears that the defendants, by resolution, have ordered the complainant to remove the poles of its telegraph line upon the said Maumee Pike from the place where they are at present located, and in the same resolution permission is granted to the Postal Telegraph & Cable Company to locate said line of poles upon the extreme north portion of the pike; that the intention has been expressed on the part of the commissioners

nless the poles are removed as ordered, they will be cut down
defendants' direction. It is recited in the last resolution re-
to, as a reason for the resolution, "that the present location
l line of telegraph poles upon said highway seriously incom-
the public in the use of said highway." The condition of the
as in no wise been changed since its erection.

899 the county commissioners of Sandusky county granted to
oledo, Fremont & Norwalk Railway Company the right to
maintain, and operate a line of electrically operated railway
and upon the macadamized portion of the Maumee Pike,
ubsequently such railway was built. The terms and provi-
of the franchise thus granted appear in evidence, and it is,
g other things, provided that the railway company shall save
sky county harmless from any and all expense, injury, or
ge arising from the operation of said road, and in any way
g from the location, construction, and operation of said pro-
railroad. Testimony is introduced tending to show that
ublic is to some extent inconvenienced in its use of the pike
e existence of the railroad and the line of telegraph poles,
ey are now situated. There is no testimony showing that
nconvenience would have arisen to the public, except for the
uction of the railway line in the pike. There is testimony,
tradicted, which shows that, if the telegraph line of the com-
nt should be removed to the side of the pike designated
resolution passed by the commissioners for the removal, the
ion of the line would be much hampered by the existence
es. It also appears in evidence that considerable expense
attend the removal of the line. There is no fault attributed
complainant, and the only injury to the public has arisen by
n of the construction of the railroad by the railway company,
has agreed to hold the county harmless. It does not ap-
that any proceedings have been taken in which the rights
respective parties might be adjudged. It is undoubtedly
the power of the state of Ohio, through its county commis-
s, to exercise police power or other sovereign powers for
enefit of the public, notwithstanding such exercise of power
nterfere with the rights of individuals; but if such interference,
uch appropriation, in whole or in part, of such rights, to the
the public, result in injury or loss to the one in whom such
exist, compensation should first be made. The inconvenience
e public evidently has arisen either from the action of the
y commissioners in granting the franchise to the railway com-
or in the manner of exercise by the railway company of such
nise. In relieving against the existing inconvenience, the
nd expense should be borne by those creating the incon-
nce.

s court has jurisdiction of the cause, for the reason that the
ened physical interference with the telegraph line of the
ainant would seriously interrupt the rights acquired by the
ainant under the statutes of the United States.

the reasons given, the injunction prayed for by the com-

plainant is granted; and, for the same reasons, the mandatory injunction prayed for by the cross-bill is refused. Final decree may be drawn in accordance with this opinion.

Ex parte HUTCHINSON.

(Circuit Court, D. Washington, N. D. May 16, 1904.)

No. 1,183.

LICENSES—CONSTITUTIONALITY OF ORDINANCE—DEALERS IN TRADING STAMPS.

A city ordinance imposing a license tax of $600 per year on any person selling trading stamps to merchants, in addition to $100 per year on each merchant using trading stamps in his business, is not one for the purpose of providing revenue, but is clearly intended to prohibit the use of such stamps, and is void, as an abridgment of the privileges of citizens to engage in a legitimate business, in violation of the fourteenth constitutional amendment.

On Petition for Writ of Habeas Corpus.

P. P. Carroll, for petitioner.

Mitchell Gilliam, Corp. Counsel, for city of Seattle.

HANFORD, District Judge. Ordinance No. 6036 of the city of Seattle requires a person carrying on business as a pawnbroker to pay $100 per annum for a license, and exacts payment of six times as much for a license to sell trading stamps to merchants, in addition to a license fee of $100 per annum, which each merchant using trading stamps in his business is required to pay. It is very apparent that the purpose of this ordinance with respect to trading stamps is to prohibit their use in retail trade as a means of drawing custom, rather than to provide revenue, or to exercise in a reasonable manner the police power of the city. The giving of trading stamps is merely one way of discounting bills in consideration for immediate payment in cash, which is a common practice of merchants, and is doubtless a popular method, and advantageous to all concerned, and it is not obnoxious to public policy. The ordinance, therefore, is oppressive, and an invasion of the liberty of the people to carry on legitimate business by the use of legitimate means.

In the case of Seattle v. Barto, 31 Wash. 141, 71 Pac. 735, the Supreme Court of this state affirmed the validity of Ordinance No. 6036 in so far as it relates to pawnbrokers, and in its opinion the court said, in effect, that the fee of $100 per annum required of pawnbrokers is not so exorbitant or disproportionate to the cost of police surveillance that the court could, without proof of special hardship, deny its constitutionality. The court was not required to, and did not, express an opinion as to the validity of the subdivisions of the ordinance relating to the selling and use of trading stamps.

Admitting the principle that the city government is invested with discretionary power to license different trades and occupations, and

ıe rule of uniformity in taxation is not violated by differences
es, the cases of Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665,
R. A. 205, Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L.
892, and State v. Clark, 30 Wash. 439, 71 Pac. 20, are easily
guishable from this case, and I am not required to comment
ose decisions.
the reason above set forth, it is my opinion that subdivisions
2 of section 7 of the ordinance under consideration are an un-
nted abridgment of the privileges of citizens, and void, and
he imprisonment of the petitioner thereunder is a deprivation
liberty in violation of the fourteenth amendment to the Con-
on of the United States. Therefore I direct that a judgment
ered discharging him from custody.

Ex parte HUTCHINSON.

(Circuit Court, D. Oregon. April 19, 1905.)

No. 2,889.

IPAL CORPORATIONS—TRADING STAMP ORDINANCE—CONSTITUTIONALITY. A city ordinance making it unlawful for any person to sell goods and erchandise by selling trading stamps to merchants for delivery to their stomers with purchases, without paying an annual license tax of $200, nether or not authorized by the city's charter, is in violation of the ghts secured to citizens affected thereby by the fourteenth amendment the Constitution of the United States, and void; being neither a legiti-ate exercise of the taxing power, nor a reasonable police regulation.

Petition for Writ of Habeas Corpus.

roll & Carroll, for petitioner.
A. McNary, City Atty., for the city of Portland.

LLINGER, District Judge. The petitioner is a citizen of the of Michigan, and is a member of a firm doing business under ame of the National Stamp Company. The company is en- in what is popularly known as a "trading stamp business." s stamps to merchants at the rate of 50 cents a hundred, to be by them to their patrons as a cash discount—one stamp to 10 cents represented in the purchase made. These stamps are med by the stamp company in merchandise at its place of busi-n this city. The petitioner alleges that said stamps are used as a means of advertising the business of the stamp company f the merchants using the same, and as a medium of co-opera-nd exchange for value.
e restraint complained of grows out of the petitioner's arrest se of his failure to take out a license as required by an ordi- of the city of Portland which makes it unlawful for any per-o sell, offer, or attempt to sell goods and merchandise by sell-rading stamps, etc., to merchants for delivery to their cus-rs upon the purchase of merchandise from such merchants ut paying annually the sum of $200 for a license authorizing

the same. The city charter authorizes the council "to grant licenses with the object of raising revenue or of regulation, or both, for any and all lawful acts, things or purposes," etc. The city defends its action in arresting and imprisoning the petitioner upon the ground that the ordinance in question was for the purpose of raising revenue, and that it is a lawful exercise of the power conferred by the charter to that end.

The authority to raise revenue by a tax levied upon business is undeniable, but it does not admit of argument that the Legislature cannot authorize a tax "for any and all lawful acts, things, or purposes." It is impossible to imagine a form of government so oppressive as one that would authorize a tax upon every lawful act or thing a man may do, to say nothing of the authority to tax "any and all" his lawful "purposes." Judge Hanford, in the Circuit Court of the United States for the District of Washington, in passing upon the validity of a trading stamp ordinance of the city of Seattle, in a case identical with this (137 Fed. 949), says:

"It is very apparent that the purpose of this ordinance with respect to trading stamps is to prohibit their use in retail trade as a means of drawing custom, rather than to provide revenue or to exercise in a reasonable manner the police power of the city. The giving of trading stamps is merely one way of discounting bills in consideration for immediate payment in cash, which is a common practice of merchants, and is doubtless a popular method and advantageous to all concerned, and it is not obnoxious to public policy. The ordinance, therefore, is oppressive, and an invasion of the liberty of the people to carry on legitimate business by the use of legitimate means."

The court held that the imprisonment of the petitioner for a violation of the ordinance in question deprived him of his liberty in violation of the fourteenth amendment to the Constitution of the United States.

The Supreme Court of Georgia in a recent case (Hewin v. City of Atlanta, 49 S. E. 765) has decided that the furnishing of trading stamps is not a business. In the concluding part of its opinion that court says:

"In its ultimate analysis, the use of trading stamps by a merchant is simply a unique and attractive form of advertising, resorted to for the purpose of increasing trade. In the strict commercial sense of the term 'business,' it is not a business at all. It is simply a mode or manner of business—an instrumentality or incident of a business. When resorted to for the purpose of increasing the business to which it is annexed, it occupies the same relation to that business as newspaper advertising, circulars, dodgers, and the like; and, if the city of Atlanta can classify as a business advertising through the medium of the trading stamp, it can also classify as a business advertising through the journals of the city, or through the medium of a person employed to walk the streets with the sandwich upon which the goods, wares, and merchandise of a merchant are advertised, or the employment of a dwarf who carries upon his shoulder a barrel upon which the wares of a merchant are advertised, and who stops at every street corner and seats himself upon it."

I adopt this view of the effect of the acts for which the petitioner is held. These acts do not constitute a "business," in the proper use of that word. They are a mere means of advertising—an incident of a business—"a medium," as stated in the petition, "of co-opera-

l exchange for value." But whether considered a business
the ordinance in question and the charter which authorizes
n violation of the rights secured by the fourteenth amend-
the Constitution of the United States.
petitioner's imprisonment is illegal, and it is therefore or-
hat he be discharged from custody.

THE SARNIA.

(District Court, S. D. New York. April 26, 1905.)

N—INJURY IN SERVICE—NEGLIGENT FAILURE OF SHIP TO FURNISH PER TREATMENT.

ortly before a steamship left New York for a voyage to the West
es and return, libelant, a seaman, injured his hand on a loose wire
a cable he was handling. A few days after it became very much
len and painful, and libelant requested to be left in a hospital at
ston, which was the first port made. He was not left, but was
ed by a physician there, who performed an operation and gave di-
ons for further treatment on board. He was further treated by a
ician at another port, but was kept on board until the return of the
el to New York, when his hand was in such condition that he was
pelled to remain in the hospital for two months, and barely escaped
utation; the result being that his hand was rendered permanently
ss. It appeared that the directions of the Kingston physician were
followed, and that the hand was negligently treated by the officers
he ship, which contributed to its serious condition at the end of the
ge. *Held*, that the failure to leave libelant at Kingston and his
equent improper treatment were acts of negligence which rendered
ship liable in damages.

—DAMAGES.

n award of $1,500 made to a seaman 43 years old for the permanent
pling of his right hand through the neglect of the ship to furnish
with proper treatment after an injury to the hand in the service.

dmiralty. Action by seaman to recover for loss of use of his
rough improper treatment after its injury in the service of
sel.

ord H. Smith, for libellant.
e, Wallace & Dudley, for claimant.

MS, District Judge. This action was brought by Carmelo
a seaman on board the steamship Sarnia, to recover for per-
njuries sustained by him, while on a voyage from New York
West Indies and return, in July, 1904. It is alleged that be-
ving New York, the libellant's right hand was injured by a
ire from a cable which he was handling sticking in it while
d in the performance of his duties, and that in a few days
ter he suffered severe pains and the hand became greatly
n. It is further alleged that the libellant asked the master
e him ashore at the first port at which the vessel should
that the vessel was bound for Kingston and Port Limon,
libellant was not left at either port but was kept on board
consequence his hand became so badly and dangerously af-

fected, notwithstanding some treatment on board, before the vessel's return to New York, that when he reached there, he was obliged to go to a hospital, where he remained for about two months, and barely escaped amputation of his hand, which he has lost the entire use of, whereas it could have been saved by proper treatment and medical attention.

The claimant denies that there was any defect in the cable for which it could be held responsible, or any negligent treatment and alleges that when the hand was examined by the chief officer of the vessel, in consequence of the libellant's complaint that his hand was paining him, he applied a treatment of hot poultices, which was continued until the vessel arrived at Kingston, where the libellant was sent ashore and examined by a physician and surgeon, who advised the master that the libellant was suffering from a whitlow, and it was not necessary or advisable to send him to a hospital at Kingston. It is further alleged that this physician and surgeon treated the libellant's hand for two days, the 8th and 9th of July, and prepared various dressings to be subsequently applied, which was accordingly done. The next port was Port Limon, and when that was reached, the libellant was sent ashore by the master for the purpose of having his hand examined and properly treated there, twice a day, on the 15th, 16th, 17th and 18th days of July, and the libellant was requested by the physician and surgeon there to go to the hospital but the libellant refused to do so. The physician thereupon advised the master of the ship that it was not necessary to send the libellant to a hospital at Port Limon and suggested that there might be danger of his contracting a fever if it were done and advised that he be taken to New York and transferred to a hospital there. The physician gave to the master full instructions as to the treatment of the injured hand, which were duly observed by the mate and stewardess of the vessel, and when the vessel reached New York, the master caused the libellant to be sent to a hospital there, where he was cared for at the expense of the master for a long time thereafter. Further answering the claimant alleges that the master of the vessel in not compelling the libellant to go to a hospital in the West Indies and in taking the libellant to New York for hospital treatment and the treatment which was given him on the vessel, was under the advice of competent physicians and surgeons.

The testimony shows that the libellant was hurt as stated by him in the libel but not that there was any negligence in such respect on the ship's or libellant's part. The case may be regarded as one where a seaman is injured in the service of the ship, without negligence, leaving the question to be determined whether there was any negligence on the ship's part in the subsequent care of the seaman, which gives him a right of action.

It appears that a few days after the ship sailed from New York, the libellant's hand commenced to swell from the effects of the wound and he asked that he be put ashore at Kingston for treatment in the hospital there. Before arriving his hand was treated on board under direction of the chief officer with "black brown bread and onions," which softened the skin and the chief officer took the soft

with a knife. No apparent good effect followed and when was reached, the libellant was sent ashore for examination hysician there, who usually attended to such matters for nship line to which the vessel belonged. The physician he found that it was a case of whitlow but it was unfit for tion the first day. Instructions were then given for warm c applications and further instructions for another exam- he next day, the 9th of July. An operation was then per- causing a free discharge of pus, and the physician's opinion, icated to the ship's officers, was that such further treatment be necessary could be carried out on board the ship, and ffect a complete recovery in a week or ten days. The li- was accordingly kept on the ship and some treatment at- there. The ship then proceeded to Port Limon, stopping at Savanilla for about 36 hours and at Cartagena about four No physicians were called in and none were apparently at either of those places. At Port Limon, a physician was d to attend the libellant and he did so on the 15th, 16th, 17th days of July. The physician there found a deep seated ation of the hand involving all the fingers and he advised er of the ship that a transfer should be made of the patient ospital under his charge for treatment, because he could etter attention there than on board ship. This physician that the libellant refused to go on account of the Port Li- nate and he returned to the ship, after the physician had the chief officer how to treat him. The physician felt con- at with the instructions and dressings given, the patient uffer no permanent injury by reason of sailing back to New

is a conflict between the libellant and the officers of the to whether he wished to be transferred to the hospital at non but I have no doubt that the libellant wished to be left ton, for treatment in the hospital there, and whether or not d it at Port Limon is apparently immaterial. The master, by medical advice, was required to determine what should with the libellant. The chief officer said "We don't go by es of the sailor."

e return voyage to New York, the libellant was treated on by the chief officer and the stewardess, with the result that ew York was reached, he was in a serious condition and to a hospital, where he remained about two months. The owever, had gone too long without adequate attention and not be cured but is apparently crippled, as far as his right concerned, for life.

hysician, under whose charge the libellant was in the New spital, testified that when he came there the wound was not d was in a very bad condition. Proper treatment resulted and being saved to the libellant but in such a condition as ereafter practically useless for any manual labor. The tes- shows that if proper treatment had been given at Kingston Limon, the usefulness of the hand would, in all probability,

have been preserved, but the treatment that was given on board the ship resulted in a permanent partial disability. The chief officer, who had charge of the libellant on board did not apparently follow the instructions given him by the physician at Kingston but substituted a method of his own, which he says he "learned at school," taking the pus out when he deemed necessary, that is, as he said, "By my knowing it, by my knowledge." When the libellant came back from the physician's examination at Port Limon, the officer first discovered the formation of pus, and the doctor there advised him to keep the wound clean, to "take the pus out all the time." The physician in Kingston had given him practically the same advice but little or no attention was given to the formation of pus. In fact, I am forced to the conclusion that the libellant was negligently treated by the ship's officers. The master gave him no personal attention; the chief officer's was useless, as was also that of the stewardess, as far as any favorable results were concerned. But for the treatment he received in New York, the hand would probably have been lost. With it, he lost control of his second and third fingers but the hand could not then be put in a normal condition. If the pus had been removed at first and the wound kept clean, it is probable that no serious results would have followed the original wound, which was not of a very important character. In this respect, at least, there was marked neglect. The libellant should have been left in the hospital at Kingston in conformity with his request, but even at Port Limon, it was probably not too late to save the full usefulness of the hand, as it turned out to be seven days later in New York.

The right of seamen to obtain substantial compensation for such negligence as is apparent here is well settled. The Eva B. Hall (D. C.) 114 Fed. 755; The Troop, 138 Fed. 856, 63 C. C. A. 584.

It only remains to determine what the libellant should recover. Before the injury he was a strong, healthy man, about 43 years of age, and earning as a sailor from $20 to $25 per month. He is only partially disabled but will be unable hereafter to make such a living as he has been accustomed to. It seems to me that $1,500 will be a proper sum to allow him under the circumstances.

Decree for libellant for $1,500, with interest.

THE FURNESSIA.

(District Court, S. D. New York. May 4, 1905.)

COLLISION—STEAMSHIP AND SCHOONER CROSSING—EXCESSIVE SPEED AND WANT OF EFFICIENT LOOKOUTS IN FOG.

A steamship approaching New York at night in a fog came into collision with a crossing schooner 15 miles east of Fire Island Lightship. Both vessels were sounding fog signals. The steamship was admittedly going at a speed of six knots, and had a lookout on the forecastle head, and another in the crow's nest on the foremast, but neither saw nor heard the schooner until she was seen from the bridge, when quite near. At this time a white light was seen on the schooner nearly ahead, which was mistaken for a stern light, and the steamship changed her course, but

on little affected thereby at the time of collision. *Held*, that the hip was in fault for excessive speed and want of efficient look- that the schooner would not be adjudged in fault because the mate, extremity of the collision, set out a false and misleading light, g doubtful whether or not it contributed in any way to the col- which was fully accounted for by the plain faults of the steamship.

Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 152–

iiralty. Suit for collision.

rland, Taylor & Costello, for libellants.

on, Biddle & Ward and W. S. Montgomery, for claimant.

IS. District Judge. This action was brought by John nd Richard K. Snow, the part owners and agents of the William Bisbee, to recover the damages arising from a between the schooner and the steamship Furnessia about ock A. M. of the 15th day of May, 1901, some 15 miles east sland Lightship in the Atlantic Ocean.

sbee, loaded with oak timber and a small amount of gen- o, was bound from Gallick's Landing, Virginia, to Rock- ine. The steamship, with passengers and general cargo, d from Glasgow to New York. The weather before and at of collision was foggy, dense according to the steamship's n, but light according to the schooner's.

hooner was on the starboard tack and carrying full sail, main sail and spanker, with 3 top sails, 4 stay sails and 3 e was not making very much progress, however, probably at the utmost, as there was a very light wind from the . The mate was steering and a lookout was stationed on astle head. The latter was using a mechanical fog horn, ber size and type. She also had her lights duly set and

eamship ran into a haze shortly after midnight which l into a fog about 20 minutes before the collision. Her course was West by North, 2 degrees North, which allow- leviation, gave the steamship practically a West course. at first proceeding at her full speed of 14 or 15 knots but ner speed twice, so that, it is claimed, she was going at the knots at the time of collision. She had a lookout sta- the forecastle head and another in the crow's nest on the The fog whistle was duly blown. According to the y of the navigating officers, the first knowledge they had cinity of the schooner was seeing a white light, less than n the steamship's port bow, in close proximity, which they e a ship's stern light. The wheel was put hard-a-port to vessel which was supposed to exhibit the light, and when nship was beginning to feel the influence of the helm, a ht was seen on the port bow, whereupon the steamship rsed at full speed, but it was too late to check her headway y and she struck the schooner a hard blow a little abaft s on her starboard side, which turned her over.

The members of the schooner's crew were obliged to take to the boat which hung at her davits astern. They thus reached the steamship and were taken aboard and brought to New York.

The schooner's contention is that the steamship was solely at fault for the collision, principally in that she did not have sufficient lookouts and was proceeding too fast in a fog.

The steamship's contention is that the collision was solely produced by the schooner exhibiting a false light which misled the steamship into changing her course, bringing about the collision.

The steamship did not take the testimony of her lookouts but they were hunted up by the schooner and examined on her behalf. Their testimony does not seem to be of much importance, as there are circumstances which tend to discredit the witnesses and I do not consider it necessary to resort to their statements in disposing of the case, as taking the steamship's own testimony, she should be condemned for proceeding at an undue speed in a dense fog and in not having sufficient lookouts. If her speed was only 6 knots, it was too much in such a fog, and the fact that she claims the first knowledge she had of the presence of the schooner was by observation from the bridge, suffices to condemn her navigation in such respect. The schooner had a mechanical fog horn which she was using some time before the collision, but it was not heard on the steamship until the collision was imminent.

The difficult question in the case is concerning the exhibition of an irregular light by the schooner. When the steamship's pressure became known to those on the schooner, the mate, who was then in charge and steering her, took the light out of the binnacle, and set it on top of the house, where it remained until nearly the time of the collision, when it was put back into the binnacle. The mate explains this by stating that he was afraid of steamers and always used this precaution. It was very bad practice on his part and if it had any effect in producing the collision, the vessel should be condemned for it. The steamship claims that she supposed that the light was one of an overtaken vessel shown in conformity with Art. 10 of the sailing rules, which provides:

"Art. 10. A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

The white light required to be shown by this article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of twelve points of the compass, namely, from six points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried nearly as practicable on the same level as the side lights."

Art. 1 provides:

"The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited."

And see The Excelsior (D. C.) 33 Fed. 554, affirmed (C. C.) 39 Fed. 393; The Palinurus, L. R. 13 P. D. 14.

The steamship's change of course to starboard tends to show that she was misled by the white light, but she was then apparently her-

lt, in that she had, by reason of her excessive speed of admitted, and it was probably more, and want of efficient approached too close to the schooner. The change of the steamship's part was slight, said by her wheelsman en less than a point and by her officers between 1 and 2 The wheelsman was probably correct. If it had been ne other direction, the steamship would have gone astern hooner and the collision been avoided. Without any e collision would probably have taken place by the steam- ng further aft on the schooner, but it is not profitable to about what might have taken place, if something else done. What was done, was a steamship striking a sail- in a fog, proximately through her own excessive speed of efficient lookouts. The schooner exhibited a false ading light in the extremity of the collision. The effect hibition is too doubtful to make the schooner bear any loss therefor. The collision is too well accounted for by ship's plain faults to allow a division of the damages. for the libellants, with an order of reference.

BURKHART v. GERMAN-AMERICAN BANK.

(District Court, S. D. Ohio. November, 1904.)

y—Banks—Partnership.

r. Act July 1, 1898, c. 541, § 1, cl. 6, 30 Stat. 544 [U. S. Comp. 1, p. 3419], declares that "corporations" shall mean all bodies any of the powers and privileges of private corporations not ed by individuals or partnerships, and shall include limited or artnership associations organized under laws making the capital ed alone responsible for the debts of the association. Section es that private bankers, but not national banks or banks incor- under state or territorial laws, may be adjudged involuntary ts; and section 5 (30 Stat. 547 [U. S. Comp. St. 1901, p. 3424]) s that a partnership during the continuance of its business or s dissolution and before settlement may be adjudged a bankrupt. nat where an association of individuals was formed to carry on iness of a private bank, as authorized by Laning's Rev. Laws 4891 et seq. (Bates' Ann. St. § 3170–1 et seq.) but was not incorpo- t was a partnership, and as such subject to be adjudged a bankrupt, it was entitled to exercise some of the attributes of a corporation.

Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 17,

persons are subject to bankruptcy law, see note to Mattoon Nat. First Nat. Bank, 42 C. C. A. 4.]

ruptcy.

man, Burkhart & Shea, for plaintiff.

lt, Dale & Ferneding, A. J. Hess, W. J. Emmons, Goeke s, and Prescott Smith, for defendant.

PSON, District Judge. The petition, as amended, among gs alleges that the German-American Bank is a partner- ged in the general banking business; that it and each and

all of the copartners composing it are insolvent; that in an action brought in the common pleas court of Shelby county, Ohio, a receiver was put in charge of its property because of its insolvency; that on or about August 23, 1904, it transferred, while insolvent, a portion of its property to certain of its creditors, with intent to prefer such creditors over its other creditors; and prays that the bank and copartners composing it, and each of them, may be adjudged bankrupts. The defenses are:

(1) That the bank is not a copartnership, but a corporation. (2) It says that it was not a party to the suit in which the receiver was appointed, and it claims that the evidence shows that the receiver was appointed upon an ex parte hearing to protect and preserve the property for the time being and until the further order of the court.

It is not denied, and the evidence conclusively shows, that the bank is, and was at the time of the appointment of the receiver and at the time of the filing of the petition herein, insolvent; and it is not denied, and the evidence conclusively shows, that the defendant within four months preceding the filing of the petition in bankruptcy transferred a portion of its property with intent to prefer certain of its creditors; and the question presented for the determination of the court is whether the defendant is a corporation, and not a partnership. Clause 6, § 1, c. 541, Bankr. Act July 1, 1898 (30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], 11 O. F. D. 76), defining the words and phrases used in the act, declares that:

"Corporations shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association."

And it is urged that this bank, having some of the powers and privileges of a private corporation not possessed by individuals or partnerships, is a corporation, and not a partnership, and that therefore the petition must be dismissed. But this clause must be construed in connection with section 4 of the act (30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]), which provides as follows:

"Any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

And with section 5 of the act (30 Stat. 547, 548 [U. S. Comp. St. 1901, p. 3424]), which provides that:

"A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

This bank is an unincorporated company, and under the laws of Ohio and for general purposes is a partnership, and for the purpose of banking is a private banker, but the contention is that it must be deemed to be a corporation for the purpose of administering its as-

bankruptcy, and it is urged, that to hold otherwise would
he provisions of clause 6, § 1. The broad terms of clause
re, however, limited by sections 4 and 5 in relation to who
ome bankrupts. In this respect sections 4 and 5 distinguish
porated companies and private bankers and ordinary part-
from corporations. It is difficult to conceive of an unin-
ed company (as distinguished from a corporation and an
partnership) without any of the powers and privileges of
corporation, for without any of these powers and privileg-
uld be an ordinary partnership. It is generally understood
body or association occupying middle ground between part-
and stock corporations, possessing some of the powers and
s of both, and is generally so recognized by the courts;
ion 4 may have contemplated such an unincorporated com-
ereby limiting the definition of "corporations," at least for
pose of adjudications in bankruptcy, to bodies organized
ws making the capital subscribed alone responsible for their
Clause 6, as construed by counsel for the respondents, would
with section 5, and deprive creditors of the right to have the
al property of the partners administered for their benefit by
krupt courts. It would be reasonable to treat as corpora-
lies whose subscribed capital stock is alone responsible for
ts, but it would be contrary to the spirit and purpose of the
t act to deprive creditors of the right to have the individual
of partners administered for their benefit by the bankrupt-
s simply because the partnership contract invested the part-
with authority to exercise some of the powers or privileges
poration. Laning's Rev. Laws, §§ 4891, 4892, 4893, 4894,
06, 4897 (Bates' Ann. St. §§ 3170-1 to 3170-7) require unin-
ed joint stock companies and banking partnerships, doing
in the state under a fictitious name or designation not show-
ames of the persons interested as partners in such business,
nce a year with the clerk of the court of common pleas of
ty in which its principal office or place of business is situ-
names in full of all the members of such partnerships and
ces of residence. One of the purposes of this law mani-
to advise those dealing with such partnerships who the
are, so that they may be able to enforce their rights against
the partnership but its members.

ank is a partnership, formed for the purpose of carrying on
ness of banking as a private banker, such as is contemplated
g's Rev. Laws, § 4891 (Bates' Ann. St. § 3170–1) et seq. and
may be adjudged a bankrupt.

LAKE STEAM SHIPPING CO. v. BACON.

(District Court, S. D. New York. May 4, 1905.)

SHIPPING—CHARTER HIRE—DISABLEMENT OF VESSEL BY STRANDING.

Where a steamship under a time charter was disabled by stranding so that during the remainder of the voyage she was not in the condition required by the charter, the charter hire nevertheless runs after she reached port and while discharging, when the disablement did not affect her efficiency to discharge, although there was delay, owing to damage to the cargo resulting from the stranding.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 219–221.]

In Admiralty. On exceptions to commissioner's report. For prior opinion, see 129 Fed. 819.

Convers & Kirlin, for libellant.

Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This action was brought to recover hire of the steamship Arenmore from April 16, 1903, to May 13, 1903. It was held—(D. C.) 129 Fed. 819—that under the terms of the charter party, there could be no recovery of hire, while the vessel was in an unfit state to perform the service for which she was engaged, owing to her condition arising from a stranding on Anegada Reef, Virgin Islands, but the time occupied in discharging in New York should be paid for and the matter was sent to a commissioner to assess the damages in such respect. Testimony was then taken tending to show that the vessel was employed in discharging 7 days and 1½ hours, for which the commissioner found the libellant was entitled to recover $623.70, with interest.

The respondent excepts to such allowance upon the ground that the vessel was not in an efficient state for such service because the discharge was very much delayed, owing to the damaged condition of the cargo. The commissioner says in this connection:

"On testimony of which the above is the substance, respondent argues that the ship was not 'again in an efficient state to resume her service,' so far as the discharge was concerned, since owing to the condition of the cargo it could not be discharged with the usual despatch. While I think the decision of the court disposes of this question adversely to respondent, it also seems to me that the delay in discharging described by respondent's witnesses was due not to the condition of the ship, but to the condition of the cargo. Had the ship been fully repaired at St. Thomas and restored to her original condition so as to be 'ready to receive cargo, and tight, staunch, strong and in every way fitted for the service,' or had the cargo been transshipped into another vessel, there would have been the same necessity for separating the damaged cargo from the sound after landing it on the dock at New York, the only difference being that the time thus consumed would probably have been somewhat less because there would have been no additional damage on the voyage to New York. The bulk of the damage was sustained before the ship started from St. Thomas for New York. As far as the evidence shows, the fact that the cargo was damaged did not in any way delay or embarrass the actual discharge from the ship to the dock, nor does it appear that any machinery or apparatus belonging to the ship and used in the discharge was ineffective, or that its efficiency had been in any way impaired. There is nothing to show that the cargo which remained in the ship could not have been landed with the same despatch as before the accident.

the Harter Act and the decision of the court, the owners of the cargo
e no claim against the ship or her owners for damage to the cargo
he stranding; nor has the respondent any such claim, or any claim
reight, since if there might otherwise have been any doubt on that
t is covered by clause 27 of the charter, which provides: 'It is also
agreed that this Charter is subject to all the terms and provisions of
ie exemptions from liability contained in the Act of Congress of the
tates, approved on the 13th day of February, 1893, and entitled "An
ing to Navigation of vessels," etc.' Act Feb. 13, 1893, c. 105, 27
[U. S. Comp. St. 1901, p. 2946]. The libellant, therefore, is not re-
for the delay resulting from the separation of the bags on the dock,
lowance in time should be made therefor to respondent."

s not seem necessary to add much to what the commission-
aid, as it apparently disposes of the question now presented.
s true that the delay was partly due to the stranding in that
he sugar in such a condition that it could not be expedi-
handled after being landed on the wharf and in such sense
ay was partially attributable to the stranding, which, it
held, relieved the respondent of the obligation to pay hire
he voyage, but such relief did not go to the extent of releas-
respondent from the payment of hire while the discharge
ing place, unless the ship's condition was such as to pre-
being accomplished with due celerity. It was the condition
argo and not of the ship that caused the delay in question
eems that when the cargo reached New York, the hire was
ing again and should be paid for for such time as was nec-
occupied in the discharge, even though some of the loss
was due to the condition of the cargo arising out of the
misfortune. The question whether full hire should be
ler the circumstances, seems to be answered in the affirma-
the fact that the ship was necessarily occupied during the
owed for. She was in a condition for such service. The
nowever, was not in a condition to be rapidly taken away
r as it was discharged. The commissioner says, with ap-
correctness, that there could be no maintainable claim
the ship for damage to the cargo through the stranding and
ing the case, it is not important here that some delay was
to such damage. This matter can not be disposed of on
equitable principles but must be considered in connection
e contract of hiring, which provided how and when the hire
run.

otion overruled. Report confirmed.

CLENEAY et al. v. NORWOOD et al.

(Circuit Court, S. D. Ohio. January 21, 1905.)

CIPAL CORPORATIONS—SPECIAL ASSESSMENTS—SEWERS—EXEMPTION OF PERTY—UNIFORMITY.

v. St. Ohio 1892, § 2383, authorized the council of a city to exempt
a special assessment such portion of the frontage of any lot having
eater frontage than its average depth, and so much of any frontage
orner lots as seemed equitable, and charge the deficiency caused by

such exemption on the whole frontage taxed pro rata. *Held*, that an assessment for sewer construction was not invalid for nonuniformity because certain lots fronting on the improvement were exempted under such section.

2. SAME—INJUNCTION—BILL—NOTICE.

Where a bill to restrain the collection of a special sewer assessment alleged that the sewer subdistrict was established in June, 1899, that the ordinance authorizing the improvement was passed January 15, 1900, and that the assessing ordinance was passed December 3, 1900, it would be assumed, in the absence of a showing to the contrary on demurrer to the bill, that in the course of such proceedings the various steps required by Rev. St. Ohio 1892, §§ 2304, 2374–2376, and 2378, then in force, were duly complied with.

3. SAME.

The publication of a resolution declaring the necessity of a sewer, and the filing of the plans and plats as required by Rev. St. Ohio 1892, §§ 2304, 2374–2376, and 2378, affords reasonable notice to the property owners of the intention to make the improvement, its extent and character, and the manner in which it would affect their property.

4. SAME.

An allegation in a bill to restrain collection of a special sewer assessment that the improvement was made without notice to complainants, "as the owners of property to be charged," was not an averment that the steps required by Rev. St. Ohio 1892, §§ 2304, 2374–2376, and 2378, for the publication of resolutions, etc., and the filing of plans, had not been taken.

5. SAME.

Rev. St. Ohio 1892, § 2370, provides that the plan devised for providing a city with sewers shall, in the discretion of the council, be formed with a view of dividing the corporation into as many sewer districts as may be deemed necessary for securing efficient drainage, the main or principal sewers having their outlet in a river or other proper place. *Held*, that the "proper place" for the outlet of a sewer was within the discretion of the city council, and that lot owners subject to assessment were bound by the council's action.

6. SAME.

Where a bill to restrain the collection of a sewer assessment alleged that the sewer emptied into a creek which was mostly stagnant during the larger part of the dry or summer season, and in which at no time was the volume of water or the current sufficient to carry off the sewage, such allegation did not allege that the creek was insufficient to carry off "any or a large part" of the sewage.

7. SAME—POLLUTION OF STREAMS—VILLAGE OFFICERS—VIOLATION OF STATUTE—ASSESSMENTS—VACATION.

That a village, its officers and agents, had violated certain statutes prohibiting the pollution of streams by sewage, and were liable for the penalties prescribed therefor, constituted no ground for setting aside an assessment for the construction of the sewers.

In Equity. Bill to enjoin the collection of municipal assessments. Submitted on demurrer to the bill. Sustained.

David Davis and Clifford Woods, for plaintiffs.
W. R. Collins and O. G. Bailey, for defendants.

THOMPSON, District Judge. The bill is demurred to upon the ground that it does not state a cause entitling complainants to the relief prayed for.

The grounds upon which relief is sought, as stated in the bill, are, in substance, as follows: (1) The apportionment of the assess-

among the property holders is not uniform, but, on the con- discriminates against complainants. (2) The improvement ot benefit the property of complainants, and the enforcement assessment will deprive complainants of property without rocess of law, in violation of the fourteenth amendment to the itution of the United States. (3) The assessment is prema- nd illegal, because the outlet provided for the sewers is not s is required by law.

bill alleges that, of the lots bounding and abutting on the s named in the ordinance authorizing the improvement, 9 were , and about 36 were partly, exempted from assessment by the ing ordinance, and that the exemption was made without no- complainants.

bill shows that the partial exemption of the 36 lots was made npliance with the requirements of section 2383, Rev. St. Ohio repealed 96 Ohio Laws, p. 96), then in force, which provides

council may exempt from assessment, such portion of the frontage lot having a greater frontage than its average depth, and so much of ontage of corner lots, as to it may seem equitable, and charge the de- caused by such exemption on the whole frontage taxed pro rata; but oing, it shall specially set forth, in the ordinance making such assess- each lot so exempted; which ordinance, when passed, shall be binding he parties interested."

complying with the provisions of this section, the village il did not violate, but enforced, the rule of uniformity by de- ning the true frontage of lots having a greater frontage than average depth, and of corner lots subject to assessment upon er street, and complainants were not prejudiced for want of . Of the nine lots which were wholly exempted, four, name- s 406, 387, 391, and 399, belonged to the complainants, and it shown in the bill why any of the nine were exempted. Only n streets "through or in which such sewers and drains may l" are subject to assessment, and it may be that, when the work ompleted, it was found that these lots did not bound or abut the streets, or parts of the streets, named in the ordinance au- ing the improvement, "through or in which such sewers and s" were laid, and for that reason were omitted from the as- g ordinance. The bill fails to show that these lots were sub- assessment.

e bill states that:

d alleged improvement was made and assessment levied upon an arbi- front-foot plan, and without any notice whatever to the complainants, owners of property to be charged."

this is a conclusion not warranted by the facts stated in the The bill shows that the sewer subdistrict in question was ished in June, 1899, that the ordinance authorizing the im- ment was passed January 15, 1900, and that the assessing ance was passed December 3, 1900, and, in the absence of any ng in the bill to the contrary, it will be presumed, for the pur- of the demurrer, that in the course of these proceedings the

various steps required by original sections 2304, 2374–2376, and 2378 (repealed 96 Ohio Laws, p. 96. See Laning's Rev. Laws, §§ 3602, 3603, 3654-3656, and 3610; Bates' Ann. St. §§ 1536–211, 1536–212, 1536-212 to 1536–244, 1536-248), then in force, were duly taken to authorize, make, and pay for the improvement. It is provided in these sections as follows:

"Sec. 2304. When it is deemed necessary by a city or village to make a public improvement, the council shall declare by resolution the necessity of such improvement * * * and publish the resolution not less than two nor more than four consecutive weeks in some newspaper published and of general circulation in the corporation."

"Sec. 2374. Such board shall have plans and specifications prepared for the construction of the proposed main sewers, showing the size, location and inclination thereof, and the depth of the same below the surface.

"Sec. 2375. When plans and specifications for the main sewers have been prepared, the board of improvements, or the board of commissioners of sewers, shall give at least ten days' notice in one or more newspapers of general circulation in the corporation, stating that such plans have been prepared, and are filed in the office of the board for examination and inspection by parties interested; by which notice the board shall designate the portions of the work proposed to be done, and where main sewer districts are provided for, the boundaries thereof.

"Sec. 2376. At the time specified in the notice, or at an adjourned meeting, the board shall hear the parties interested, and may, if it sees proper, amend or correct the plans; and it shall thereupon file the plans, as amended, or, if no amendment be made, then the original plans, duly certified by it, in the office of the civil engineer of the corporation."

"Sec. 2378. The council, on the recommendation of the board, shall cause such sewer, or sewers, specified in the plan, as may be designated by the board, to be constructed; * * * and the council, upon the passage of such ordinance, shall cause a plat to be made, and filed in the office of the clerk of the corporation, showing the lots so bounding or abutting, and the number of the feet front of each lot."

The publication of the resolution declaring the necessity of this improvement, and the filing of the plans and plats thus required, afforded reasonable notice and means of information to the property holders of the intention to make the improvement, and of its extent and character, and of the manner in which it would affect their property. It is not stated in the bill that the village or its council or officers failed to take these various steps, or any of them, and the broad allegation that the improvement was made without notice to the complainants, "as the owners of property to be charged," cannot be construed to be an averment that these steps were not taken. Paulsen v. Portland City, 149 U. S. 30, 40, 13 Sup. Ct. 750, 37 L. Ed. 637; French v. Paving Co., 181 U. S. 324, 339, 21 Sup. Ct. 625, 45 L. Ed. 879.

Health and convenience require that town and city lots used for residence and business purposes should have the benefit of an adequate system of sewerage, and the Legislature of Ohio have provided that when a village council has declared the necessity for such a system, and has constructed it, the cost of construction may be imposed upon the owners of the lots abutting upon the streets through or in which the sewers are laid, necessarily assuming that they will be benefited thereby, and, in fact, they are benefited thereby in the enhancement of the value of their lots. Necessarily, con-

n with an adequate system of sewerage will enhance the of abutting village and city lots, whether they be improved or roved.

claimed, however, in the bill that this sewerage system has proper outlet, "and the complainants have as yet no sewers, , to drain their said lots and lands," and consequently have en benefited by the improvement; but in the stating part of l it is alleged, upon information and belief:

t said sewerage system consists of a large main sewer, into which smaller sewers, known at laterals or branches, drain, and that the ain sewer, which is the only outlet to the entire system, empties into a tream, which is not a river or other proper place, as required by sec- 70, Rev. St. Ohio 1892, and which stream is mostly stagnant during the part of the dry or summer season, and in which at no time is the of water or the current sufficient to carry off the sewerage. This is known as 'Duck Creek,' * * *."

ginal section 2370 (repealed 96 Ohio Laws, p. 96. See Lan- Rev. Laws, 3633; Bates' Ann. St. § 1536–241) provides as fol-

plan so devised shall, in the discretion of the council, be formed with w of the division of the corporation into as many sewer districts as deemed necessary for securing efficient drainage and sewerage; each districts shall be designated by name and number, and consist of one e main or principal sewers, with the necessary branches and connec- he main or principal sewers having their outlet in a river or other place; and the districts shall be so arranged as to be independent of her so far as practicable."

the express terms of this section the determination of what oper place" is confided to the discretion of the council, and owners are bound by its action. It is not shown that there outlet or proper place, but only that Duck creek, into which ain sewer empties, "is mostly stagnant during the larger part dry or summer season, and in which at no time is the volume er or the current sufficient to carry off the sewerage." Mani- in the opinion of the complainants, the outlet is insufficient, is not stated as a fact that Duck creek fails to furnish any out- the sewer. The language, "and at no time is the volume of or the current sufficient to carry off the sewerage," in the ction in which it is used, means that it does not carry off all werage, not that it does not carry off any of the sewerage. vere a fact that the creek was insufficient to carry off any or e part of the sewerage, unequivocal and explicit language have been used in stating the fact.

bill also calls attention to certain statutes enacted by the al Assembly of the state of Ohio in the exercise of the police , prohibiting the pollution of streams, etc., and prescribing ies for the violation thereof. The village or its officers and s may be liable for the violation of these statutes, but that fact s no ground for setting aside the assessment.

demurrer will be sustained.

In re McGUIRE.

(District Court, N. D. Ohio, E. D. May 4, 1905.)

No. 1,852.

SUBROGATION—PAYING INCUMBRANCE FOR ANOTHER—AGREEMENT FOR SUBROGATION.

One who, at the request of a debtor, furnishes the money to discharge a lien, under an agreement that he shall have the same lien, is entitled in equity to be subrogated to the lien of the creditor whose debt is paid.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Subrogation, § 61.]

In Bankruptcy. On review of decision of referee.

C. P. Winlugler, for claimant.

J. W. Mykrantz, for trustee.

TAYLER, District Judge. This matter is before the court on the petition of the trustee for the review of the decision of the referee with reference to the claim of G. A. Cassell.

The facts in the case are as follows: McGuire, the bankrupt, in October, 1902, purchased a farm for $3,500, giving in payment $500 in cash, and six notes for $500 each, the first payable April 1, 1904, and the others annually thereafter, the notes being secured by mortgage on the farm. The mortgagee transferred the first three notes. When the first note became due, Cassell, at the request of the mortgagor, and upon the mortgagor's promise to turn over to him this first note, advanced to the mortgagor the money with which to pay the note, which was taken up by McGuire and given to Cassell. There seems to have been some argument between McGuire and Cassell on the one hand, and the agent of the holder of the note on the other, at the time of the negotiations for payment of the note, the latter refusing to assign the note, and stating that he would mark it "Paid", but at the time of the payment no such indorsement was made.

Cassell claims that he is entitled to be subrogated to the rights of the original payee of the note under the mortgage executed by McGuire to secure it, and this claim is disputed by the trustee. The contention of the claimant was sustained by the referee.

The doctrine of subrogation will be applied, in general, wherever any person, other than a mere volunteer, pays a debt or demand which, in equity and good conscience, should have been satisfied by another. Was Cassell, in the dealings above recited, a mere volunteer? In the case of Home Savings Bank v. Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146, the court says:

"Subrogation, as a principle of equity jurisprudence, is generally confined to the relation of principal and surety and guarantors, or to a case where a person is compelled to remove a superior title to that held by him in order to protect his own, and also to cases of insurers. * * * Whilst these general heads include the doctrine and principles of subrogation, that doctrine has been steadily expanding and growing in importance and extent in its application to various subjects and classes of persons. This equitable principle is enforced solely for the accomplishment of substantial justice, where one has an equity to invoke which cannot injure an innocent person

of subrogation which springs from the mere fact of the payment and which is included under the heads first above stated, is what legal subrogation, and exists only where included within those But, in addition to this principle of legal subrogation, there exists rinciple, which is termed conventional subrogation, which results quitable right springing from an express agreement with the debtor, one advances money to pay a claim for the security of which there ien, by which agreement he is to have an equal lien to that paid upon he is entitled to the benefit of the security which he has vith the expectation of receiving an equal lien. * * * It is the that the security shall be kept alive for the benefit of the person he payment which gives the right of subrogation, because it takes character of a mere volunteer."

case of Wilkins v. Gibson, 113 Ga. 31, the court says, on 38 S. E. 374, 379, 84 Am. St. Rep. 204:

ise where a stranger pays off the debt of another which is secured r mortgage, the parties have a right to agree that the payor will same priority as the holder of the security, and be substituted for ourt of equity will enforce this agreement as made, and give the editor just such security as he contracts for."

Circuit Court of Appeals for the Fifth Circuit, in the case l et al. v. Smith et al., 101 Fed. 159, 164, 42 C. C. A. 297, 302,

the equitable doctrine of subrogation was ingrafted on the English risprudence from the civil law, it has been steadily growing in im- and widening in its sphere of application. It is a creation of nd is administered in the furtherance of justice. It is applied to party who actually pays the debt the full benefit and advantage of ment. It has been long settled, and it is not controverted, that the pplies where a junior incumbrancer discharges the prior incum- nd where the surety pays the debt of his principal, and in cases haracter. A just limitation of the application of the doctrine is oes not apply to payments made by a mere volunteer or stranger. an be allowed to intrude himself upon another as his surety; and if a man voluntarily pays the debt of another, without any agree- hat effect with the debtor, he cannot take the place of the creditor, way recover the money so paid of the debtor, because the law does it one man thus officiously and without solicitation to intermeddle affairs of another.' Winder v. Diffenderfer, 2 Bland, 199; Harris, 558, § 810, note 'h.' This objection is made in the present case. d that Francis Smith, in advancing the money to pay the mortgages, ere volunteer within the meaning of the authorities, and that the of subrogation, therefore, does not apply. It will be remembered that y was lent and applied to the payment of the mortgages at the f the debtor, the new mortgage being taken on the same lands y the older mortgages."

court quotes further from Harris, Subrogation, p. 559, § e 1, as folllows:

son who has lent money to a debtor may be subrogated by the debtor editor's rights; and if the party who has agreed to advance the r the purpose employed it himself in paying the debt, and dischar- incumbrance on land given for its security, he is not to be regarded anger. Dix. Subr. 165; Payne v. Hathaway, 3 Vt. 212. The real in all such cases is whether the payment made by the stranger n to the debtor through a mere desire to aid him, or whether it was h the expectation of being substituted in the place of the creditor. rmer is the case, he is not entitled to subrogation; if the latter, f a person pays a debt at the instance, request, or solicitation of r, he is neither a volunteer, stranger, nor intermeddler; nor is the

debt regarded as extinguished, if justice requires that it should be kept alive for the benefit of the one advancing the money, who thereby becomes the creditor. Association v. Thompson, 32 N. J. Eq. 133."

Pomeroy, in his work on Equity Jurisprudence (1883) § 1212, after stating the general rule as to subrogation or equitable assignment in cases of payments made by persons who have subsequent interest in the premises, adds:

"The doctrine is also justly extended by analogy to one who, having no previous interest and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his benefit. Such a person is in no true sense a mere stranger and volunteer."

In the case of Straman v. Rechtine et al., 58 Ohio St. 443, 455, 51 N. E. 44, 46, the Supreme Court of Ohio says:

"Where money is loaned under an agreement to be used in the payment of a lien on real estate, and it is so used, and the agreement is that the one who loans the money shall have a first mortgage lien on the same lands to secure his money, and through some defect in the new mortgage, or oversight as to other liens, the money cannot be made on the last mortgage, the mortgagee has a right to be subrogated to the lien which the money supplied by him has paid, when it can be done without placing greater burdens upon the intervening lienholders than they would have borne if the old mortgage had not been released."

I am of the opinion that the facts in the case under consideration clearly entitle Cassell to the relief claimed, and the decision of the referee is therefore affirmed.

JULIA v. CRITCHFIELD.

(Circuit Court, S. D. New York. April 27, 1905.)

CORPORATIONS—STOCK—VALUE—EVIDENCE.

In an action for breach of a contract to deliver to plaintiff 1,000 shares of 6 per cent. preferred stock of an asphalt mining company, evidence *held* to justify a verdict finding that its value was $75,000.

Motion to Set Aside Verdict as Against the Weight of Evidence and as Excessive.

L. Laflin Kellogg, for the motion.
W. Benton Crisp, opposed.

LACOMBE, Circuit Judge. This is a motion to set aside the verdict and order a new trial. So far as the motion is based upon the exceptions reserved during the progress of the trial, it need not be discussed. Possibly the court erred in the construction which it put upon the written contract, or in admitting or rejecting evidence relating thereto; but those exceptions can all be argued in the appellate court, and there finally determined. So, too, any alleged errors in the charge may be presented in that tribunal as effectively as here. As to the suggestion that the verdict—in favor of plaintiff on the whole case—is against the weight of evidence, it is unsound. If the contract was properly construed by the court, the evidence fully warranted a verdict for the plaintiff.

ontended, however, that the amount of damages found by is excessive. So far as the contention is directed to the ion that upon the evidence nominal damages only could led, that question can also be passed upon by the appellate It is a close one upon the authorities presented on this argu- it, if the defendant is right in his contention, the exception to the court's refusal to instruct the jury that they could anything more than nominal damages sufficiently preserves ts. The question, however, whether the jury erred, not substantial damages, but in assessing the amount at $75,- ead of some smaller sum, should be disposed of here, be- nder the practice in the federal courts, the appellate tribunal e no power to pass upon it.

nly point, therefore, which will now be discussed, is wheth- eding that the jury were properly instructed to find sub- damages upon the testimony, their verdict is excessive. blem submitted to them was "what would 1,000 shares of erred stock of this company have been worth on the day the was entitled to receive it?" Defendant contends that no nt answer can be given to that question; that it is pure rk to name any sum. Incidentally it may be remarked that tention, if sound, will secure a reversal upon the excep- the charge. But in addition it seems to the court that there fficient factors proved to warrant an intelligent deduction. preferred stock been issued, it would have ranked below ,000 of bonds; but that $500,000 was all put into the prop- building railroads and wharves, putting up houses and uying machinery, boats, etc. Since the asphalt deposit, veloped, turned out to be a valuable one, and the company concern, there is no reason to infer that the proceeds of the as lost or seriously depreciated when invested there. On rary, the bringing together of all these materials in a place heir use could earn money presumably made their aggregate gher than the total separate values of the units composing t. The jury were fairly warranted in concluding that the ments put upon the property were of sufficient value to e prior lien of the $500,000 bonds. Besides the improve- here was the original deposit of asphalt, with the conces- hich gave the right to mine and export it; and besides the here was the issue of $700,000 of common stock. One testified that the stock was given out as a bonus to purchas- onds. The secretary of the company testified that it was or the property; i. e., the asphalt deposit and concessions. r the issue of common stock was large or small, it would ow preferred stock, which latter, after the bonds were pro- r, would take all the balance of the property up to the of preferred stock issued. The evidence showed that in ears 30,000 tons of asphalt were removed, and sold here o $25 a ton. Of course, there were large sums to be de- from that selling price for expenses of production, freight, t it was a perfectly fair inference that there was money in

the business, or it would not have been continued for so long. There was evidence, too, from which the jury were warranted in finding that the total deposit was 200,000 tons. Under these circumstances, it is not an unreasonable deduction that the Inciarte mine itself, exclusive of the improvements, was worth not merely the 100,000 bolivars which were paid for it, but at least $100,000 over and above the sum which was spent upon the improvements. Undoubtedly this result is reached largely by inference from facts proven, and may fairly be described as in one sense speculative, but it is not more so than many verdicts which have been sustained; and, if it be assumed that there was no error in allowing the jury to figure out substantial damages from the testimony, the $75,000 they agreed upon was well within the limit which such testimony indicated. The real question in the case—on this branch of it—was whether the court ought not to have instructed the jury that there was not sufficient evidence to warrant a verdict for more than nominal damages. The opinion expressed on the argument is unchanged by the discussion on this motion, although undoubtedly the question is a close one. In any event, it may more appropriately be answered by the appellate court.

The motion is denied.

UNITED STATES v. TIFFANY.

(Circuit Court, S. D. New York. January 4, 1905.)

CUSTOMS DUTIES—ACTION FOR UNPAID DUTIES—FINALITY OF DECISION OF COLLECTOR.

The provision in section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], that the decision of the collector of customs as to duties "shall be final and conclusive," unless the duties are paid under protest, and proceedings brought for their recovery before the Board of General Appraisers, does not require that an action by the government for unpaid duties the importer should be limited to the proceedings prescribed in said section. He may defend on the ground that the assessment in question was illegal.

At Law. Action to recover duties. Motion to exclude evidence. Compare United States v. Phelps, 17 Blatchf. 312, 317, 27 Fed. Cas. 521, and United States v. Campbell (D. C.) 10 Fed. 816, 819.

Tiffany & Co. imported into the port of New York and entered for consumption certain merchandise on which duty was assessed at the rate of 10 per cent. ad valorem, the entry being liquidated on that basis and the duties duly paid. Within one year after the liquidation the merchandise was reclassified at the rate of 60 per cent. ad valorem and the entry reliquidated on that basis. The importers filed a protest against the reliquidation, but neglected to pay the increased amount that had accrued; whereupon the government brought these proceedings for the recovery of the unpaid balance. The importers alleged in their answer that the duties had been illegally assessed, and at the trial of the cause offered proof of this allegation. The government objected to the introduction of such evidence, on the ground that the importers have no right to question the correctness of the assessment of duty, the reason for this objection being that section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], provides that the decision of the collector "shall be final and conclusive" in the

rotest and of proceedings before the Board of General Appraisers.
reads in part as follows:

That the decision of the collector as to the rate and amount of
eable upon imported merchandise * * * shall be final and con-
nst all persons interested therein, unless the owner, importer, con-
ent of such merchandise, or the person paying such fees, charges
ns other than duties, shall within ten days after, but not before
ainment and liquidation of duties, * * * give notice in writ-
collector, setting forth therein distinctly and specifically, and in
ach entry or payment, the reason for his objections thereto, and
handise is entered for consumption shall pay the full amount of
charges ascertained to be due thereon. Upon notice and pay-
llector shall transmit the invoice and all the papers and exhibits
erewith to the board of three general appraisers, * * * which
examine and decide the case thus submitted, and their decision,
a majority of them, shall be final and conclusive upon all per-
ted therein, * * * except in cases where an application shall
he circuit court within the time and in the manner provided for in
en of this act."

was formally made on this point and was argued before the
importers relying upon the decision of the Supreme Court in
es v. Goldenberg, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. Ed. 394, as au-
their position.

A. Wise, Asst. U. S. Atty.
B. Coughtry and A. J. Rose, for importer.

Circuit Judge (orally). I think I will overrule the objec-
impression is that, under the peculiar reading of this sec-
terpreted by the Supreme Court, the only remedy the
now has is to do just what these parties have done, and
y should pay the duties at this time or at any time there
at least an exceedingly awkward question for them to meet
Board of General Appraisers. Objection overruled and
nied.

se of the trial the jury brought in a verdict for the importer.

THE ST. LOUIS.

(District Court, S. D. New York. April 20, 1905.)

AGES—LOST TIME.

e a seaman laid off from work for five days in port on account of
although the surgeon refused to give him a certificate, and he
o complaint on that ground to the captain, and was logged and
nd a copy of the log entry was given him, he cannot recover
for the time without proof that he was in fact too ill to work.

Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, § 90.]

iralty. Suit for seaman's wages.

an American citizen, signed shipping articles on the St. Louis
oyage, beginning 25th February, 1905, and ending March 20, 1905.
d faithfully performed all his duties while able to do so, and
lawful commands of the master and officers of said ship. Sues
and one day's pay for each and every day payment has been de-

ver admits everything, except alleging that libelant, while said
ying in the port of Southampton, England, without leave or au-

thority from his superior officers, absented himself from his duty on said ship, and remained absent therefrom on March 6, 7, 8, 9, and 10, and for such absence from duty without leave he was properly logged and fined two days' pay for each day's absence.

The libelant testified he had a very sore back and could not work on the days in question; that he went to the doctor on the 5th and 6th of March, and the doctor refused to give him a ticket allowing him to lay off, but nevertheless, thinking he was too sick, he laid off of his own accord; that, while he received a slip showing that he was logged, yet the log was never read over to him. He had witnesses who testified that they thought he was sick.

The claimant proved by the surgeon of the ship that, in his opinion, the libelant was not too sick to do light work, and that for this reason he refused to give libelant a ticket permitting him to lay off; also that the libelant did not go to the captain and object to the fact that the doctor would not permit him to lay off.

Franklin Grier, for libelant.

Robinson, Biddle & Ward and Henry G. Ward, for claimant.

HOLT, District Judge (orally). It is clear that a sailor or any other man that is employed to do work is entitled to be paid for his services, but he is obliged to comply with his contract and render the service. If he is ill, that excuses him, of course, but he must prove he is ill in order to be excused. In this case it is admitted that the libelant laid off while the vessel was at Southampton for five days. The officer told him he must get his certificate from the doctor, and he tried to get the certificate from the doctor, and the doctor would not give it. The doctor says he complained of no other symptoms, except the pain in his back; that he had no fever, his pulse was normal, his temperature was normal, and he was able to put this bandage around himself, and showed, by all those things with which a physician is familiar, that his illness was nothing more than a strain in the back, and he could do reasonably light work, in the judgment of the doctor. I can't assume in such a case—certainly without any proof—that the doctor or the officers of this vessel were in any way prejudiced against this man, any more than the other men. It is their duty to see that the men perform their part of the agreement, and to put it down in the log at the time if they do not. They did that. The statute says they must do it, and I think the statute says something about reading the entry to the men who are fined. They did not do that expressly, but they gave the man an extract from the log. That is a more perfect method of informing him of the matter which has been entered in the log than if they read it, for it remains permanently in his hands. When this doctor refuses to give him this certificate, he does not apply to the captain; he does not go to the doctor again, and in fact lays off at his own risk. He is bound under those circumstances to show that he was so ill he could not render the service, and, in my opinion, he has not shown it, and he ought not to recover.

The libel should be dismissed.

THE MILLVILLE.
THE PEARL.

(District Court, D. New Jersey. May 9, 1905.)

—Vessel Moored in Fairway of Stream—Failure to Carry
s.

cle 29 of the inland navigation rules (Act June 7, 1897, c. 4, 30
102 [U. S. Comp. St. 1901, p. 2884]), which provides that "nothing
ese rules shall exonerate any vessel * * * from the conse-
es of any neglect to carry lights or signals, or of any neglect to
proper lookout, or of the neglect of any precaution which may be
ed by the ordinary practice of seamen, or by the special circum-
s of the case," applies to a vessel lying moored at the end of a
, in a dark night, in the navigable part of a narrow stream, con-
y traversed by different kinds of craft, and having neither lights
lookout, there being special circumstances in such case which
ed her, in the exercise of common prudence, to carry a light, wheth-
not it was expressly required by the rules; and she cannot recover
injury by collision with a passing vessel in tow, which could
been avoided, had she been properly lighted.

Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 223–

niralty. Suit for collision.

l H. Richards, for libelant.

d M. Harris, for claimants.

ING, District Judge. This case has been reargued on
cation of the libelant, after the filing of an opinion that
should be dismissed. The steam propeller Elsie Weatherby
day night, August 23, 1902, was tied fast to Weatherby's
n Old Man's creek, Salem county, N. J., heading up the
to remain there for the night. About 9 o'clock in the
the steam tug Millville, with the barge Pearl in tow,
ing down the stream by the Elsie Weatherby, when the
llided with the Weatherby, knocking a hole in her port
his suit is brought for the recovery of the damages sus-
nd also for the loss of the use of the Weatherby while she
ergoing repairs. One of the allegations contained in the
hat the Weatherby was lying "in a proper and lawful place
o be, with all the lights and lookouts required by law."
nswers filed by the claimant of the tug and the claimant
rge, it is declared that "on the night in question the steam
sie Weatherby, being deeply loaded, was moored along
head so as to lie directly in the channel or fairway, with-
s or lookouts." Much testimony was taken on the ques-
o whether the Weatherby was provided with lights, and
st argument by counsel much was said on the same ques-
rule of the board of supervising inspectors of steam
adopted February 8, 1899, and printed in the pilot rules
the Department of Commerce and Labor in 1904, is as

d, that all coal boats, trading boats, produce boats, canal boats,
ts, fishing boats and other water craft navigating any bay, harbor

or river, propelled by hand power, horse power, sail, or by the current of the river, or which shall be moored in or near the channel or fair-way of any bay, harbor or river, shall carry one bright white light forward, not less than six feet above the rail or deck."

Article 11 of "An act to adopt regulations for preventing collisions upon certain harbors, rivers, and inland waters of the United States," approved June 7, 1897, c. 4, 30 Stat. 98 [U. S. Comp. St. 1901, p. 2879], provides that:

"A vessel under one hundred and fifty feet in length when at anchor shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile."

And article 29 of the same act (30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]) provides that:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

I adhere to the opinion previously expressed, that the Weatherby was not provided with signal lights at the time of the collision. But it is urged now, for the first time, by the libelant, that article 11, above quoted, is not applicable to a vessel moored at the end of a wharf, and that the Weatherby was under no obligation to carry lights of any kind. I think this contention cannot be sustained. The evidence shows to my satisfaction that the Weatherby was moored in the navigable part of the creek. At that point the creek was not more than 110 feet in width from low-water mark to low-water mark. The navigable portion must be considerably less in width. Assuming that neither article 11 of the act of June 7, 1897, c. 4, 30 Stat. 98 [U. S. Comp. St. 1901, p. 2879], nor the rule of the board of supervising inspectors adopted February 8, 1899, is applicable to this case, I think the position of the Weatherby in the stream, which the testimony shows is much traversed by trading vessels, was one which, by a fair construction of article 29, above quoted, required her to carry a light. There were "special circumstances" in her case, growing out of the fact that she was moored at the end of the wharf on a dark night, in the navigable part of a narrow stream constantly traversed by different kinds of water craft. In my judgment, these "special circumstances" distinguish the case from The Granite State, 3 Wall. 310, 18 L. Ed. 179, The Dean Richmond, 107 Fed. 1001, 47 C. C. A. 138, and The Martin Dallman, 70 Fed. 797, 17 C. C. A. 419, to which my attention has been directed. In The Kennebec, 108 Fed. 300, 47 C. C. A. 339, a vessel moored in the channel of a river, without lights or signals, was held to be liable for a collision, notwithstanding it was there objected that the statute did not require her to have lights or signals. But the court said:

"Even so, common prudence demands that ships appropriating a quarter or a third of a channel should use care to employ adequate means to make their presence known."

facts of this case lead me to the same conclusion before
, and there will be a decree that the libel be dismissed, with

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CHEMICAL BANK v. LYONS.

(Circuit Court, E. D. Pennsylvania. May 20, 1905.)

No. 42.

FRAUDULENT REPRESENTATIONS—KNOWLEDGE.

hat defendant made certain false representations to a note broker
reference to the validity of certain notes left with him for sale,
h the broker sold to plaintiff, was insufficient to entitle plaintiff
maintain an action against defendant for deceit without proof that
representations were repeated by the broker to plaintiff and that
ntiff relied thereon in purchasing the notes.

on to Take Off Nonsuit.

. M. Newlin, for plaintiff.
ge L. Crawford, for defendant.

McPHERSON, District Judge. The plaintiff's statement
rth a cause of action in deceit. It avers a right to recover
.57, with interest,

h said sum of money the said defendant, J. Harry Lyons, induced the
to pay him on the 29th day of October, 1895, by reason of the said
nt, J. Harry Lyons, making to the plaintiff, through James R. Plum,
fraudulent representations now hereinafter set forth, in reliance up-
h the plaintiff then paid to the said J. Harry Lyons the said sum of

details of the transaction are thus set forth:

rry Lyons was secretary of a company known as 'Keen Sutterle Co.'
npany, at the time of this payment by the plaintiff to the defendant,
its possession seven promissory notes made by the following named
and coming due at the dates specified, for the amounts mentioned,
n the endorsements indicated in the following columns:

[Names, dates, and amounts omitted.]

tiff further avers that the said J. Harry Lyons, being at that time
etary and general manager of the Keen Sutterle Co., brought said
said James R. Plum, and asked him to request the plaintiff to buy
several notes above mentioned, which notes he stated were in his
be sold for the benefit of the Keen Sutterle Co. When this request
de by the defendant of the said James R. Plum, the defendant, in
to inquiries by the said James R. Plum as to the said notes, and in
induce plaintiff to purchase them, made to said James R. Plum
wing representations, which defendant made with the understanding
himself and the said James R. Plum that the latter should com-
e the same to the plaintiff.

tated to the said James R. Plum that the Keen Sutterle Co. was then
and was making money. He further stated to said James R. Plum
makers of the said notes were all solvent, and that the notes were
te business paper, representing actual transactions in the ordinary
f business between the makers of the notes and Keen Sutterle Co.,
t the said notes would be paid at maturity. The plaintiff avers that
e of the said statements was untrue and was known to be untrue
aid J. Harry Lyons at the time he made the same to the said James
to be communicated to the plaintiff, and that each of the said state-

ments was communicated by the said James R. Plum to plaintiff, and were believed to be true, and in reliance thereupon plaintiff then and there purchased the said several notes, and gave therefor to the said J. Harry Lyons the sum of $13,757.57, less discount.

"The plaintiff further avers that shortly thereafter the said Keen Sutterle Co. failed, and all of the makers of the notes above mentioned also failed, and were ascertained to be so worthless pecuniarily that no suits were brought against them because there was no possibility of collecting from them a sum equal to the expense of getting judgment against them.

"Upon the amount of the said notes the plaintiff has received the sum of $38.10, and with the exception of that sum the plaintiff has received nothing on account of the money so as aforesaid obtained from the plaintiff by the defendant by reason of the aforesaid false and fraudulent statements made by the said defendant to the said James R. Plum, and with defendant's knowledge communicated to plaintiff."

A compulsory nonsuit was entered at the trial on the ground that the bank had failed to prove that the alleged fraudulent representations were ever communicated to it by Mr. Plum—or, for that matter, by any one else—and a recent review of the evidence has confirmed my belief in the correctness of this ruling. Indeed, I am inclined to think that the nonsuit might be sufficiently rested also upon the inadequacy of the proof to establish the defendant's knowledge that the representations set out in the plaintiff's statement were false and were made with intent to deceive. As to all the notes except two, there is confessedly no evidence even that the representations were false, and as to these two the evidence concerning the defendant's knowledge of their falsity and concerning his intent to deceive is so meager as to be barely sufficient at the best. The action being founded upon fraud, the burden was on the plaintiff to prove the averments of deceit clearly, and to leave nothing to be guessed at by the jury. But I lay no stress upon this point. It is enough to say again that the record contains no evidence that such representations as may have been made by the defendant to Plum were repeated to the plaintiff, and it is fundamental in an action of deceit to show that the person suing was actually deceived. To quote from volume 14 of the American & English Encyclopedia of Law (2d Ed.) on page 406:

"To entitle a person to relief or redress because of a false representation, it is well settled that it is not enough to show merely that it was material, that it was known to be false, and that it was made with intent to deceive, but it must also be shown that it actually did mislead and deceive, or, in other words, that it was relied upon by the party complaining."

In support of this proposition numerous cases are cited in the footnotes.

As was said also in Farrar v. Churchill, 135 U. S. 615, 10 Sup. Ct. 773, 34 L. Ed. 246:

"The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed, and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate, and material. If the purchaser investigates for himself, and nothing is done to prevent his investigation from being as full as he chooses,

ot say that he relied on the vendor's representations. Southern De-
nt Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678."

Plum was a notebroker, among other occupations, receiving
mission for negotiating the sale of commercial paper, and he
l the bank to buy the notes involved in the present contro-
His advice was contained in a letter which was not pro-
at the trial, nor was its absence accounted for. Its contents,
re, were unknown; but the court was asked to let the jury
at what the letter contained, and, in the absence of testimony
subject, to find not only that the letter repeated such rep-
ations as may have been made by Mr. Plum, but that the bank
upon them and discounted the notes on the faith of their
cy, and not in reliance upon Mr. Plum's advice. I did not
stified in submitting these questions at the trial, and the argu-
pon this motion has not changed my mind.
motion to take off the nonsuit is refused, and to this refusal
eption is sealed in favor of the plaintiff.

CARTER, WEBSTER & CO. v. UNITED STATES.

(Circuit Court, D. Maryland. March 17, 1905.)

s DUTIES—CLASSIFICATION—EMBROIDERED HOSIERY.
The provision in paragraph 339, Tariff Act July 24, 1897, c. 11, § 1, edule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], that "no wear- apparel * * * when embroidered * * * shall pay duty at ess rate than that imposed in any schedule of this act upon any em- ideries of the materials of which such embroidery is composed," is limited to wearing apparel not specially enumerated in the tariff; embroidered hose, though covered by paragraph 318, Schedule I, said act (30 Stat. 179 [U. S. Comp. St. 1901, p. 1660]), relating to "hose half hose," are subject to the embroidery rate when that exceeds rate provided in said paragraph 318.

Application for Review of a Decision of the Board of United General Appraisers.
decision in question affirmed the assessment of duty by the or of customs at the port of Baltimore on merchandise im- by Carter, Webster & Co. Note G. A. 4,721, T. D. 22,357, A. 5,235, T. D. 24,073.

ch, Keener & Clute (J. Stuart Tompkins, of counsel), for ap-
s.
n C. Rose, U. S. Dist. Atty.

RRIS, District Judge. The importations were cotton half
n open work or lace effects, having embroidered upon them
r other designs in silk thread. They were assessed for duty
rate of 60 per cent. ad valorem, under paragraph 339 of the
act of July 24, 1897, c. 11, § 1, Schedule J, 30 Stat. 181
Comp. St. 1901, p. 1662], 60 per cent. ad valorem being a
r duty than the compound rate imposed by paragraph 318
same act (chapter 11, § 1, Schedule I, 30 Stat. 179 [U. S.

Comp. St. 1901, p. 1660]), upon cotton half hose without embroidery.

The importers claim that the merchandise is dutiable at the compound rate under paragraph 318, viz., 70 cents per dozen and 15 per cent. ad valorem, upon the ground that paragraph 318 specially provides that stockings, hose, and half hose, and clocked stockings, hose, and half hose, composed of cotton or other vegetable fiber, valued at more than $1.50 and not more than $2 per dozen pairs, should be dutiable at 70 cents per dozen pairs, and in addition 15 per cent. ad valorem. Paragraph 339 imposes a duty of 60 per cent. ad valorem on laces and articles made in part of lace, trimmings, braids, and a number of other articles, "wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram or otherwise, composed wholly or in chief value of flax, cotton or other vegetable fiber and not elsewhere specially provided for," provided that no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed.

It is claimed by the importers that half hose are specifically named by their well-known designation in paragraph 318, and that they do not cease to be cotton half hose because they are decorated by silk embroidery; that the proviso of paragraph 339 is an additional provision for embroidered articles under descriptive terms, and applies only to such articles as are not specially provided for in the act; so that the proviso in effect stands as if it read that no wearing apparel or other article or textile fabric not specially enumerated or provided for in the act shall pay duty at a less rate than is imposed upon embroideries of the material of which such embroidery is composed, and that if it had been intended otherwise the provision would have been worded as was a corresponding proviso in paragraph 373 of the act of October 1, 1890, c. 1244, § 1, Schedule J, 26 Stat. 594, which read "that articles of wearing and textile fabrics when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed."

This argument would seem to overlook the fact that embroidered half hose are not specially provided for. Half hose are not embroidered half hose, but they are an article of wearing apparel embroidered by "hand or machinery." The classification in this case is not made upon the ground that the articles in question are embroideries, but upon the ground that they are wearing apparel embroidered by hand or machinery, and paragraph 339 distinctly enacts that no wearing apparel when embroidered shall pay less duty than embroideries of the same materials. Under the fair interpretation of the wording it would seem not necessary to find that the articles in question are embroideries, but simply that

e wearing apparel embroidered by hand or machinery. re not material for wearing apparel like dress patterns, but nselves complete articles of wearing apparel. Under such sion it would seem that the fact that the particular article ing apparel, to wit, cotton half hose, is specifically men- n paragraph 318, is not controlling, for the reason that para- 39 contemplates that, although specific articles of wearing are provided for by other paragraphs of the act, yet it in- ally provides that if such articles of wearing apparel are lered they shall pay 60 per cent., unless by the paragraph in uch wearing apparel is specifically mentioned the duty im- greater than 60 per cent. As to all embroidered stockings, nd half hose of the value exceeding $3 per dozen, the com- duty at $2 per dozen pairs, plus 15 per cent. ad valorem, xceed 60 per cent. ad valorem, and they would remain dutia- he compound rate under paragraph 318.

present case would seem, therefore, altogether distinguish- m the class of cases in which it has been held that an article ted by its commercial designation or other specific name is o the duty imposed upon it by that name, and not to that l by general terms sufficiently broad to have included such for the reason that a specific designation, eo nomine, must over general words. Arthur v. Lahey, 96 U. S. 112, 24 L. ; Robertson v. Glendinning, 132 U. S. 158, 10 Sup. Ct. 44, d. 298.

rthur v. Homer, 96 U. S. 137, 24 L. Ed. 811, manufactures were dutiable at a certain rate, and manufactures of linen oidered, by another section, at a different rate. The Su- Court said, "The test of the rate of duty we are consider- nat of embroidery or not," and so I think the test is in this

e Schefer (C. C.) 49 Fed. 826, and on appeal, 53 Fed. 1011, A. 153 (1893), the importation was worsted shawls em- d with silk. Under the act of 1890 the worsted shawls eo were dutiable at 44 cents per pound and 50 per cent. ad . The act contained a provision similar to the act now iscussion, to the effect that wearing apparel, when embroid- ould not pay a less rate of duty than embroideries of the ls of which they were respectively composed. By the act of broideries made of wool were dutiable at 60 cents per pound per cent. ad valorem, and, classifying these embroidered shawls as embroideries made of wool, the collector assessed 60 cents per pound and 60 per cent. ad valorem. The Cir- urt of Appeals held that the main object of the proviso prevent a classification by their specific names of articles lered with some material which might enable them to be du- t a lower rate than is imposed upon embroideries of that l, and the court proceeds to say:

roviso therefore prescribes that such articles shall not pay a less duty than is imposed upon embroideries of that material, but they utiable at a greater rate because a higher rate may be imposed upon

articles of that specific description. Thus, an article of wearing apparel, of whatever material composed, which is embroidered with silk, shall not pay a less rate of duty than that imposed upon silk embroideries."

Silk embroideries were dutiable under the act of 1890 at 60 per cent. ad valorem, a less rate of duty than was imposed upon worsted shawls, and so the court held that the importation was dutiable at the rate prescribed specifically for worsted shawls. This case is an authority for the proposition that in the present case it is the silk embroidery upon the cotton half hose which, being dutiable at a greater rate than that upon the half hose themselves, determines the rate properly dutiable.

It is urged on behalf of the importer that the proviso of the act of 1890 contained the words "that wearing apparel, when embroidered, and whether specially or otherwise provided for in this act," and that these words not appearing in the proviso of the act of 1897 is evidence of a change of intention on the part of Congress. It seems plain, however, that the act of 1897 in using the language, "provided that no wearing apparel * * * when embroidered * * * shall pay a less duty," etc., expresses an intention quite as clear and to the same effect.

It is suggested that the small amount of embroidery upon the half hose of some of the importations in question is not sufficient to constitute embroidery within the meaning of the act. The fact is, however, that the importations are entered and scheduled as "embroidered hosiery." The embroidery is quite a feature in the appearance of the article, is a very obvious decoration, and without doubt adds to the cost and salable value of the article. U. S. v. Altman, 107 Fed. 15, 46 C. C. A. 116.

The intention of Congress is shown by the fact that in paragraph 339, "wearing apparel, handkerchiefs, and other articles and fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram or otherwise," are classed among embroideries at 60 per cent. ad valorem.

The decision of the Board of General Appraisers is affirmed.

VENABLE BROS. v. LOUISVILLE & N. R. CO. et al.

(Circuit Court, N. D. Georgia. April 24, 1905.)

No. 706.

CARRIERS—ACTION BY SHIPPER—GEORGIA STATUTE.

An action against a railroad company under Code Ga. 1895, §§ 2317, 2318, known as the "Tracing Act," as construed by the Supreme Court of the state, is one for a penalty, and it cannot be converted into one on contract by an amendment of the declaration.

On Motion to Allow Amendment to Declaration.

Benj. H. Hill and Fulton Colville, for plaintiffs.

J. E. & Bryan Cumming and Sanders McDaniel, for defendants.

PARDEE, Circuit Judge. The contention that the plaintiffs' original declaration contains two counts upon separate causes of

wit, one count under the tracing act, and one on through ling, is not well founded. This not only appears from the e of the declaration, but also from the form thereof, as ler made no effort to comply with the rule declared in . Portner Brewing Company, 112 Ga. 895, 38 S. E. 91, to t that where a petition contains, under different counts, n one cause of action, each count must contain a com- se of action, in distinct and separate paragraphs. The on negatives the construction that it is a suit upon a bill of lading. The bill of lading, which is made a part ffs' petition (sixth paragraph), and is attached to the decla- an exhibit, shows that the liability of the defendant there- ased at Atlanta, Ga.

construction of the declaration shows the suit is founded racing act, contained in sections 2317 and 2318 of the Code of 1895. Suits under the said sections are held in the Court of the state of Georgia to be in the nature of suits alty. McCall v. Central of Georgia Railroad Company, 02 605, 48 S. E. 157. It seems to be settled that a suit alty cannot be converted into an action upon a contract lment. Western & Atlantic Railroad Company v. Exposi- on Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; Ex- Cotton Mills v. Western & Atlantic Railroad Company, 1, 10 S. E. 113.

o be further noticed that, the plaintiffs having pleaded f lading in the original declaration, they cannot be allowed endment to repudiate or impeach the same. Southern Rail- npany v. Parramore, 119 Ga. 690, 46 S. E. 822.

otion for leave to amend is refused.

MACFARLANE v. ADAMS EXPRESS CO.

(Circuit Court, E. D. Pennsylvania. May 22, 1905.)

No. 23.

COMPANIES—LOSS OF PACKAGE—LIMITING LIABILITY FOR NEGLI-

express company can, by condition clearly appearing in its receipt package, limit its liability for loss of the package by its negligence , no valuation thereof being given by the shipper, and the express e being based on the value not exceeding that amount.

Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 654–

n by Defendant for Judgment Notwithstanding the Verdict.

Rex, for plaintiff.

don Bromley and Thos. De Witt Cuyler, for defendant.

McPHERSON, District Judge. On February 9, 1903, the delivered to an employé of the Adams Express Company, ty of Philadelphia, a suit case containing wearing apparel

to be carried to Norwood, Pa., for which she was given the usual receipt. She put no value upon the suit case or its contents and none was asked for. At the trial the receipt was offered in evidence by the plaintiff, and she did not prove, or offer to prove, that she had not read it, or did not know what it contained, or did not understand it, or had not agreed to its terms, or had been induced to sign it by any fraud or under any misapprehension. The relevant portions of the receipt are as follows: The top line, in dark legible type, declares that:

"The company's charge is based upon the value of the property, which must be declared by the shipper."

A few lines further down are the words in large type:

"Valued at $.....

"Marked .....

Which the Company agrees to carry upon the following terms and conditions, to which the shipper agrees, and as evidence thereof accepts this bill of lading."

Certain conditions follow in smaller type, the first being this:

"(1) In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

The bottom line, in type similar to the top line, is this:

"Liability limited to $50, unless a greater value is declared."

The suit case did not reach its destination and has never been found. The defendant offered no explanation of the loss; admitted in effect, although not expressly, that negligence was properly chargeable, and offered to submit to a verdict of $50, under the foregoing conditions of the receipt. The jury found that the defendant had been negligent, and assessed the plaintiff's damages at $215, the court reserving the question of law whether a larger sum than $50 could be recovered. It is unnecessary to spend time in the discussion of the point reserved. Upon the facts stated the plaintiff's acceptance of the receipt was equivalent to an express assent to its terms, and she was as much bound thereby as if she had signed the paper. It is true that, if the effect of the receipt were to be determined according to the decisions of the Supreme Court of Pennsylvania, the attempt to limit the defendant's liability would be held unavailing, because the loss was due to the defendant's negligence: Grogan v. Adams Express Co., 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360; Weiller v. Railroad Co., 134 Pa. 310, 19 Atl. 702, 19 Am. St. Rep. 700; Ruppel v. Railroad Co., 167 Pa. 166, 31 Atl. 478, 46 Am. St. Rep. 666. But, since the defendant's liability under the receipt or bill of lading is to be determined not by the local, but by the general commercial, law, it is well settled that a federal court is at liberty to follow its own opinion, and is not bound by the decisions of the state tribunals. This being so, it is only necessary to refer to Hart v. Penna. R. R. Co., 112 U. S. 331,

. 151, 28 L. Ed. 717, as a controlling authority in support rier's right to limit its liability under circumstances such esented here, even against its own negligence. The Su- urt of Pennsylvania recognized this to be the scope of the as will appear by the following extract from the opinion n's Case, on page 529 of 114 Pa., page 136 of 7 Atl. (60 360):

ned court further charged the jury that the defendant could limit bility, even as against its own negligence, and had done so by the n to the plaintiffs when the goods were shipped. This was done in o a decision of the Supreme Court of the United States in the case Penna. R. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717. An n of that case shows that such is the law as declared by that court. decision were a binding authority upon us, we would be obliged t. But our own decisions for a long time have established the ctrine, until it has become firmly fixed in our system of jurispru- could not depart from it now without overruling them all, and we ling to do so. The authorities upon the general subject are very and conflicting. But with us the rule has been uniform, and we dhere to it."

ther cases have followed Hart v. Railroad Co., as will be ne citations in 10 Rose's Notes, U. S. Reports, 896.

ent is directed to be entered on the verdict for $50, with in- m February 15, 1903, to April 3, 1905, the day when the as rendered.

In re WINFIELD MFG. CO.

(District Court, E. D. Pennsylvania. May 26, 1905.)

No. 1,910.

AND TENANT—LEASES—STIPULATIONS—ENFORCEMENT—BANKRUPTCY.
re, after the bankruptcy of a tenant, the landlord accepted a sur- of the premises, and did not consent that the remainder of the night be sold as a part of the bankrupt's assets, he was not en- to enforce a provision of the lease that in case the tenant became pt the rent reserved for the entire term should immediately be- due and payable, and that the landlord might proceed as he was ized to do in case of a breach of a covenant under the lease, etc.

kruptcy. Certificate from referee.

& Middleton, for trustee.
W. Carr, for claimant.

cPHERSON, District Judge. The facts upon which the ontroversy arises appear in the following extract from the the learned referee (Richard S. Hunter, Esq.):

nkrupt leased the premises at the northeast corner of Allegheny d A street for three years from the 15th day of February, 1902, rly rental of $2,600, payable in advance in monthly installments. as paid on the 15th day of January, 1904, in advance. The install- ent falling due February 15th and March 15th, 1904, in advance, aid, so that at the time of the filing of the petition in bankruptcy, d, 1904, there was due two months' rent, $333.32.

"The receiver made arrangements with the landlord to leave the key with him as a matter of convenience. The auctioneers came down daily for several days before the sale, got the keys from the landlord, and again returned them to him. The receiver's sale then took place, and the keys were delivered at various times during the ensuing week. The last time the auctioneers were upon the premises, they told the landlord there was very little left, and asked if the landlord would give them few remaining goods to them when they came after them. Several days afterwards a letter was sent by the receiver to the landlord, asking him to allow the goods to be taken away, and they were accordingly removed. The keys remained with the landlord, and nothing further occurred until a certain conversation over the telephone, when counsel for the claimant called counsel for the receiver and trustee, and told him that goods were still there, and not removed, and that the receiver would be held accountable for rent while the goods were upon the premises. Counsel for the receiver then and there said he would surrender possession. This was on May 10th, 1904.

"Upon these facts the trustee contends that possession was surrendered at the time when the auctioneer made his last visit. But no direct intimation of surrender appears to have been made at that time either by the auctioneer or by the receiver, and certain goods remained on the premises until the next month.

"Upon consideration of these circumstances, the referee finds as a fact that possession was not surrendered to the landlord until May 10th, 1904, and that a sum is due for use and occupation, to be measured under the lease up to the 10th day of May, 1904.

"The lease contained the following provision: 'The said lessees further agree in case of their insolvency, or the entering of a judgment against them in any court of record, or the filing of a petition by or against them or any of them, to bankruptcy or insolvency, that the entire rent reserved for the term of this lease shall immediately become due and payable, and the said lessors may proceed as above authorized to do in case of any breach of a covenant under this lease, and with the same powers, release of errors, waiver of exemption, etc.'

"The landlord claims under this clause a priority for the year from February 15, 1904, to February 15, 1905, being $2,000."

The referee rejected the landlord's claim, and the correctness of this ruling is now presented for consideration. If the claim were made upon the distribution of a fund raised by execution process issued by one of the state courts, the priority of the landlord would unquestionably be upheld. The Supreme Court of Pennsylvania has expressly so decided, as will appear from the syllabus in the case of Platt et al. v. Johnson et al., 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877:

"A stipulation in a lease for years that if the lessee shall become embarrassed or make an assignment for the benefit of creditors, or be sold out by sheriff's sale, the whole rent for the balance of the term shall become due and payable in advance of other claims, is not against public policy, and will be sustained in favor of the landlord on a distribution of the proceeds of the sheriff's sale of the lessee's property, to the extent of giving the landlord priority for one year's rent."

This case is recognized in Teufel v. Rowan, 179 Pa. 408, 36 Atl. 224, and is to be accepted as declaring the law of the state tribunals. Without questioning in any degree the soundness of the decision, it is, I think, only necessary now to point out that the facts of the present case are materially different. They resemble closely the facts in Wilson v. Penna. Trust Co., 114 Fed. 742, 52 C. C. A. 374, 8 Am. Bankr. R. 169, decided by the Circuit Court of Appeals for

t, as will be seen by the following quotation from the opin-

standing the ruling in Platt v. Johnson, 168 Pa. 47, 31 Atl. 935, Rep. 877, upholding as valid a provision in a lease that the entire balance of the term should become due if the lessee should be- rassed, or make an assignment for the benefit of creditors, or be sheriff's sale, it may well be doubted whether the stipulation here whole rent for the whole term due and payable if the lessee 'shall ankrupt' is enforceable as against the provisions of the bankrupt he court below did not pass upon that question, and we do not find to consider it. Assuming the validity of the stipulation where s adjudged a bankrupt, these consequences would follow its en- In the first place, under the Pennsylvania act of 1836 the land- be entitled to priority of payment out of the proceeds of sale of goods upon the demised premises to the extent of one year's streth v. Pennock, 20 Wall. 575, 22 L. Ed. 451. Secondly, the entire residue of the term would be provable as an unpreferred d only to a pro rata dividend, and the unexpired portion of the become an asset of the bankrupt's estate, to be disposed of by the ankruptcy for the benefit of the estate. The latter result, how- claimant repudiated altogether. He sought a partial and one- cement of the stipulation. He attempted to secure a preference r's rent, and at the same time retain his interest as landlord un- the residue of the term. He took that position at the start, and e end. His proof was only for a single year's rent as a preferred im, at the expiration of the year, he took, and has since main- usive possession of the leased premises. The court held—and we y—that the claimant could not split up the term in that way. t was not divisible. If the claimant desired to avail himself of ion as to bankruptcy for the purpose of securing a preference for ent, he was bound to conform to the contract as a whole. But this to do. We are therefore of opinion that the action of the court

need be added to this ruling. The present claimant ac- urrender of the premises on May 10th, and has since that in exclusive possession. He has been paid in full all the was due when the petition in bankruptcy was filed, and allowed compensation at the rental rate for the receiver's ccupation. By accepting the surrender he assented to the hat the lease had been brought to an end by the proceed- nkruptcy, and I am unable to see, therefore, in what es- pect his situation differs from the situation of the land- e claim was rejected in Wilson v. Trust Co. As the court , and I may now repeat:

ract was not divisible. If the claimant desired to avail himself lation as to bankruptcy for the purpose of securing a preference r's rent, he was bound to conform to the contract as a whole. But lined to do."

ision of the referee is affirmed.

In re SEABOARD FIRE UNDERWRITERS.

(District Court, S. D. New York. May 18, 1905.)

No. 8,004.

1. PROCESS—SERVICE—DEMURRER.

An objection to an involuntary bankruptcy petition that the court had no jurisdiction because the subpœna was improperly served can be raised only by motion or its defense at the trial, and not by demurrer.

2. SAME—BANKRUPTCY—FIRE LLOYDS—UNINCORPORATED ASSOCIATION.

An unincorporated Lloyd's association of fire underwriters is subject to adjudication as an involuntary bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], declaring that a natural person, other than a wage earner or a person engaged chiefly in farming, etc., and any unincorporated company, and any corporation engaged principally in manufacturing, trade, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt, etc.

[Ed. Note—What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

In Bankruptcy.

George M. Curtis, for alleged bankrupt.
Robert Van Ideastine, for petitioning creditors.

HOLT, District Judge. This is a demurrer to a petition in involuntary bankruptcy. The petition is brought against the Seaboard Fire Underwriters, and alleges that the Seaboard Fire Underwriters is an unincorporated company engaged in the business of fire insurance, the business being carried on by S. Richard Tobin and Thomas R. Tobin, doing business as Tobin & Tobin, as attorneys in fact and managers thereof; that the company was originally organized in 1892 under the name of the Fireman's Fire Lloyds of New York; and that its name had been subsequently changed. A copy of the articles of association is attached to the petition. This instrument is in the usual form for the organization of that class of associations which were organized in New York about 1892, previous to the passage of the act forbidding further organization of such companies, which were known as "Fire Lloyds," the general characteristic of which was that policies were to be issued by underwriters whose liability was several on each policy, and not joint, as though each underwriter had issued a separate and individual policy; the business being conducted by the managers. The amended answer contains a paragraph at the end alleging that the defendant demurs to the petition upon the ground, in substance, that the court has no jurisdiction because the subpœna was served upon one of the managers, and not upon each of the underwriters. In my opinion, this is no ground of demurrer. A demurrer attacks the sufficiency of the allegations in the petition. If process has not been served so as to properly bring into court the alleged bankrupt, the remedy is by motion or by defense on the trial. On the argument, however, of the demurrer, the ground was also taken that the petition, on its face, did not state facts sufficient to authorize an adjudication. The grounds, as I understand

n which this claim was made, were that this association "Seaboard Fire Underwriters" could not be proceeded bankruptcy as a separate entity, but that it consisted of writers, and that they must be proceeded against individ- they were partners. The point also was suggested that ny engaged in the business of insurance was subject to upt act. The bankrupt act provides as follows (section ly 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p.

ural person, except a wage-earner, or a person engaged chiefly in the tillage of the soil, any unincorporated company, and any cor- gaged principally in manufacturing, trading, printing, publishing, mercantile pursuits, owing debts to the amount of one thousand over, may be adjudged an involuntary bankrupt upon default or l trial, and shall be subject to the provisions and entitled to the this act. Private bankers, but not national banks or banks in- under state or territorial laws, may be adjudged involuntary bank-

this provision, in my opinion, any unincorporated com- be adjudged a bankrupt. The restriction of the liability ıtary bankruptcy proceedings to corporations of certain es not seem to me to apply to this provision of unincor- mpanies, and I think, therefore, that any unincorporated engaged in any kind of business may be put into bank- it is insolvent and has committed an act of bankruptcy. reason to doubt that the Seaboard Fire Underwriters is rporated company, within the meaning of the bankrupt articles of association call it an "association." It is not ted, and I think it is a company, within the meaning of used in the bankrupt act. It has been regularly organized tten articles of association. Its members hold meetings s a year. It does business and issues policies of insurance company name. It is sued by its name, and it is in fact rporated company. If it were a corporation, I have no t it could not be proceeded against, because corporations on the business of insurance are not corporations which, e bankrupt act, are liable to involuntary proceedings in cy. Re Cameron Town Ins. Co. (D. C.) 2 Am. Bankr. 96 Fed. 756. See, also, N. Y. Building Loan Co. (D. C.) ankr. Rep. 51, 127 Fed. 471, and cases there cited. But as no restrictions on the liability to such proceedings of rated companies similar to those applied to corporations, at the fact that the Seaboard Fire Underwriters was en- he business of fire insurance does not prevent an adjudica- nking corporations, either national or state banks, are xempt from the provisions of the bankrupt act, but the ion (4b) provides that private bankers may be adjudged ry bankrupts. The distinction between one of these unin- d fire Lloyds and an incorporated insurance company is similar to the distinction between a private banker and orated bank, and the same reasons which may have led to permit a private banker, but not an incorporated bank,

to be put into involuntary bankruptcy, would apply in the case of an unincorporated company doing an insurance business.

My conclusion is that the motion to dismiss the petition should be denied, and the demurrer overruled, and that the issues raised by the answer should be sent to a referee for trial.

UNITED STATES v. ZEMEL et al.

(Circuit Court, D. New Jersey. May 27, 1905.)

INDEMNITY BOND—ACTION—DECLARATION.

A declaration on an indemnity bond, the condition of which was that the principal should in all respects comply with the requirements of law and regulations in relation to the duties of distillers, was demurred to on the grounds that the breach of said condition assigned did not set forth with sufficient certainty the law and the regulations of the Commissioner of Internal Revenue alleged to have been violated, or the law under which such regulations were made, or that any such regulations were made. *Held*, that not only should the act prescribing the penalty be set forth with reasonable certainty, but also the act authorizing said Commissioner to make regulations and the fact that they were made by him thereunder, as well as the specific regulation or regulations thus authorized and made, which were violated. *Held*, further, that the declaration was insufficient in the above-mentioned respects.

(Syllabus by the Court.)

Action at Law on Contract. On demurrer to declaration.

John B. Vreeland, for the United States.

Grey, McDermott & Enright, for defendant United States Fidelity & Guaranty Company.

Frank N. McDermit, for defendant Zemel.

CROSS, District Judge. This action is brought by the United States of America against Meyer Zemel and the United States Fidelity & Guaranty Company upon a bond dated May 7, 1904, in the penal sum of $10,000, given by the defendants to the plaintiff. The bond was subject to the following condition:

"Whereas, the said Meyer Zemel was then, or intended on and after the seventh day of May, nineteen hundred and four, to be, engaged in the business of distilling brandy from apples, peaches, grapes, pears, pineapples, oranges and apricots, berries, prunes, figs, and cherries, exclusively, under the name and style of Meyer Zemel, within the Fifth collection district of the state of New Jersey, to wit, as registered distillery No. 115, situate at Nos. 77 and 79 Manufacturers' Place, in the city of Newark, in the county of Essex, and state of New Jersey aforesaid: Now, therefore, if the said Meyer Zemel should in all respects faithfully comply with all the requirements of law and regulations in relation to the duties and business of distillers of brandy from apples, peaches, grapes, pears, pineapples, oranges, apricots, berries, prunes, figs, and cherries, exclusively, and shall pay all penalties incurred of fines imposed on him for a violation of any of the said provisions, then this obligation shall be void; otherwise, it shall remain in full force and effect."

After setting out the bond and its condition, the declaration alleged that the said Zemel did not faithfully comply with all the requirements of law and regulations in relation to the duties and business of distillery of brandy as aforesaid, and did not pay the

incurred and the fines imposed on him for a violation of
isions, and for a further breach averred that the said Zemel,
th day of May, 1904, did use on the said premises described
ond (setting them forth) molasses and other substances, for
se of producing said spirits, before an account of the same
stered in the proper book provided by law in the form
ad theretofore been prescribed by the Commissioner of
Revenue for that purpose, contrary to the provisions of
306 of the Revised Statutes of the United States, whereby
defendant Meyer Zemel thereupon became and was in-
the said United States in the sum of $1,000, the penalty
by law, by means of which premises the United States has
l damages, etc.

efendants demurred to the declaration, alleging substan-
t it did not set forth the facts upon which a breach of the
of the bond could be concluded; that it did not set out
which had theretofore been prescribed by the Commis-
Internal Revenue, in which form the plaintiff asserted the
t Zemel should have entered an account of the molasses
r substances alleged to have been unlawfully used by him;
ailed to set out what other substances than molasses the
t Zemel used for the purpose of producing spirits, before
nt of the same was registered in the proper book, etc.; and,
hat the declaration, in assigning a breach of said condition,
set out what book was or is provided by law in which an
of molasses and other substances, alleged to have been used
urpose of producing spirits, should have been registered
aid defendant Zemel.

case of Crawford v. N. J. R. R. Co., 28 N. J. Law, 479–481,
as an action against the railroad company to recover pen-
running their locomotives in violation of the statute, the
d:

t enough that the defendants may have a hint of the statutes under
y are sued, nor that they be put upon inquiry in relation to them.
entitled to a distinct and clear statement of the statutes which they
d to have violated, and to be directly informed that it is for the
of those statutes that the penalties are claimed."

ited States v. Bornemann (D. C.) 41 Fed. 751, we find the
d as follows:

claration being founded upon a statute penal in its character, a well-
nciple of pleading requires that in it must be averred every particu-
sary to bring the case within the purview of the statute. All the
nces must be stated which are requisite to support the action. Noth-
e left to inference or conjecture."

el for the government has cited a number of cases showing
court will take judicial notice of the statute and of the form
ok prescribed. This is quite true. Regulations prescribed
President or departments, under authority granted by Con-
ve in a real and proper sense the force of law, and judicial
ill be taken of them; but the question of judicial notice is
under consideration, so much as the question of the notice

which should be given the defendants by this pleading. Counsel also claims that it is now the settled doctrine of the Supreme Court that statutes to prevent fraud upon the revenue are construed as enacted for the public good and to suppress public wrong, and therefore, although they impose penalties or forfeitures, are not to be construed, like penal laws generally, strictly in favor of the defendant, but they are to be fairly and reasonably construed, so as to carry out the intention of the Legislature, and cites U. S. v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555.

The questions raised by this demurrer, however, do not arise upon construction of the statute, but are directed rather at the insufficiency of the pleading, in that it does not set forth with sufficient definiteness the act prescribing the penalty sought to be enforced. Under the condition of the bond, the defendants were not liable unless they failed to comply with the requirements of law and regulations in relation to the duties and business of distillers, etc. They, and more especially the surety, are therefore entitled to know the particulars of the alleged breach of the condition of the bond, and to this end are entitled to have set forth with reasonable certainty "the requirements of law and regulations" which have been violated. We think the declaration should refer to so much of the act as confers power upon the Commissioner of Internal Revenue to prescribe the form in which entries were to be made in the book required to be kept, that it should allege that the form of keeping the same was prescribed by the Commissioner, and that, notwithstanding the premises, the proper entries were not made; and in particular it should allege the specific entry or entries which were not made, whereby the act was violated. There are several sections of the statute which relate to the penalty for which this action is brought. The declaration, however, refers to but one section, and this not the one which confers authority upon the Commissioner to prescribe the manner in which the book shall be kept. The only reference made to the act in the declaration is calculated, therefore, to mislead, rather than direct attention to the section violated. Hoeberg v. Newton, 49 N. J. Law, 617, 9 Atl. 751; Allaire v. The Howell Works Co., 14 N. J. Law, 21.

The addition of the words "and other substances" to the word "molasses," to which one of the specifications of demurrer is directed, we do not regard as material. It is true they make the allegation indefinite, but they can and should be treated as surplusage. If this were the only objection, we should hold the declaration good, and upon trial the proof would be confined to the failure to enter molasses in the book; but we regard the other objections as substantial, and the demurrer is therefore sustained.

Leave will be given to the plaintiff to amend.

SPERRY & HUTCHINSON CO. v. TEMPLE.

(Circuit Court, D. Massachusetts, May 16, 1905. Final Decree, June 24, 1905.)

No. 2,019.

1. TRADING STAMPS—IMPROPER USE—NOTICE.
Where defendant had been in complainant's employment long enough to know that the necessities of complainant's business in selling and redeeming trading stamps required that such stamps should not be dealt in by the public generally, he was not an innocent purchaser without notice in purchasing issued stamps for resale.

2. PUBLIC POLICY.
The business of issuing trading stamps to merchants to be given to purchasers of small bills for cash, redeemable in articles of merchandise when honestly conducted, is not contrary to public policy.

3. INJUNCTION.
Where defendant purchased complainant's trading stamps, among others, for resale, and such purchases seriously interfered with complainant's business in issuing such stamps for redemption in articles of merchandise, etc., complainant was entitled to an injunction prohibiting defendant from advertising that he would purchase complainant's stamps, or from selling stamps so purchased as articles of merchandise.

In equity.

Hale & Hall and W. Benton Crisp, for complainant.
Arthur A. Coulthurst and John F. Hurley, for defendant.

LOWELL, Circuit Judge (orally). This case has been submitted upon answer, replication, and proofs, and fully argued by counsel, and the court sees no reason why judgment should be reserved. The court need not inquire whether the complainant was the originator of the general system of dealing in trading stamps described in the bill, but it puts out the stamps to merchants under special contracts with them. The nature of the business requires that there should be a certain monopoly. If the stamps were on the market generally, thus opening the business extensively, no merchant would have any inducement to deal with the complainant. Therefore, by the very nature of the business, the stamps are not intended to be dealt with by the public generally, and are not transferable in the general and ordinary sense of the word. From the reasonable and necessary course of business there must be certain restrictions on dealings in the stamps. This case does not involve the rights of parties who purchased stamps in ignorance of the necessities of the course of business. Some of the stamps are said to have had imprinted on them a notice, or words which in substance amount to a notice, with regard to the necessary course of business, and that the stamps were not to be dealt with generally, or that they were not generally transferable. While the fact that the stamps were dealt in by the respondent contained no such notice would, perhaps, bar the complainant as to a purchaser obtaining them innocently, yet this respondent was in the employment of the complainant long enough to know what the necessities of the course of business were. This was sufficient knowledge, regardless of the question whether he knew that there were specific limitations in

the books which were given out by the complainant as an element in the use of the stamps. Therefore he does not stand altogether in the position of an innocent party.

Objections have been made that the system of dealing in trading stamps is contrary to public policy, and that certain representations made that the stamps are without cost to the purchaser are untrue and inequitable, and therefore bar the complainant from coming into the chancery court. These statements were, however, substantially true, provided the business was carried on honestly. The trading stamp business is essentially legitimate, and, so far as the court can discover, it is the only way in which the small purchaser practically obtains a discount for immediate payment, whether that immediate payment is in cash or anything else. Honestly conducted, it leads to an allowance to one who purchases for cash, or the equivalent thereof; and statements of the character referred to are not in their proper sense untrue. Undoubtedly, the way in which the business is done, requiring the stamps to be redeemed in articles of merchandise, mainly articles of furniture, leads to certain impressions on the part of the public which induce the public to take the trading stamps when otherwise they would not take them. That, however, is not distinguishable from many usual methods adopted by merchants for inducing custom, and it is one of those methods of so inducing custom which courts cannot interfere with, unless they are disposed to protect the public beyond what the law permits. So far as this case is concerned, the court is unable to perceive from any proofs in the record, or from any suggestion, that the business of the complainant is not perfectly legitimate, honestly carried on, and, therefore, a business which the courts ought to protect, and one which the Legislature has no right to obstruct.

As already said, the stamps issued by the complainant go into the hands of merchants who deal directly with it; and, unless protected in some way against unauthorized competition arising from the stamps being resold to the public by other merchants, the whole system would break down and the business of the complainant would be destroyed. Therefore, so far as necessary, and so far as within the reason of the law, the court ought to protect the complainant in carrying out its system of issuing stamps. A question arose in the mind of the court whether the complainant could not protect itself by refusing to redeem stamps which had got into the channels of trade otherwise than in accordance with its fundamental method of transacting its business. The court perceives, however, that it would be impracticable for the complainant to discriminate between stamps properly issued by the merchants with whom it deals, and other stamps, which otherwise come upon the market. Perhaps, as suggested by the respondent's counsel, that might be done with a great deal of labor; but it would require a system of consecutively numbered stamps, combined with cumbersome accounts, which might be too expensive and too laborious to afford the complainant a practical remedy. If the complainant had any method by which it could reasonably, and without too much labor

much expense, protect itself by rejecting stamps which come
perly on the market, an equity court could not interfere; but
the circumstances the court is of the opinion that it ought to
ie complainant aid, so far, at least, as issuing an injunction is
rned. The circumstances of this particular case would not
the court in directing an accounting, because the amount
ed is too small, because the question of profits which the com-
nt would be entitled to recover runs into too narrow channels
oubtful and speculative character, and because, for the reasons
will be explained, this respondent ought not to be charged
nything in the nature of profits or costs.

ppears that the respondent advertised that he would purchase
s of all colors. This included, of course, the complainant's
s. There is no question that he did purchase from any one
aw fit to bring to him stamps, which included the complain-
stamps, and that he sold them on the market, so that the pur-
of them might use them as a thing of value, in such a manner
extended indefinitely, would break down the complainant's
n and method of business, as the court has already explained.
er words, the respondent assumed to deal generally in trad-
amps, including these stamps, buying and selling them as
s of merchandise. This court has no power to restrain him
purchasing all the stamps he sees fit to purchase. It has no
to prevent him from selling stamps to persons who desire
ke collections as mere matters of curiosity. It has no power
train him from selling them as waste paper, provided they are
ceeled or in any way broken up or disfigured that they can be
nly as such. It has power to restrain him from selling them
icles of merchandise, and from advertising generally that he
urchase specifically them, or stamps which would include
as articles of merchandise. It should go to that extent, and
t the complainant's business so far as an injunction of that
cter would protect it.

complainant's bill describes its stamps as issued in connection
the words: "Caution: This pad is not transferable." The
ainant admits that this was done only to a limited extent, and,
as this case is concerned, we must hold that there was no
n to the public plainly printed on the face of the stamps, and
hey were not salable except in accordance with the course of
ess of the complainant. Therefore, although on the one side
st hold the respondent liable to an injunction, because he was
inted with the course of business of the complainant generally,
new enough of it to understand that the stamps ought not to
the open market, yet the complainant has not put itself in
tion where it is positively entitled to costs against him, or to
er profits. Therefore the decree will be limited to an injunc-
and that injunction will be limited as already explained. It
irect that an injunction go against the respondent, prohibit-
im, and those representing him, from putting out advertise-
that he or they will purchase the complainant's particular
s, or advertisements so broad as to include them. It will also

restrain him and those representing him from selling the complainant's stamps as articles of merchandise. It cannot provide that he shall not purchase, so far as he sees fit to purchase, because that is beyond the power of the court to enjoin.

The court will observe that it would undoubtedly follow Judge Brown in Sperry & Hutchinson Co. v. Mechanics' Clothing Co., 135 Fed. 833, if the facts were the same; but they are so far different that we are compelled to go deeper than did the Circuit Court for the District of Rhode Island in that case.

Ordered: The complainant will file a draft decree in accordance with the opinion passed down this day, under rule 21, within one week from to-day. The respondent may file corrections thereof, under rule 21, within one week thereafter.

Final Decree.

This cause came on to be heard at the February term on bill, answer, replication, and proofs, and was argued by counsel for the respective parties; and, on consideration thereof,

It is now ordered, adjudged, and decreed that the defendant, Onsville L. Temple, his agents, servants, attorneys, and representatives, be, and each of them is, hereby restrained and enjoined from putting out advertisements that he or they will purchase the trading stamps of complainant, or advertisements so broad as to include the trading stamps of the complainant.

And it is further ordered, adjudged, and decreed that the defendant, Onsville L. Temple, his agents, servants, attorneys, and representatives, be, and each of them is, hereby restrained and enjoined from selling the trading stamps of the complainant as articles of merchandise.

And the court reserves the cause for further directions, in the event either party from time to time applies for modifications of this decree.

INDEPENDENT BAKING POWDER CO. v. BOORMAN.

(Circuit Court, S. D. New York. March 10, 1905.)

EQUITY—EXAMINATION OF WITNESSES BEFORE EXAMINER—TESTIMONY IN SUPPORT OF EXCLUDED ISSUE.

Where that part of an answer in equity setting up a particular defense has been stricken out by the court on exception on the ground that it is irrelevant and impertinent, the court of another district in which testimony is being taken before an examiner, pursuant to equity rule 67, will, on objections brought before it, exclude testimony offered by defendant in support of such defense.

On Motion to Compel Witnesses to Answer Questions before Examiner.

Philip Carpenter, for the motion.
Archibald Cox, opposed.

LACOMBE, Circuit Judge. In form, this is an application to compel witnesses who are being examined before an examiner under

xty-seventh rule in equity to answer certain questions. The sses, however, are in no way recalcitrant, nor is there any stion of a refusal to answer proper questions. The real ob- f the motion is to determine whether certain testimony offered half of the defendant should be taken by the examiner— er certain questions which are objected to by complainant l be allowed. It will be so treated, and each question will ed upon.

ere can be no doubt that the judge who passed upon the ex- ns to the answer, which were duly heard in the court where use is pending, decided that there should be eliminated from ntroversy, as immaterial, all issues as to the motives with complainant's alleged rights are asserted, and as to its rela- with the Royal Baking Powder Company or with other man- rers. Shall testimony bearing on these issues be, neverthe- received? Under the rule laid down in Blease v. Garlington, S. 1, 23 L. Ed. 521, and repeatedly followed in this court, ony has been frequently taken when objected to as irrele- and immaterial, the objection being reserved to be passed at final hearing, and the testimony preserved, so that, in the of an adverse decision at circuit being reversed upon appeal, might be no necessity for a new trial. This cause, however, nts a somewhat different question. It is not merely whether, taking testimony before an examiner, who has no power to n objections, certain proofs shall or shall not be excluded as g no bearing upon the controversy. The court in which the is pending, and which has power to pass upon all questions g therein, has made a careful examination of the pleadings, after a full hearing and consideration of all the arguments now nted, has decided that certain issues presented by the defend- hall not be considered by the court. Should defendant be ted at final hearing, his appeal will bring up this decision nating portions of his answer. If the appellate court should the conclusion that the decision was erroneous, and that de- nt was entitled to show motives, on the theory that he might show that complainant did not come into equity with clean s, it would have the power upon reversal to remand the cause instructions to take testimony touching the issues thus re- d. Chicago, etc., R. R. v. Tompkins, 176 U. S. 167, 20 Sup. 36, 44 L. Ed. 417. The Court of Appeals in this circuit would ubtedly exercise such power where, as the result of an erro- s decision by the court below, the defendant had been pre- d from presenting testimony in support of the defense which been stricken out. It must be assumed that the Court of als in the Third Circuit would take a similar course. The on is by a circuit judge, familiar with the practice in that t, and who, presumably, would not have made the decision d if the result would be to deprive defendant of his day in in the event of such decision being reversed on appeal. In- ch as the court where the cause is pending has decided in ad- e of the trial that certain issues must be kept out, it would not

be proper for another court (not an appellate tribunal sitting in review of such decision) to force into the record testimony in support of those issues. In accordance with these views the questions certified will now be ruled on.

Attention has been given first to every question referred to in complainant's brief (complainant raising the objections), and then to every question referred to in defendant's brief not already considered. If by this process any questions are omitted, a list of these may be presented.

Witness Le Fetra:

Questions 2 and 13. Objection sustained.

Question 20. Objection overruled.

Question 23. Objection sustained.

Question 24. Objection sustained.

Question 32. Objection sustained; the "impressions" of the witness are incompetent.

Questions 36, 37, 41, and 42. Objection sustained.

Question 44. Objection sustained; the witness' "discussions" with third parties are incompetent.

Question 46. Objection overruled.

Question 47. Objection sustained; had it not been for the answer to Q. 45, it would have been overruled.

Witness William McMurtrie:

Questions 9, 10, 13, and 14. Objection sustained.

Questions 21 and 30. Objection sustained; the "understanding" of the witness, or "what he thinks," is not competent.

Question 37. Objection overruled.

Question 50. Objection sustained; the "impressions" of the witness are not competent.

Questions 53 to 59. Objection sustained.

Questions 79, 80, 81, 85, and 88. Objection sustained.

Questions 104, 106. Objection sustained.

Questions 114, 115. Objection sustained.

Question 123. Question is answered. A. 125, 126, 127.

Questions 139, 140, 141, 142, 143, 145, 146, 148, 149, 150, 151. Objection sustained.

Questions 153, 154, 155, 156, 157. Objection sustained.

Questions 143, 178, 179, 180, 181. Objection sustained.

Witness Charles T. Whittier:

Question 347. Objection sustained.

Question 418. Objection sustained.

Questions 439, 443, 446, 447. Objection sustained.

Questions 457, 458. Objection sustained.

Questions 459, 466. Objection sustained.

Questions 665, 666, 667, and 668. Objection sustained.

Questions 670, 671. Objection overruled.

Questions 723, 724, 727, 729. Objection sustained.

As to all these questions, except where otherwise stated, the objections are sustained upon the ground that the evidence sought

elicited relates to issues which the court where the suit is to d has expressly and specifically excluded. And defendant ke a separate exception to the ruling as to each question.

ADAMSON & MAIL v. 4,300 TONS PYRITES ORE.

(District Court, E. D. South Carolina. May 23, 1905.)

R PARTY—CONSTRUCTION—DEMURRAGE.

Where a vessel was chartered to load at a pier belonging to a town a foreign port, in charge of the captain of the port, whose duty it s to assign vessels to berths at the pier, and he refused to permit vessel to berth in her turn at the pier in a berth where she would ject beyond the pier, resulting in a delay, such delay was caused by "intervention of constituted authorities," within an exception in the rter party relieving the charterers from liability for demurrage.

Ed. Note.—Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; ndall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.]

Admiralty. Libel for demurrage.

an & Bryan, for libelant.

nans & Sinkler, for respondents.

AWLEY, District Judge. The steamship Robert Adamson t to freight to the Davis Sulphur Ore Company June 11, or a voyage from Huelva, Spain, to Charleston. The charter executed on that day was on the printed form of the Davis ur Ore Company, which provided that the steamship should d to the port of Huelva, and "there load where and as order- the regular turn for steamships." The shipowner, not be- lling to charter his ship on those terms, had required an ment; and, as executed, the charter party provided that the ship should proceed to the port of Huelva, Spain, and "there here and as ordered in the regular turn for steamships if at into Pier, or three working days loading either at the Town f the port or at any other loading places named by char- or their Agents on arrival." The charter party further pro- that, "being so loaded, steamship should proceed to such in the United States at Charterers' option [Charleston be- cluded], and there discharge according to the custom of the Any days or parts of days not consumed in loading shall led to the time for discharging, and any extra time consumed ling shall be deducted from the time for discharging"; there a further provision for "ten days on demurrage at port of g or discharge if required, at the rate of 20 shillings per hour, le at port of discharge; all disputes to be settled at port of rge either in the law Courts or by arbitration there." The ship arrived at Huelva July 17th, and gave due notice of ess to load under such charter, and the agent of charterers d the master that such steamship would load at the Town

Pier. It is not disputed that the first lay day commenced at noon, July 22d. The master's testimony is that:

"Mr. Poole [who was the charterers' agent] told me verbally that the first turn day would commence the next day, the 18th, at noon, and the last would finish at noon on the 22d. Mr. Poole also intimated that he hoped that there would be a clear berth ready for me on the 30th of July, at midnight, and that he would send the pilot over when berth was ready."

It appears from the testimony that the turn of the steamship at the Town Pier came on the night of the 30th of July, and that the pier master so informed the charterers, but, for reasons to be stated, the pilot was not sent to the ship on that night, and she was not actually brought to the pier until August 6th; and the contention in this case is whether the delay which supervened between July 30th and August 6th shall be deducted from the lay days. In behalf of the respondents it is claimed that this delay or hindrance was caused by the "intervention of the constituted authorities," and is within the exception of the charter party. The provision of the charter party on this subject is as follows:

"Charterers to have the liberty to load and discharge on Sundays and holidays without time counting, and no time shall count as lay days during which any delay or hindrance may occur in procuring, carrying, shipping, exporting, or discharging cargo, by reason of frosts, floods, bad weather, disturbed condition of sea, holidays, political disturbances, quarantine, strikes, intervention of constituted authorities, accidents, stoppage of mines supplying cargo, stoppage of Consignees' works, stoppage of trains, or any other causes whatsoever beyond the control of the shippers or the Charterers."

It is this contract that the court is now called upon to construe and execute.

It appears from the testimony that the berth No. 3 at the Town Pier was one where the steamship, owing to her length, would have projected between 80 and 90 feet beyond the end of the pier, there being another vessel lying on the inside at that time in berth No. 1; and it further appears that it was not unusual for vessels lying at that pier to project beyond the end of it; and the contention of the libelant is that, in these circumstances, it was not a safe berth, in fact, and a good deal of testimony has been offered to support that contention. If the master of the steamship had refused to take the berth because it was unsafe, it seems to me that there is sufficient testimony in the case to support his refusal, and the decree should be for the libelant, for I think it cannot be disputed that it is the duty of the charterer, under the general maritime law, to provide a safe berth. There is considerable conflict in the testimony on this point, the libelant having offered proof that it was not safe, and the respondents having offered proof that it was safe, and that other vessels, projecting beyond the pier head to a considerably greater length than the Adamson would have done, had loaded at the pier without injury. But the testimony of the chief pilot of the port of Huelva, acting under the orders of the captain of the port, or, rather, of his second in command—the chief officer being absent—is that he was forbidden to take the Adamson to that berth, on the ground that it would cause damage to

p or the pier, and would have been an obstruction to naviga- the river. It appears from the testimony that the Town elonged to the town, and that it was the duty of the captain port to determine questions of this nature. In an ordinary e determination of a question of fact by an official whose t was to determine it would be so far controlling that it be our duty to accept it, unless it was clearly against the of testimony; and, if the master of the steamship had re- o go to the berth because the authorities had decided that not a safe berth, it would require a great deal more testi- than has been produced here to hold the ship responsible y loss incurred by such refusal. But that is not the case. ter of the master to Poole, the agent of the charterers, of date t 2d, shows that he did not refuse to go to the berth for son that it was not safe. On the contrary, it is to be fairly d that he considered the berth safe, and was willing to go f he had been permitted. The letter is as follows:

irming my conversation with your brother this morning, I beg to in- u that I have protested before his Britannic Majesty's Consul against vn Pier officially, and all concerned in preventing my steamer from a berth in such pier as ordered by you."

conversation referred to has been testified to by Poole's r, and it appears from that testimony that the master desired e the berth, and consulted him as to the possibility of success ertaking some legal proceedings to compel the authorities w him to take his regular turn; and it further appears that, if l berthed his ship at No. 3 berth on the night in question, ld on the next day have been transferred across the dock to o. 4 berth, where the loading could have proceeded without fficulty arising from the projection of his ship beyond the the pier, and that in point of fact his ship was moved from berth when his next turn came, to No. 4 berth. By rea- the refusal of the "constituted authorities" to allow him to ne No. 3 berth when his turn came, he was put behind all ner vessels which at that time were ahead of him, and did not the pier until August 6th. I feel bound to conclude, there- hat the delay and hindrance was due to the "intervention constituted authorities," and to a cause "beyond the con- f the shippers or the charterers," and that under the ex- ns in the bill of lading the charterers are not responsible e delay. Many of the cases cited by the learned counsel e libelant in opposition to this view have arisen upon bills ng where the liability of common carriers is fixed by the on law. These doctrines have no application in the construc- f a charter party, where the rights and obligations of the s depend upon the stipulations of the contract. It would be t to draw a contract where the ordinary vicissitudes which be likely to interfere with the charterers' performance of their tions are more carefully provided against. As the charter was prepared by the charterers, any doubts as to its con-

struction ought to be solved against them: but if it is clearly provided that no time shall count as lay days, during which delays or hindrances were due to "any causes whatsoever beyond the control of the shippers or the charterers," it seems to be the duty of the court to enforce it, and that the delay in berthing the ship in her regular turn was due to the "intervention of constituted authorities" is clearly proved.

My first impression was that the charterers were liable for the demurrage; that, inasmuch as it was their duty to provide a safe berth for the ship, the determination by the captain of the port and the chief pilot that berth No. 3 was an unsafe berth was conclusive, and fixed the liability of the charterers. But upon reconsideration, and reviewing all the testimony, I am led to the conclusion that the causa proxima of the loss was not any supposed danger in the berth, for the master of the ship accepted it as safe, but the intervention of the port authorities, without which the delay and loss would not have occurred. The charter party protects the charterers against delays or hindrances arising from that cause, or from "any causes whatsoever" beyond their control.

The libel must therefore be dismissed.

POOSER et al. v. WESTERN UNION TELEGRAPH CO.

(Circuit Court, D. South Carolina. May 22, 1905.)

REMOVAL OF CAUSES—FEDERAL JURISDICTION—AMOUNT INVOLVED.

A cause removed from the state court will be remanded on the ground that the amount involved is only $1,900, and therefore not within the jurisdiction of the federal circuit court, though the complaint, in form, states two causes of action, the prayer as to each of which is for a judgment for $1,900; each being for nondelivery of a telegram; the only difference therein being that one is addressed to "Mrs. P.," and the other to "Mr. P."; and it appearing that the complaint, in form, stated two causes of action because plaintiffs' counsel was uncertain, from the chirography, as to which of the two persons the telegram was addressed.

Izlar Bros., for plaintiffs.
Smythe, Lee & Frost, for defendant.

BRAWLEY, District Judge. This is a motion to remand a cause removed from the state court by the defendant company on the ground that the amount involved is only $1,900, and that the Circuit Court of the United States therefore has no jurisdiction of the cause. The complaint states, "as for a first cause of action," the failure of the defendant company to deliver a telegram reading as follows: "Mrs. F. M. Pooser, Blackville, S. C.: Mr. Edwin Curry accidentally shot and dying from wounds. R. C. Adams"—and the prayer is for judgment for the sum of $1,900.00. It alleges, "as for a second cause of action," the nondelivery of a telegram which reads as follows: "Mr. F. M. Pooser, Blackville, S. C.: Mr. J. Erwin Curry accidentally shot and dying from wounds. R. C. Adams." The question is whether the complaint states two

of action, each of which is below the jurisdictional amount, hich added together make more than that sum. The same on was presented to Judge Purdy on a motion in the state and his conclusion, as stated in writing, is:

action is but for one grievance, separately stated in two causes of The prayer for relief in the first cause of action is no part of the f action, and does not make the case an action for two separate and amounts. There can be but one recovery by the plaintiffs, as the f action is for but one grievance, though separately stated."

ncur in this view. The cause of action is the nondelivery rtain telegram. It is first stated as a telegram addressed to . M. Pooser, and the second so-called cause of action is the ivery of the identical telegram alleged to have been addressed F. M. Pooser. The reason alleged by the counsel for plain- r stating the causes of action separately is that he was un- , from the chirography, whether the telegram was addressed or Mrs. Pooser, and, to be on the safe side, he alleged sep- auses of action.

rule in removal cases is that the court can look only to the ated in the complaint, and its determination is to be gov- by what appears upon the face of the pleadings. But it does em to me that this rule requires the court to shut its eyes reality, and, if it should appear, as it does appear in this case, e plaintiff has but one cause of action, to wit, the failure to a certain telegram, the jurisdiction of the court cannot be d by the fact that he has bunglingly alleged two separate of action. The prayer for relief is no part of the cause of and, although the plaintiffs have asked for two separate of $1,900 each, they cannot, upon the cause of action stated, r more than $1,900; and, if that is so, this court is without ction, the amount involved being below the jurisdictional t. In the case of Armstrong v. Ettlesohn (C. C.) 36 Fed. ted and relied on by defendant, the question arose on a de- to a declaration and motion to dismiss. In that case the tion contained three counts. One was upon a promissory ne for money had and received, and one for work and labor The aggregate of these sums exceeded the sum of $2,000. urged in the argument that the only right of action that intiff had was upon the promissory note mentioned in the unt, but the court said:

the face of this declaration, which we can only look at under this r, there appear to be three causes of action, which, when aggregated, ore than the amount required to give jurisdiction."

hat case there was another ground of jurisdiction, which the referred to as conclusive of the plaintiff's right to maintain t in the United States court, and that was that the plaintiff, he receiver of a national bank in process of liquidation, had ht to bring the suits in the United States court under the l banking law. I do not consider that this case is control- the one now being considered, or that it throws any light he question; and being of opinion that there is but one

cause of action, to wit, the failure to deliver but one telegram, and that the damages laid are but $1,900, and that upon such a complaint the plaintiffs could not recover more than $1,900, this court is without jurisdiction, and the cause must be remanded to the state court, and it is so ordered.

THE KENILWORTH.

(District Court, E. D. Pennsylvania. May 19, 1905.)

No. 45.

1. SHIPPING—INJURIES TO SEAMAN—TREATMENT—NEGLIGENCE OF MASTER—EVIDENCE.

   On a libel against a vessel for failure to provide proper treatment for an injured seaman, evidence *held* insufficient to show that the master was negligent in diagnosing or treating the injury or in failing to put into port in order to afford libelant surgical assistance.

2. SAME—EXPENSES OF MAINTENANCE.

   Where libelant sustained an injury while in the service of a ship on which he was engaged as a seaman, he was entitled to recover from it the expenses of his maintenance and cure at least during the continuance of the voyage.

   [Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, §§ 39–43, 186–188.]

In Admiralty.

Joseph Hill Brinton, for libelant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. The libelant was a seaman on board the bark Kenilworth, and was injured during a voyage from Hawaii to the port of Philadelphia. His cause of action appears in the following extract from the libel:

"That on or about June 8, 1904, during the said voyage, at about noon on that day, whilst the vessel was at a point about 100 miles northeast of Cape Horn, the libelant was directed by the first officer to assist in the furling of the fore topgallant sail, in the execution of which order it was necessary for him to be on the main deck about midships, at which time the vessel shipped a heavy sea, which knocked the libelant down and broke his right leg above the knee. By reason of the injuries thus received, it became necessary for the libelant to have, and the master to furnish, such attention and care as was necessary under the circumstances for the fractured bone to be properly set in order that a cure might be effected. The master and officers of the said vessel, however, disregarding their duties in the premises, failed to give the libelant any care or attention whatsoever, notwithstanding his repeated requests to that end, but, on the contrary, had the libelant placed in the forecastle, where he remained until the arrival of the vessel at the port of Philadelphia, as aforesaid. The libelant further avers that by reason of the negligence and carelessness of the said master in denying the libelant due attention and care the fractured ends of the bone overlapped each other, and thus became knitted together, which has resulted in the shortening of the right leg by about two inches, which condition he believes to be permanent and incurable. The libelant further avers that, had the master afforded him reasonable and proper care in setting the fractured bone, his injuries would have been comparatively slight, and of a temporary character. The master, however, refused to believe that the bone was fractured, and therefore refused

o the libelant, and also refused to put in to the nearest port for
ention."

s some dispute about the facts, but I think the following
-in which I have made free use of the clear and satisfac-
of the respondent's proctor—is correct in all essential re-

enilworth is a large four-masted bark of 2,147 tons net
carrying 25 men all told, including the master. On June
while on a voyage from Hilo, Hawaii, to Philadelphia, in
0 deg. 30′ south, longitude 50 deg. 30′ west, to the north-
eastward of Cape Horn, the vessel encountered thick,
ather, with a very heavy sea. Shortly after noon the libel-
ree other men, who were engaged in furling the fore top-
il, were swept from the brace by a heavy sea, which car-
to the deck, where the libelant was washed against the
e, and from there to the steam winch, where he received
es complained of. The master, seeing the libelant hold-
mizzen rigging, called to him to jump down on the poop,
plied that he could not, and that he thought his leg was
The libelant, by order of the master, was then brought
op, and from there was taken to the cabin, where he was
and examined by the master, to ascertain if the leg was
The master placed one hand on the knee and the other on
but got no movement of the parts that were afterward
e fractured, nor did he hear any grating noise, or crepitus,
e surgical term. He also requested libelant to move his
this movement was made. The master then said, "Your
broken, because if it was you could not move your foot
our life." The libelant could move his toes, ankle, and
longitudinal discoloration about the width of two fingers,
from the knee to the thigh, was also observed by the
ho concluded, as the result of his examination, that the
everely bruised, or that a tendon or muscle had been rup-
l proceeded to treat libelant for that character of injury.
uit of underclothing was put on libelant, his leg was rubbed
ca, and a bandage soaked with the same liniment was
tightly around the leg from the knee to the hip. The
as placed in the cabin boy's berth, where he remained
following day, when he was taken to the forecastle, in
t he might be in the company of his shipmates, and
l of the steward, who was in the kitchen, immediately

g was rubbed first with arnica, and afterwards with
, by the master or steward. When the swelling subsided,
hed with a solution of vinegar and water to take out the
ion. To guard against fever, no salt provisions were al-
the libelant was given a light diet of arrowroot, macaroni,
and similar food. The bandaging was done once or twice
r the first two or three days by the master, and then by
rd, until the libelant was able to do it himself. In about

three weeks he was able to go about on crutches, and from that time until the end of the voyage he was apparently cheerful and contented. Upon the assumption that the injury was a severe bruise or ruptured tendon, there was no obvious necessity for putting into port for medical or surgical assistance. The nearest place was Port Stanley, in the Falkland Islands, about 350 or 400 miles west by south, and this port was difficult to reach on account of the prevailing winds and the stormy conditions in that region. It was also a dangerous port to approach, and, moreover, it does not appear what facilities for surgical treatment it affords. By the time the vessel passed Pernambuco, Brazil (when she came nearest to the land on her regular course), the libelant was going about the deck. He made no complaint of neglect or ill treatment to the master, or to any one else in authority, and did not ask to be put ashore. So far as appears, no one who saw the leg believed it to be broken.

On the arrival of the vessel at Philadelphia, the libelant on July 27 walked on crutches several squares to the custom house, and from there rode in a trolley car, with an attendant, to the German Hospital. On August 1 the libel in this case was filed—most of the crew having meanwhile dispersed—and on August 4 libelant went to the Marine Hospital at Baltimore, where he remained until September 19. The master's and steward's depositions were taken on August 5, but it was not definitely ascertained that libelant's leg was broken until November 25, when a skiagraph or X-ray picture of libelant's injured leg was produced, which showed an oblique fracture of the upper third of the right femur, running through the bone from the outside, and disclosed also a longitudinal split of the bone extending from the oblique fracture to the knee joint. It was along the line of this longitudinal fracture that the master observed the discoloration that led him to conclude that the injury was probably due to a ruptured tendon or a bruised muscle running in this direction. The surgeons on both sides agree that the fracture was of an unusual character, and that as soon as the injury took place the powerful muscles of the thigh contracted, drawing the fractured ends of the bone past each other to the point where they are now united, and that no force could have then brought them into proper position so that the ends would have come together. This could only have been done by a gradual process of drawing them into place, which would have required skilled surgical treatment, and the use of a traction apparatus and appliances to be found mainly in hospitals, and not to be expected on board a ship. A surgeon called by the libelant testified that it was a difficult fracture to treat, that the setting of the bone was not a simple matter, that the most skillful surgeon might not have discovered crepitus (grating of the ends of the bones), that the cause of the longitudinal discoloration could only have been ascertained by knowledge which no layman could be expected to have, and that it is a popular belief that the power to move any part of a limb sets aside the idea of fracture. He would not say that the master was negligent in drawing the conclusion that the discoloration indicated a severe bruise, but thought him negligent in not discovering the transverse fracture. The sur-

alled on behalf of respondent considered the result of the
's treatment as shown by the skiagraph to be a good result,
d that libelant was exceedingly fortunate in having a leg
e could walk on, that a nonprofessional man could not be
discover the fracture, because the muscles are rigid, and
ne bones together, so that the movement in an unnatural
on that might indicate fracture even to a layman could not
ıced, and that the master was wise in not attempting further
this movement, as it might have torn an artery or vein, and
thus have resulted in the loss of the libelant's leg or his life.
belant is able to walk with a limp on his injured leg, and
s no evidence that placing it in splints by the master would
ffected the result in any way, or that he could thus have ob-
any better use of the leg than he has at present. The ever-
the right foot, which showed after recovery, was caused by
ıtraction of the muscles at the time the injury occurred, and
ıot have been remedied, even if observed at the time, by any
ıces on board the ship.

n these facts it is evident, I think, that the crucial inquiry is
er the master was negligent in not discovering that the leg
actured. If his examination was so careless that he over-
what he ought to have seen, he must be charged with the
edge that would have been gained by a careful examination.
ot asserted—or, if such a charge is intended by the libel, it
been proved—that the master was inhuman in his treatment
libelant, or that he willfully or recklessly shut his eyes to the

The charge is negligence in examination and negligence
sequent treatment, and, as I have just stated, the first inquiry
e: ought the master to have known that the leg was broken?
, he cannot be blamed for his failure to discover the longi-
split. There was no outward sign of this fracture, and I
he testimony shows plainly that, except for the X-ray, no
ould know even now that the bone had been fractured along
gth. Was the master negligent, then, in failing to discover
nsverse fracture? If he is to be judged by the standard of
lled surgeon, no doubt the answer would be in the affirma-
ut this standard is much too exacting. The ordinary ex-
signs were lacking. The ends of the bone did not protrude,
buried in the deep muscles of the thigh; the ends were not
osed, and therefore there was no crepitus; the muscles were
nd contracted so that unnatural movement was difficult, and
ly dangerous, to induce; and the sole external sign that was
t—shortening of the leg—could scarcely be detected except
asuring. And, to throw the examiner off the scent, there was
ility to move the toes, the ankle, and the knee—an ability
the popular belief, shared by the master, denies to a broken
nd, even more, the broad and long discoloration, which seem-
tself to account for all the injury by pointing to a torn tendon
neavy bruises. All the subsequent treatment shows clearly
ne master's belief was honestly entertained, for it is incred-
at he should have persistently bandaged the leg and rubbed

it with liniments if he knew all the while that it was broken instead of being bruised. Endeavoring, as far as possible, to reproduce the situation as disclosed by the evidence, and taking into account the conflict in the testimony of the surgeons concerning what should have been discovered by an ordinarily careful and intelligent man, I cannot reach the conclusion that the master failed in the discharge of his duty. He was wrong in his conclusion, of course, as now appears; but I think he was honest, careful according to his light, and that his judgment upon what he saw found plenty of support, both at the time and afterward.

If I am correct in this, it is not necessary to consider whether the master should have put into the nearest port. Certainly, a bruise such as this injury appeared to be, severe as it was, did not call upon the master to beat 300 or 400 miles to Port Stanley, at the cost, perhaps, of two or three weeks' delay, and especially when external improvement was soon apparent. The evidence satisfied me that, in view of the prevailing winds in that part of the South Atlantic Ocean, the port of Bahia, or of Pernambuco, was as near in point of time as any other; and when the latitude of Pernambuco was reached there was no apparent occasion for immediate treatment. Probably by that time the ends of the bones had already so far united out of their proper place that a remedy, even at the hands of the most skillful surgeon, would have been exceedingly difficult, if not impossible; for it is certain that when he arrived in this country, about three weeks afterward, the surgeons in Philadelphia and Baltimore declined to attempt an operation.

I have no disposition to minimize the obligation of a master to care for his crew, and to seek the best of help for them in cases of injury, even at the cost of considerable delay and inconvenience; but this obligation is to be reasonably enforced, and the master should not be held negligent because he is not a skilled surgeon, and has made a wrong diagnosis in an obscure and difficult case. Here I think the master did his best, and was not at fault, although he was misled. The cases cited by the libelant have all been considered. The rules of law they lay down are accepted without reserve, but the facts are so different—especially on the vital point of accurate knowledge concerning the injury—that I think they are all readily to be distinguished. The latest case on the subject is The Iroquois, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955, in which the Supreme Court uses the following language:

"The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowner by all maritime nations. It appears in the earliest codes of continental Europe, and was expressly recognized by this court in the recent case of The Osceola, 189 U. S. 158, 47 L. Ed. 760, 23 Sup. Ct. 483. Upon large passenger steamers a physician or surgeon is always employed, whose duty it is to minister to the passengers and crew in cases of sickness or accident. Of course, this would be impracticable upon an ordinary freighting vessel, where the master is presumed to have some knowledge of the treatment of diseases, and in ordinary cases stands in the place of a physician or surgeon (The Wensleydale [C. C.] 41 Fed. 602); but for the further protection of seamen vessels of the class of the Iroquois are compelled by law to be provided with a chest of medicines and with such anti-scorbutics, clothing, and slop

hests as the climate, particular trade, and the length of the voyage may require. Rev. St. U. S. §§ 4569, 4572 [U. S. Comp. St. 1901, pp. 3100, 3101].

"What is the measure of the master's obligation in cases where the seaman s severely injured while the ship is at sea, has been made the subject of discussion in several cases; but each depends so largely upon its own peculiar acts that the rule laid down in one may afford little or no aid in determining nother, depending upon a different state of facts. The early cases of Harden . Gordon, 2 Mason, 541, Fed. Cas. No. 6,047, and Reed v. Canfield, 1 Sumn. 95, Fed. Cas. No. 11,641, contain an exhaustive discussion of the general subect by Mr. Justice Story. But as in both cases the disability occurred at r near a port, they are of no special value in this case.

"We have carefully examined the cases of Brown v. Overton, 1 Spr. 462, 'ed. Cas. No. 2,024; The Chandos, 6 Sawy. 544, 4 Fed. 647; The Scotland (D. C.) 42 Fed. 925; Whitney v. Olsen, 47 C. C. A. 331, 108 Fed. 292; The Troop D. C.) 118 Fed. 769; and Danvir v. Morse, 139 Mass. 323, 1 N. E. 123—and re of opinion that none of them fit the exigencies of the present case. We annot say that in every instance where a serious accident occurs the master s bound to disregard every other consideration, and put into the nearest port, hough, if the accident happen within a reasonable distance of such port, his luty to do so would be manifest. Each case must depend upon its own circumstances, having reference to the seriousness of the injury, the care that an be given the sailor on shipboard, the proximity of an intermediate port, he consequences of delay to the interests of the shipowner, the direction of he wind and the probability of its continuing in the same direction, and the act whether a surgeon is likely to be found with competent skill to take harge of the case. With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary cquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such a port if the cargo be such as vould be seriously injured by the delay. Even the claims of humanity must e weighed in a balance with the loss that would probably occur to the owners f the ship and cargo. A seafaring life is a dangerous one. Accidents of this kind are peculiarly liable to occur, and the general principle of law that a erson entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen.

"To judge of the propriety of the master's conduct in a particular case, we are bound, so far as possible, to put ourselves in his place, and inquire whether, in view of all the circumstances, he was bound to put into an intermediate port."

So far, therefore, as the charge of negligence is concerned, to which the original libel was confined, I am of opinion that the testimony does not support it. An amendment that was recently allowed, however, introduces a new subject for consideration. The amendment is as follows:

"The libelant, in addition to that set forth in the libel, claims to recover for expenses which he has already incurred and may hereafter be obliged to incur in endeavoring to effect a cure, and for board and lodging during that time."

That the libelant, having suffered injury while in the service of the ship, was entitled to the expenses of his maintenance and cure, at least so long as the voyage lasted, cannot be denied. This is the first proposition laid down in The Osceola, 189 U. S., on page 175, 23 Sup. Ct. 487, 47 L. Ed. 760. But the libelant is claiming more, namely, not only expenses already incurred, but expenses likely to be incurred hereafter, in endeavoring to effect a cure, including board and lodging during both the past and future time. There is no evidence that he has incurred, or is likely to incur, any expense for medical or surgical treatment, and that item may there-

fore be laid aside. So far as possible, indeed, it appears from the slender evidence on the subject that the libelant has already been cured in a certain sense. That is to say, while he is no doubt permanently injured, nothing further can be done for him by medical or surgical skill. No ground exists, so far as has been proved, for an allowance on account of professional services. The item of board and lodging is made up of a charge of $4.50 per week from September 20, 1904, when he returned to Philadelphia from the Marine Hospital in Baltimore, to the present time. This sum has been paid, or assumed, for him by another person, and recovery therefor is sought under the amendment. The difficulty about allowing it, however, is that it does not clearly appear to have been an expense of maintenance during cure—assuming that the ship's liability continued after the voyage—but an expense incurred after the accomplishment of such cure as is now possible. No case, I think, carries the doctrine of maintenance so far as this, and it is obvious that no such indefinite liability can properly be imposed upon the ship In some cases it might be equivalent to support during life, and even in a case of great hardship this would be out of the question

But although, upon this point, the evidence is so meager that I do not feel justified in acting upon it, the burden of proof being on the libelant to show that any expense incurred since the date fixed by the amendment, September 20, 1904, is properly chargeable to the cost of cure, nevertheless, in order to avoid a possible injustice, I shall permit further testimony to be taken concerning this matter, the libelant to be allowed until June 1 and the respondent until June 10; the depositions to be strictly confined to the charge set up in the amendment

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SCOTT v. R. D. KINNEY & CO.

(Circuit Court, E. D. Pennsylvania. May 26, 1905.)

No. 7.

FEDERAL COURTS—REMOVAL OF CAUSES—DENIAL OF CIVIL RIGHTS.

Where petitioner's failure to obtain a trial of an action in a state court resulted from her inability to secure an attorney for that purpose, or because the plaintiff had been able to secure postponements of the trial against defendant's protest, and not because of any command or authority of the state, or any provision of the laws of the state, defendant was not entitled to remove the cause to the federal courts under Rev. St. § 641 [U. S. Comp. St. 1901, p. 520], authorizing removal by any person who is denied or cannot enforce in the tribunals of the state any civil right, etc.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 127.]

Remanding Case to the State Court.

Walter Stradling, for plaintiff.

R. D. Kinney, for defendants

HOLLAND, District Judge. Suit was instituted in this case in e court of common pleas No. 3 of Philadelphia county, March rm, 1898, to recover for personal injuries resulting from the neg- rence of the defendants in failing to provide a safe place in which e plaintiff could do his work, in the capacity of a boiler maker, ho was engaged, as he alleges, by the defendants to work on a nk which they were erecting at the time. On March 21, 1905, the fendants presented their petition to the said court of common eas of Philadelphia county for the removal of this case into the nited States Circuit Court for the Eastern District of Pennsyl- nia, under section 641 of the Revised Statutes [U. S. Comp. St. 01, p. 520], wherein it is alleged they have been most anxious to ve the said action brought to trial before the loss of existing portant evidence, necessary and material to the defense of said tion, and that four different lawyers, members of the Philadelphia r, had been successively employed, each of whom had withdrawn om the case, and that since August 7, 1902, the defendants have en without counsel for the defense of their suit. The case was issue on March 2, 1898, and has been regularly ordered for trial ree times since that time—first on May 10, 1899, then on January 1901, and again on December 2, 1904—and was called for trial February 14, 1905, when the defendants insisted upon trial or n pros., both of which were overruled against the objection of e defendants. Then follows a citation of the rules of court and ts of assembly enacted in the state of Pennsylvania for the pur- se of enabling the defendants to bring their case to trial. Where- re, the petition alleges, the defendants "have been denied and nnot enforce in the proper tribunal of the state of Pennsylvania ight secured to them by the laws of Pennsylvania, providing for e equal civil rights of citizens of the United States, to wit, the ght, under the fourteenth amendment to the Constitution of the nited States, to the equal protection of the laws, as also to the ght, under said amendment and acts of Congress, for the enforce- ent thereof, to wit, the full and equal benefit of all laws and pro- edings for the security of persons and property as is enjoyed by her citizens of the state of Pennsylvania." Copies of the plead- gs and other proceedings in the case were filed in this court on arch 23, 1905, and the same were docketed here, as claimed by fendants, in accordance with the provisions of section 641.

The motion of the plaintiff can be regarded as one to remand the se to the court of common pleas. All the allegations contained the petition for removal are to be taken as true, as there is no nial on the part of the plaintiff; but the facts set forth, together th the most favorable inferences to be drawn therefrom in favor the petitioners, fail to make out a case for removal to this court der section 641. At most, the facts alleged in the petition show at the defendants have been delayed in bringing their cause to al by reason of their inability to secure an attorney for that pur- se, or for the reason that the plaintiff has been able to secure stponements of the trial of the case in the state court against the

protest of the defendants. There is no allegation that there is any law of the state of Pennsylvania, or rule of court of the city of Philadelphia, which discriminates against the defendants. If the defendants have been unable to bring their case to trial in the state court, it is because of their failure to secure an attorney for that purpose, or on account of the action or nonaction of the courts, and not from any command or authority of the state, or any provisions of the laws of the state. For such wrongs, in the language of the Supreme Court, section 641 has no application. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the state, and ultimately to the review by the supreme judicial tribunal of the land. Virginia v. Rives, 100 U. S. 319, 25 L. Ed. 667.

The denial or inability to enforce in the judicial tribunals of the states rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, and on account of which a civil suit or criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the state, rather than a denial first made manifest at or during the trial of the case. Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075.

It is only when some state law, ordinance, regulation, or custom hostile to these rights is alleged to exist that a removal can be had under the first clause of this section. In re Wells, Fed. Cas. No. 17,386. It was intended to protect against state action, and against that alone. In other words, the statute has reference to a constitutional or legislative denial of equal rights, or an inability to enforce them resulting therefrom, and not to any denial or inability to enforce resulting from the action of the judiciary. Virginia v. Rives, 100 U. S. 339, 25 L. Ed. 676. And it refers to legal disabilities and legal impediments, and not to private infringements by prejudice or otherwise, when the laws themselves are impartial and sufficient. Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Le Grand v. U. S. (C. C.) 12 Fed. 577, note 583.

Thus it will be seen that the Supreme Court has held that removals under section 641 can only be had when the party complainant cannot enforce rights secured to him by the law providing for equal civil rights of the citizens of the United States in a judicial tribunal of the state by reason of some enactment or constitutional provision of the state, and the allegations in this petition fail to show or even suggest such a case.

It was suggested at the argument that the case is not properly before this court, and should be dismissed. We do not think it is necessary to examine this technical objection, as, upon the facts alleged in the petition, we are of the opinion that it is not such a case as can be removed to this court under section 641, and must therefore be remanded to the court of common pleas No. 3 of Philadelphia county, and it is so ordered.

CARROLL et al. v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Circuit Court, D. South Carolina. May 24, 1905.)

ACCIDENT INSURANCE—DEATH BY BLOOD POISONING.

Where insured died from blood poisoning from infection received in an altercation with another, his death was the direct result of bodily injuries sustained through external, violent, and accidental means, within the terms of an accident policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1166, 1170, 1171.

Risks and causes of loss, see note to National Acc. Soc. v. Dolph, 38 C. C. A. 3.]

SAME—BREACH OF THE PEACE.

Where deceased and another engaged in a mere fist fight, neither being armed, and there was no reason to expect that the encounter would result in bodily harm to either party, the fact that the injury which caused deceased's death was the result of a breach of the peace did not preclude a recovery on an accident policy containing no special clause vitiating it on that ground.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1149, 1182, 1183.]

H. J. Haynsworth and J. C. Jeffries, for plaintiffs.
Sanders & De Pass and Hall & Willis, for defendants.

BRAWLEY, District Judge. The policy of insurance sued on ntains this clause:

"Against disability or death resulting directly and independently of all er causes, from bodily injuries sustained through external, violent and idental means."

The assured, Frederick G. Stacy, was the president of a National nk at Gaffney, S. C. He was accused by one Porter, who was newhat under the influence of liquor, of having taken unfair adntage of him in some business transaction, and other charges culated to offend and irritate him were made. He started down street with Porter for the purpose of making an investigation to the truth of the charges, and, meeting his partner, told him at Porter had said, and his partner then explained the transaction t of which the charge grew. Thereupon Stacy said to Porter, his shows that you are lying," or words to that effect. Porter plied, "You are a liar yourself," or in like language. Thereupon cy struck two blows with his fist, first with his right hand, and low with the left hand instantly following, which landed upon rter's teeth, causing an abrasion. Neither of the parties were ned. In a few days blood poisoning set in, caused, according the testimony of the medical witness, by microbes in Porter's uth; the arm was amputated, and death ensued. Upon the trial facts above briefly stated were proved, and the case was subtted to the jury with these instructions:

"(1) If the injury which resulted in the death of the assured was the ural and probable result of the blow voluntarily and intentionally dered by the deceased, you will find for the defendant.

"(2) If the injury resulting in the death was something unforeseen, unexpected, and unusual, and was sustained through external, violent, and accidental means, your verdict should be for the plaintiff.

"(3) As there is no clause in this policy which expressly vitiates it when the injury was received while engaged in a breach of the peace, the court instructs the jury that the policy is not avoided unless the cause of the death was the obvious result of the breach of the peace by the assured, and naturally to be expected from the encounter."

The jury found a verdict for the amount of the policy, $5,000, with interest, and this is a motion for a new trial.

The Oxford Dictionary defines an accident as "anything that happens without foresight or expectation; an unusual event, which proceeds from some unknown cause, or is an unusual effect of a known cause; a casualty; a contingency." Webster defines it as "an event that takes place without one's foresight or expectation." Worcester, as "an unforeseen event." The courts have held that where a man is killed by robbers it was death by accident, in the sense in which that word is used in any accident policy. So, too, a death from a blow by a man attempting to blackmail the assured has been held to fall within the terms of the policy. The opposite of accident is design, volition, intent; and the question submitted to the jury was, in substance, whether the effect of the blow was its natural and probable consequence—whether it was one of those results which would ordinarily follow or could have been reasonably anticipated from the act done. In other words, did he intend to produce it, or can he be charged with the design to produce it? By its verdict the jury has found that the death was due to an accident; that it was something unforeseen and unexpected, something fortuitous. It seems to me that the testimony sustains that conclusion, and the only question that remains is whether the verdict should be set aside because this undesigned, unforeseen, and fortuitous occurrence was the result of the breach of the peace. There is no special clause in the policy which vitiates it for that reason, but the contention is that the deceased, having voluntarily engaged in a fight, must be held responsible for the result of it. If the encounter had been with deadly weapons the contention would be sustained, for death or disability would be the natural and not unexpected result of such an encounter. That was the case in Taliaferro v. Travelers' Protective Association, 80 Fed. 368, 25 C. C. A. 494, where Taliaferro, the deceased, was the aggressor from the inception of the difficulty, and the first to draw a deadly weapon, used exclamations which the court said could be "regarded in no other light than an invitation to a deadly encounter, in which the deceased voluntarily put his life at stake, and deliberately took the chances of getting killed." It cites the case of Lovelace v. Association, 126 Mo. 104, 114, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638, and distinguishes it, saying that, while it appeared in that case that the deceased had engaged in a quarrel which he might very well have avoided, it did not appear that he had drawn a weapon of any sort, or that he knew, when he engaged in the quarrel, that his opponent was armed; that he had no reason to expect when he engaged

the encounter that it would result in any bodily harm to either arty; and for that reason the court appears to have held that the nexpected result of the affray was an accident, so far as the deased was concerned. It seems to me that this case falls within e principle decided in Lovelace's Case, and that it does not fall ithin the principle of Taliaferro's Case, which is relied on by the fendants, for the principle decided in that case was this:

"Where a person thus invites another to a deadly encounter, and does so luntarily, his death, if he sustains a mortal wound, cannot be regarded as cidental by any definition of that term which has heretofore been adopted. might as well be claimed that death is accidental when a man intentionally rows himself across a railroad track in front of an approaching train, or ips from a high precipice, or swallows a deadly poison."

To the contention by the defendants that this cannot be called n accident, because it was the result of the voluntary act of the eceased, Barry's Case, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, ems an answer. In that case death resulted from injuries sustained by jumping off a platform, and it was contended in the court elow that, the jumping being a voluntary act, it could not be called n accident; that he did nothing but what he intended to do. But e court below instructed the jury that if, in jumping or alighting n the ground, there occurred from any cause any unforeseen or involuntary movement, turn, or strain of the body which brought bout the injury, or if there occurred any unforeseen circumstance hich interfered with such a downward movement as he expected make, or as it would be natural to expect under such circumances, which caused him to alight on the ground in a different osition or way from that which he intended or expected, and inry thereby resulted, then the injury would be attributable to accintal means. The Supreme Court held that there was no error in is instruction; that the term "accidental" was used in the policy its ordinary sense, as meaning happening by chance, unexpectlly taking place, not according to the usual course of things, or ot as expected; that if the result is such as follows from ordinary eans, voluntarily employed, in a not unusual or unexpected way, cannot be called a result effected by accidental means, but that in the act which precedes the injury something unforeseen, unxpected, unusual occurs which produced the injury, then the injury as resulted through accidental means.

The motion for a new trial is refused.

McGOWAN v. KNITTEL et al.

(Circuit Court of Appeals, Third Circuit. May 11, 1905.)

For majority opinion, see 137 Fed. 453.

ACHESON, Circuit Judge (dissenting). I am not able to concur in the conclusion reached by the majority of the court. The reversal is based upon the following ruling by the trial judge:

"Mr. Johnson: I offer in evidence the papers produced by this witness of the case in court of common pleas No. 4 for the county of Philadelphia, of June term, 1903, No. 1,558, wherein Frank J. Nealis is plaintiff and John A. McGowan and Arlington S. Wolfe are defendants. This whole record is offered particularly to show the entry of a judgment against the defendant in this case and the issuance of execution thereon, of date September 18, 1903, for the sum of $1,636.38. Execution issued the same date.

"Mr. Edmunds: That is objected to on the ground that the record in this case shows that at the time the petition in this case was filed this judgment was opened by the court at the instance of the defendant himself, and there is no judgment.

"Mr. Johnson: I admit that the above judgment had been opened and the defendant let into a defense previous to the time of the filing of the petition in this case.

"The Court: It is admissible at present. The effect of it is a question to be determined hereafter. The offer is admitted.

"(Exception noted for defendant.)"

In his opinion denying the motion for a new trial the judge said:

"We think there was no error committed in allowing the record of the judgment entered in the court of common pleas of Philadelphia county to be offered in evidence, although it had been opened for the purpose of allowing the defendant to make a defense to it. It was a subsisting claim, and, if he had a defense to the claim as a subsisting one against his estate in bankruptcy, he could have made it before the jury, but he offered no evidence whatever to show that he was not indebted to the plaintiff in that judgment."

It is too plain for discussion that the opening of the judgment did not operate to destroy the judgment, or to impair its lien or the lien of the execution. Therefore, although the judgment was opened, the record was evidence of a subsisting incumbrance against the estate of the defendant, the alleged bankrupt. The record as it stood when offered went directly to the issue of insolvency.

The opinion of the majority of this court proceeds upon the assumption that the judgment was opened generally, so as to entirely take away its evidential effect. This inference I most respectfully insist is unwarranted by anything shown to us. The bill of exceptions imports no more than that the judgment was opened to let in some particular alleged defense which the defendant laid before the state court. Manifestly the trial judge acted upon that view. Now he had before him the entire record of the court of common pleas. All the file papers were in evidence. The trial judge saw the petition of the defendant to open the judgment and the order of the court. But neither of them appears in the bill of exceptions or in the assignment of error. Upon this record the presumption in favor of the correctness of the ruling made by the trial judge upon the evidence before him should stand, as it seems to me.

The brief of the plaintiff in error filed in this court may not be rt of the record, strictly speaking, yet certainly we have a right look at an admission made therein, and I think we ought to con- er it here in the interests of justice. The brief contains the fol- ving statement:

> This judgment, as a matter of fact, was obtained on a bond, the consider- on of which was illegal and void, and when the facts were presented to the rt of common pleas this judgment was opened; the court ruling that a gment would not lie on such a bond."

This admission distinctly shows that the defense set up in the urt of common pleas went only to the consideration of the bond. e execution of the bond was not denied. Undoubtedly the judg- nt was opened to let in the affirmative defense of unlawful con- eration, and the burden to impeach the consideration of the bond s on the defendant. I regard the above admission by the plain- f in error, contained in his brief, as fatal to his assignment of or.

In my judgment the Pennsylvania decisions cited in the opinion the majority of the court do not require or justify a reversal here. ose cases were trials of issues framed upon formal pleadings. e principle there decided was that upon the trial of such an issue e burden of proof depends upon the pleadings. Thus, in West v. vin, 74 Pa. 258, 259, the court said:

> If payment with leave to give the special matter in evidence had been the y plea, as in Cannell v. Crawford County, 59 Pa. 196, there would have n no error in the admission of the record; for the plea would have con- sed the cause of action on which the judgment was entered. But there s also the plea of non est factum, and under the issue formed thereon the den of proof was on the plaintiff."

BELTZ v. BALTIMORE & O. R. CO. et al.

(Circuit Court, N. D. Ohio, W. D. May 16, 1905.)

No. 1,889.

ILROAD COMPANIES—LEASE OF ROAD—LIABILITY OF LESSOR FOR LESSEE'S NEGLIGENCE.

Rev. St. Ohio 1892, § 3305, declaring a railroad company leasing its road jointly liable with the lessee on all rights of action accruing to any one for any negligence or default growing out of the operation or maintenance of the road, or in any wise connected therewith, applies only to liabilities growing out of duties as a carrier, and not out of duties as an employer.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 802–816.]

Jesse Vickery, for plaintiff.
F. A. Durban, for defendant Baltimore & O. R. Co.

TAYLER, District Judge. This case is before the court on plain- f's motion to remand the same to the court of common pleas of

Huron county, Ohio, whence it was removed on the petition of the defendant the Baltimore & Ohio Railroad Company, which is a citizen of the state of Maryland, on the ground of separable controversy between citizens of different states. The defendants, the Baltimore & Ohio Railroad Company and the Cleveland, Lorain & Wheeling Railroad Company, are the lessee and lessor, respectively, of a line of railroad extending from the city of Cleveland, Ohio, to the city of Wheeling, W. Va. Plaintiff's intestate, Robert M. Beltz, was in the employ of the defendant the Baltimore & Ohio Railroad Company in the capacity of conductor of a freight train running on the line of railroad above referred to, and, while in the performance of his duties, received injuries, from which he died, by reason of the fact that, as alleged in the petition, the track at the place where he was injured was out of repair, causing him to stumble and fall under a passing car beside which he was walking.

The uniform holding in this district since the decision of the Warax Case (C. C.) 12 Fed. 637, has been, where allegations such as appear in this petition are made, that no right to remand exists. Claim is made, however, that, since the relation of lessor and lessee exists between the two defendant corporations, the provisions of section 3305 of the Revised Statutes of Ohio of 1892 control the rights of the parties, and make both the lessor and lessee liable to the plaintiff. In view of the opinion of Judge Thompson, in the Circuit Court for the Southern District of Ohio, in the case of Axline v. Toledo, Walhonding Valley & Ohio Railroad Company et al., 138 Fed. 169, I am disposed to hold that the motion to remand ought to be denied. In the unpublished opinion on the motion to remand in that case, Judge Thompson said:

"The tort set up in the original petition was not the joint tort of the defendants, nor was the Toledo, Walhonding Valley & Ohio Railroad Company a party thereto in any respect. The plaintiff was a servant of the Pennsylvania Company, employed in the operation of a railroad, and was injured while in that service, as is alleged, by reason of the negligence of that company. The Toledo, Walhonding Valley & Ohio Railroad Company was the owner of the railroad, and the Pennsylvania Company was its lessee; and it is claimed that the Toledo, Walhonding Valley & Ohio Railroad Company is liable to the plaintiff for the injury he sustained, under section 3305 of the Revised Statutes of Ohio of 1892, which provides: '* * * and notwithstanding such lease, the corporation of this state, lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith.' This law has relation to the duties of the railroad company as a common carrier, and in that respect is declaratory of the common law, and is not applicable to the plaintiff's case, which is founded upon the contract of service between the plaintiff and the Pennsylvania Company, and not upon any duty which the Pennsylvania Company, as a common carrier, owed to the plaintiff. If the Pennsylvania Company had undertaken to carry the plaintiff as a passenger, as in the case of Central Ohio Co. et al. v. Mahoney, 114 Fed. 732, 52 C. C. A. 364, and while being so carried the plaintiff had been injured by reason of the negligence of that company, both companies would have been jointly liable, under the provisions of the Ohio statutes referred to, because the injury would have been caused by the failure of the Pennsylvania Company to perform the duty imposed upon it by the law as a common carrier;

he plaintiff was not being carried as a passenger over the railroad, but a servant in the employ of the Pennsylvania Company, and the duty n that company owed him arose out of the contract between them, and not imposed by the law upon grounds of public policy."

think there is great force in the proposition laid down by Judge mpson—that the statute of Ohio making the lessor company e for any negligence or default growing out of the operation maintenance of the railroad leased was intended to apply only abilities growing out of the duty of the railroad company as mmon carrier, and not out of its duties as an employer of labor. uties as a common carrier are public in their character. Upon n rests the reason for its possession of the power of eminent ain. As an employer of labor, its duties are of the same nature ose which are laid upon other employers, and do not, in prin-, have any peculiar character because it happens at the same to be a common carrier, and as such has certain public duties. he motion to remand is therefore overruled.

MEMORANDUM DECISIONS.

OWN et al. v. KINNEY, Revenue Collector. (Circuit Court of Appeals, d Circuit. May 2, 1905.) No. 232. In Error to the Circuit Court of the d States for the District of Connecticut. W. R. Tillinghast, for plain-in error. F. H. Parker, for defendant in error. Before WALLACE, NSEND, and COXE, Circuit Judges.

R CURIAM. Upon authority of decision of United States Supreme in Vanderbilt v. Eidman, 25 Sup. Ct. 331, the judgment (128 Fed. 310) ersed in open court, and cause remanded, with instructions to overrule emurrer.

E DEUTSCHLAND. (Circuit Court of Appeals, Second Circuit. April 5.) No. 193. Appeal from the District Court of the United States for outhern District of New York. Everett P. Wheeler, for appellant. Har-n Putnam, for appellee. Before WALLACE, LACOMBE, and COXE, it Judges.

R CURIAM. A careful study of the record, aided by the full and able ments of counsel, has led us to the conclusion that the case was correctly ed in the court below (129 Fed. 964), and that it is unnecessary to at- to add anything to the very satisfactory opinion delivered by Judge s in deciding the case in that court.

RGUSON v. PROVIDENCE-WASHINGTON INS. CO. (Circuit Court peals, Second Circuit. May 8, 1905.) No. 211. Appeal from the Dis-Court of the United States for the Southern District of New York. Le S. Gove, for appellant. James Forrester, for appellee. Before LA-BE, TOWNSEND, and COXE, Circuit Judges.

R CURIAM. Decree affirmed, with interest and costs, on opinion of the ct Judge. 125 Fed. 141.

KANSAS CITY HAY PRESS CO. v. DEVOL et al. (Circuit Court of Appeals, Eighth Circuit. January 9, 1905.) No. 2,076. Appeal from the Circuit Court of the United States for the Western District of Missouri. Richard H. Manning, for appellant. George A. Neal, for appellee. Dismissed, with costs, on motion of appellant. See 127 Fed. 363.

MERCER et ux. v. BUCHANAN et al. (Circuit Court of Appeals, Third Circuit. May 15, 1905.) No. 22. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. A. Leo Weil and Philip G. Bartlett, for appellants. Henry A. Miller and Wm. H. McClung, for appellees. Before ACHESON, DALLAS, and GRAY, Circuit Judges.

PER CURIAM. By deed dated January 16, 1900, Kate V. Bingham conveyed to the appellees certain corporation stocks and other personal property, "in trust, nevertheless, to invest and keep invested the same and pay to me the income thereof. * * * which said net income shall be so paid to me, if possible, quarterly during the term of my natural life, and from and after my decease to pay over the said net income quarterly, as near as may be, unto my said daughter, Helen B. Mercer, for and during the term of her natural life, and upon the further trust, upon the death of my said daughter, to pay, transfer, deliver, and convey the said trust fund, stocks, and other property, freed and discharged from this trust, to the child or children of my said daughter," and in default thereof to certain collaterals. Kate V. Bingham died upon April 7, 1900, and thereupon Helen B. Mercer became entitled during her life to the net income of the trust estate under the above-quoted provision. Included in the trust estate were 2,564 shares of the capital stock of the Apollo Iron & Steel Company; and as the holders of these shares the trustees received from that company, after the death of Kate V. Bingham, certain shares of stock in other corporations and about $64,000 in cash. The appellants, in their bill of complaint, claimed that these last-mentioned shares and this cash should be delivered and paid over to the life tenant, Mrs. Mercer, because, as they alleged, they were dividends "declared from earnings or accumulated profits." In response to this allegation the defendants below (appellees here) answered "that such dividends are capital, and not income"; and the issue thus presented was decided by the court below in favor of the defendants. Accordingly a decree dismissing the bill was entered (132 Fed. 501), and from that decree this appeal was taken. But, after examining the record with special attention, we find it impossible to reach any conclusion upon which the final determination of this important cause could be safely rested. Therefore, without now intimating an opinion upon any question involved, we feel constrained to remit it to the court below for further proceedings, to be there taken in conformity with the following order. This cause is remanded to the Circuit Court for the Western District of Pennsylvania, with direction to vacate the decree heretofore entered by that court, and to appoint a master to take and report the evidence which shall be adduced before him, together with his findings and conclusions as to whether all the shares of stock and the money claimed by Mrs. Mercer in this suit were acquired by the Apollo Iron & Steel Company in exchange or payment for capital assets of that corporation, or whether said shares of stock and money were to any, and, if to any, to what, extent derived from earnings or profits of that company which it had not converted into capital. Either or both parties may except to the report of the master, and will be entitled to hearing and decision thereon in accordance with the usual practice; and from the final decree thereafter to be made by the Circuit Court an appeal will lie, precisely as if this present appeal had not been taken. All questions respecting costs upon this appeal are reserved.

NEWPORT NEWS & O. P. RY. & ELECTRIC CO. v. HAMPTON ROADS RY. & ELECTRIC CO. et al. (Circuit Court of Appeals, Fourth Circuit.

, 1904.) No. 555. Appeal from the Circuit Court of the United States Eastern District of Virginia. S. Gordon Cumming, R. T. Thorp, and T. O'Ferrall, for appellant. A. L. Holladay and R. G. Bickford, for e.

ee filed vacating supersedeas and dismissing appeal. See 131 Fed. 534.

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e SPALDING et al. (Circuit Court of Appeals, Second Circuit. 1905.) Nos. 238, 239. Appeals from the District Court of the United for the Southern District of New York. Selden Bacon, for petition- . J. Myers, for respondent. Before WALLACE, TOWNSEND and Circuit Judges.

CURIAM. Reversed in open court. See 134 Fed. 507.

VELERS' INS. CO. OF HARTFORD v. BLACK. (Circuit Court of s, Third Circuit. May 17, 1905.) No. 6. In Error to the Circuit Court United States for the Western District of Pennsylvania. George M. , for plaintiff in error. A. T. Black, for defendant in error. Before S and GRAY, Circuit Judges, and BRADFORD, District Judge.

DFORD, District Judge. The questions now raised fairly come within ision of this court on a former writ of error in this case. Black v. rs' Ins. Co., 121 Fed. 732, 58 C. C. A. 14, 61 L. R. A. 500. We do not posed to depart from the principles there laid down; and in accord- ith them the judgment below must be and is affirmed, with costs.

ED STATES v. LEERBURGER. (Circuit Court of Appeals, Second May 1, 1905.) No. 223 (3,344). Appeal from the Circuit Court of ited States for the Southern District of New York. Henry A. Wise . S. Atty. William B. Coughtry, for appellee. Before WALLACE, IBE, and COXE, Circuit Judges.

CURIAM. Affirmed in open court. For decision below, see 130 Fed.

ED STATES v. MONTANA LUMBER & MFG. CO. et al. (Circuit f Appeals, Ninth Circuit. May 1, 1905.) No. 941. In Error to the Court of the United States for the District of Montana. Carl Rasch, tty. Before GILBERT and ROSS, Circuit Judges, and HAWLEY, Judge.

CURIAM. The plaintiff in error by its writ of error seeks to re- e judgment of the District Court of the United States for the Dis- Montana, rendered in an action brought by the plaintiff in error the defendants in error to recover the sum of $15,000, the value of 0 feet of lumber alleged to have been manufactured out of timber s which had been cut by the Montana Lumber & Manufacturing y from unsurveyed government lands in the District of Montana, verted by the defendants in error to their own use and benefit. The nt alleged that on July 10, 1901, and long prior thereto, the plaintiff was the owner of and entitled to the possession of 2,000,000 feet er, which, it was alleged, had been cut by the defendants in error surveyed government lands, which, when the same shall have been d, will be in township 26 north, of range 34 west, Montana meridian, state of Montana; that on said July 10, 1901, and while the plaintiff was the owner of said lumber as aforesaid, the defendants in error lly and unlawfully took possession of the same, and disposed of and d the same to their own use and benefit, to the damage of the

plaintiff in error in the sum of $15,000, the value of said lumber. To this complaint the Northern Pacific Railway Company filed its separate answer, denying the material allegations of the complaint. The other defendants in error made a joint answer, likewise denying the material allegations of the complaint, but alleging by way of further answer and defense that, although they cut timber from the premises mentioned in the complaint, all of said timber was cut from that portion of said township which will be, when surveyed, section 5, and that said section is within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the defendant Montana Lumber & Manufacturing Company was at the time of the cutting of said timber by mesne conveyances from the Northern Pacific Railway Company the owner of and entitled to the lands upon which said timber was growing at the time when it was cut. Upon the issues so joined the cause was tried before the court and a jury, and it was proven that the land from which the timber was cut was within the limits of the congressional grant to the Northern Pacific Railway Company, that it was unoccupied public land and was wholly unsurveyed, and that the nearest lines of government survey were approximately 20 miles distant therefrom. For the purpose of establishing the affirmative matter set up in the answer, the trial court, over the objection of the plaintiff in error, permitted the Montana Lumber & Manufacturing Company to introduce evidence of a private survey of a portion of the township in question, made by one John K. Ashley, a civil engineer and surveyor, in the year 1886 at the instance of the Northern Pacific Railway Company, for the purpose of ascertaining the location of the railroad sections contained in said township, and to prove by other evidence that the timber was cut and taken from what Ashley had designated by means of his survey section 5 of said township. After the defendants in error had rested their case, the plaintiff in error offered to prove, in rebuttal, by George F. Rigby a surveyor and engineer, that he and another had made a survey of the same lands, and that the Ashley survey was incorrect; that section 5 as located by Ashley had been placed three-fourths of a mile too far east. The court sustained the objection to this evidence, and excluded the same. At the close of the testimony the court instructed the jury to return a verdict for the defendants in error, on the ground that the plaintiff in error had failed to prove its ownership of the land upon which the timber had been cut. The rulings of the trial court in admitting in evidence the testimony of the Ashley survey, and in excluding the evidence offered by the plaintiff in error to rebut the same, and in directing the jury to return a verdict for the defendant in error on the ground above stated, were assigned as error. This court, after the hearing of said cause, ordered that the three questions involved in the assignments of error be certified to the Supreme Court of the United States for its answer thereto; and it now appears that the Supreme Court, in the case of United States v. Montana Lumber & Manufacturing Company et al., 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. —, by its decision rendered February 20, 1905, has ruled that the trial court erred in admitting in evidence the proof of the survey made by Ashley and proof tending to show that the timber cut by the Montana Lumber & Manufacturing Company had been cut upon what will be, when surveyed, section 5 of township 26 north, of range 34 west, Montana meridian, and that the court erred in instructing the jury to return a verdict for the defendants in error on the ground that the United States had failed to prove its ownership of the land upon which the timber was cut, and that the Supreme Court, in its opinion filed in answer to said question so certified, sustained the right of the United States to recover the value of the timber cut and removed by the defendants in error. The judgment of the District Court is accordingly reversed, and the cause is remanded for a new trial.

UNITED STATES v. PEARSON & EMMOTT. (Circuit Court of Appeals, Second Circuit. May 8, 1905.) No. 225 (3,024). Appeal from the

Court of the United States for the Southern District of New York. k Lloyd, Asst. U. S. Atty. William B. Coughtry and W. K. Griffin, ellees. Before WALLACE, LACOMBE, and COXE, Circuit Judges.

CURIAM. Affirmed, on opinion of the court below. 131 Fed. 571.

ED STATES v. WILCKES. (Circuit Court of Appeals, Second Cir- larch 2, 1905.) No. 135. Appeal from the Circuit Court of the States for the Southern District of New York. This cause comes on appeal from a decision of the Circuit Court, Southern District of ork (132 Fed. 1007), reversing a decision of the Board of General ers (G. A. 5,347; T. D. 24,460), which had affirmed the classification collector of the port of New York of certain importations under ct July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]. D. Baker, for the United States. H. T. Walden, for appellee. Be- LLACE, LACOMBE, and COXE, Circuit Judges.

CURIAM. The merchandise imported consists of steel in strips. stions presented are the same as those discussed in U. S. v. Crucible o., 137 Fed. 384, opinion in which is handed down to-day. The de- f the Circuit Court is affirmed.

ORIA LAND CO. v. HYDE. (Circuit Court of Appeals, Seventh February 7, 1905.) No. 1,144. Appeal from the Circuit Court of ted States for the Eastern District of Wisconsin. George P. Wilson V. Mercer, for appellant. John Barnes, for appellee. Dismissed, t to stipulation of counsel, February 7, 1905. See 125 Fed. 970.

LIPSTEIN & CO. v. UNITED STATES. C. BISCHOFF & CO. v. (Circuit Court, S. D. New York. February 15, 1905.) Nos. 3,632, Albert H. Washburn and Albert Comstock, for appellants. Chas. r, Asst. U. S. Atty.

ELER, District Judge. The question here is whether this article bacetate of copper, under paragraph 694 of the free list of the act (Act July 24, 1897, c. 11, § 2, 30 Stat. 202 [U. S. Comp. St. 1901, p. or a chemical salt, as it was classified by the collector and affirmed board. No testimony appears to have been taken by the board, but as been taken in this court. From that, which has not been con- d, it appears to be of that kind of subacetate of copper, and to have mitted as such duty free for some years past. Thus it now appears been entitled to free entry. U. S. v. Petry (C. C.) 116 Fed. 929. reversed.

K v. EQUITABLE LIFE ASSUR. SOC. (Circuit Court, E. D. Penn- a. May 31, 1905.) No. 57. Motion for Judgment for Want of a t Affidavit of Defense. Albert B. Weimer, for plaintiff. Burr, & Lloyd, for defendant.

McPHERSON, District Judge. Before it can be accurately ascertained gal questions must be decided in this case, it may be necessary to ne the relation of C. C. Welliver to the transfer of the policy, and e nature of his relation is in dispute. For this reason, I think the ersy should go to a trial, where all litigated questions can be raised tled at one time. I intimate no opinion concerning the legal propo- that were argued upon this motion. The rule for judgment is there- charged. See 133 Fed. 816.

KILDUFF v. JOHN A. ROEBLING SONS. (Circuit Court, S. D. New York. May 2, 1905.) Noble, Hubbard & Jackson, for the motion. Hess & Holstein, opposed.

LACOMBE, Circuit Judge. It will not be necessary to consider any question of the power of the court to direct production of the books and records referred to. In deciding this motion it is understood that plaintiff will produce at the trial all the witnesses, named in notice for examination at Pittsburg, who are in the employ of the Carbon Steel Company, and that he will also produce all the books and records, still in existence, which have been referred to. It is further understood that these books and records are now here for use on the trial, set for day after to-morrow, after repeated adjournments at defendant's request. Under these circumstances the court, assuming that it has the power, will not order them to be sent to Pittsburg for the purpose of facilitating the examination of witnesses whose testimony might have been taken months ago.

MISSISSIPPI WIRE GLASS CO. v. WIRE GLASS CO. et al. (Circuit Court, E. D. Pennsylvania. June 10, 1905.) No. 23. Motion for Preliminary Injunction. A. H. Wintersteen, A. J. Baldwin, and Kerr, Page & Cooper, for complainant. A. B. Stoughton and Wm. A. Glasgow, Jr., for respondents.

J. B. McPHERSON, District Judge. Without discussing the facts in detail at this preliminary stage of the litigation, I think it is enough to say now that the equities of the case appear to be sufficiently in favor of the complainant to justify the court in preserving the present status until final hearing. It is therefore ordered that complainant give bond in the usual form in the sum of $2,500, and that upon the filing thereof a preliminary injunction issue in accordance with the third and fourth prayers of the bill. For cause shown, either party may move to increase or reduce the amount of the bond.

MOORE v. BETTS. (District Court, E. D. Pennsylvania. May 27, 1905.) No. 5. In Bankruptcy. Charles F. Van Horn and G. Von Phul Jones, for plaintiff. Henry J. Scott, for defendant.

J. B. McPHERSON, District Judge. This case presented only questions of fact, and these have been decided by the verdict in favor of the trustee. There was sufficient evidence to justify the jury in finding for either party, and I see no preponderance against the verdict such as to require me to set it aside. The motion for a new trial is refused, and judgment may be entered upon the verdict.

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ABANDONMENT.

See "Patents," § 2.

ABATEMENT AND REVIVAL.

Election of remedy, see "Election of Remedies."
Revival of judgment, see "Judgment," § 6.

§ 1. Another action pending.

A suit to foreclose a mortgage securing a note, in which the property was sold and the proceeds applied on the amount found due on the note, but in which no formal deficiency judgment has been rendered, is not a bar to a second action on the note in another jurisdiction to recover the amount of such deficiency.—Franklin v. Conrad-Stanford Co. (C. C. A.) 737.

A noncitizen *held* entitled to sue in the federal courts to restrain the use of corporate assets for an ultra vires business, notwithstanding the pendency of other suits in personam for the same relief in the state courts.—Consumers' Gas Trust Co. v. Quinby (C. C. A.) 882.

ABSTRACTS OF TITLE.

See "Vendor and Purchaser," § 1.

ABUTTING OWNERS.

Assessments for expenses of public improvements, see "Municipal Corporations," § 2.
Compensation for taking of or injury to lands or easements for public use, see "Eminent Domain," § 1.
Rights in streets in cities, see "Municipal Corporations," § 3.

ACCEPTANCE.

Of offer or proposal, see "Contracts," § 1; "Sales," § 1.

ACCIDENT.

Accident insurance, see "Insurance."
Cause of injuries, see "Explosives"; "Negligence."

ACCORD AND SATISFACTION.

See "Novation."

The acceptance by an employé of a check sent him in payment of wages at a certain rate, with directions to return it if the statement inclosed was not found correct, *held* an accord and satisfaction of the claim.—United States Bobbin & Shuttle Co. v. Thissell (C. C. A.) 1.

ACCOUNT.

Accounting by assignee in bankruptcy, see "Bankruptcy," § 7.

ACTION.

Abatement, see "Abatement and Revival."
Election of remedy, see "Election of Remedies."
Jurisdiction of courts, see "Courts."
Limitation by statute, see "Limitation of Actions."
Pendency of action, see "Abatement and Revival," § 1; "Lis Pendens."
State laws as rules of decision in federal courts, see "Courts," § 6.

Actions between parties in particular relations.

See "Master and Servant," § 1.

Actions by or against particular classes of parties.

See "Carriers," §§ 2, 3; "Husband and Wife," § 2; "Master and Servant," § 2; "Receivers," § 4; "Seamen."
Consolidated corporation, see "Corporations," § 4.
Trustees in bankruptcy, see "Bankruptcy," §§ 3, 5.

Particular causes or grounds of action.

See "Bills and Notes," § 2; "Customs Duties," § 4; "Insurance," § 5; "Libel and Slander," § 2; "Money Paid"; "Negligence," § 2.
Bond of government contractor, see "United States," § 1.
Breach of warranty in sale of corporate bonds, see "Corporations," § 3.
Infringement of copyright, see "Copyrights," § 2.
Infringement of patent, see "Patents," § 7.
Infringement of trade-mark or trade-name, see "Trade-Marks and Trade-Names," § 3.
Injuries from fires caused by locomotives, see "Railroads," § 2.
Injuries to tow, see "Towage."
Bail bond, see "Bail," § 1.
Personal injuries, see "Carriers," § 3; "Master and Servant," § 1; "Railroads," § 2; "Seamen"; "Street Railroads," § 2.
Recovery of corporate shares, see "Corporations," § 1.
Recovery of interest, see "Interest."

ADMIRALTY.

See "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Shipping"; "Towage."

§ 1. **Pleading, petitions, and motions.**

Where a libel was based on respondent's introduction of gas current into the Chicago river rendering navigation more difficult and expensive than previously, libelant was not entitled to recover because of the rate of the current as a special item.—Carnegie Transit Co. v. Sanitary Dist. of Chicago (C. C. A.) 551.

An objection that Act Cong. March 3, 1899, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3561], was unconstitutional, being incorporated in a libel based on a permit granted by the Secretary of War under such section.—Carnegie Transit Co. v. Sanitary Dist. of Chicago (C. C. A.) 551.

§ 2. **Decree and enforcement thereof.**

A judicial sale of a vessel in admiralty, which has not been finally confirmed, will be set aside on the offer of a materially higher bid; the first bidder having no claim to the proceeding until confirmation.—The Sue (D. C.) 132.

ADMISSIONS.

By demurrer see "Pleading," § 2.

ADOPTION.

One who pays a minor last while living the entire undivided portion of deceased's property that a natural father has.—Barnes v. Barnes (C. C. A.) 781.

ADVANCES.

Lien for see "Maritime Liens."

ADVERSE POSSESSION.

See "Limitation of Actions."

Against infant, see "Infants."

Effect of statute creating title by, as denial of due process of law, see "Constitutional Law," § 2.

Of mining claim, see "Mines and Minerals," § 2.

§ 1. **Nature and requisites.**

Gen. Code N. D. 1899, § 5612, providing for the creation of an adverse title by proof of adverse possession and payment of taxes for 10 years, held retroactive.—Schaible v. Schaible (C. C. A.) 880.

The period of limitation prescribed by Rev. Codes N. D. 1899, § 5612, for the establishment of title by adverse possession, "taken with the adverse possession, and not with the payment of taxes accompanied by such adverse possession."—Schaible v. Schaible (C. C. A.) 880.

Possession of a vendee under an executory contract of sale, who subsequently received a conveyance in fulfillment thereof, held adverse from the date of entry as to all but the vendor,

and as to him after the vendee's compliance with the conditions of the contract.—Schauble v. Schulz (C. C. A.) 389.

AFFIDAVITS.

See "Depositions."
Affidavit of defense in suit by trustee in bankruptcy, see "Bankruptcy," § 5.
Verification of petition for removal of cause, see "Removal of Causes," § 5.
Verification of pleading, see "Pleading," § 5.

AFFREIGHTMENT.

Contracts, see "Shipping," § 3.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

ALIENATION.

Restriction on power of, see "Deeds," § 1.

ALIENS.

§ 1. Exclusion or expulsion.

A Chinese person *held* not a "merchant" within Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], as amended by Act Nov. 3, 1893, c. 14, § 2 [U. S. Comp. St. 1901, p. 1321], and not having procured the certificate of residence required by section 6, a deportation order issued against him was not error.—Mar Sing v. United States (C. C. A.) 875.

Under Act Cong. May 5, 1892, c. 60, § 3, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], a Chinese deportation judgment rendered by the District Court will be affirmed on appeal unless the case clearly shows that an incorrect conclusion has been reached.—Mar Sing v. United States (C. C. A.) 875.

ALTERATION.

Of geographical or political divisions, see "Counties," § 1.

ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

AMENDMENT.

Of pleading, see "Pleading," § 4.
Of pleading, review of discretion, see "Appeal and Error," § 3.
Of process, see "Process," § 2.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Courts," § 4.

ANNUITIES.

Power of corporation to grant, see "Corporations," § 3.

ANSWER.

In pleading, see "Pleading," § 2.

APPEAL AND ERROR.

Review in circuit court of appeals, see "Courts," § 7.

Review in particular civil actions.

For injuries from fires caused by locomotives, see "Railroads," § 2.

Review in special proceedings.

See "Bankruptcy," § 9.
Decision of interstate commerce commission, see "Commerce," § 2.
Deportation proceedings, see "Aliens," § 1.

§ 1. Parties.

Both members of a firm *held* necessary parties to an appeal from a decree dismissing a bill to restrain the infringement of a trade-mark, notwithstanding an alleged assignment by one of the members of the firm to his partner.—Bulte v. Igleheart Bros. (C. C. A.) 492.

§ 2. Requisites and proceedings for transfer of cause.

Where two actions for personal injuries by separate plaintiffs against the same defendants were consolidated and tried to the same jury, who returned separate verdicts, on which separate judgments were entered, though one bill of exceptions was made out, yet two separate writs of error were necessary.—Waters-Pierce Oil Co. v. Van Elderen (C. C. A.) 557; Chambers v. Same, Id.

Defendants in error *held* estopped from objecting to the manner of suing out the writs.—Waters-Pierce Oil Co. v. Van Elderen (C. C. A.) 557; Chambers v. Same, Id.

§ 3. Record and proceedings not in record.

The discretion of a trial court in refusing to allow an amendment to a bill for infringement of a trade-mark *held* not reviewable, where the record showed neither the ground of the application nor the amendment proposed.—Bulte v. Igleheart Bros. (C. C. A.) 492.

§ 4. Review.

It is only when it appears beyond doubt that the error challenged could not have been prejudicial that the rule that error without prejudice is no ground for reversal is applicable.—Union Pac. R. Co. v. Field (C. C. A.) 14.

In an action for personal injury, where plaintiff's injured leg was exhibited to the jury, the subsequent admission in evidence of a photograph showing the injury, even if it was incom-

lary evidence, was harmless er-
action Co. v. Cameron (C. C.

to recover for failure to con-
accordance with contract, an
any failure of the engineer
upon the work to consider all
ed is a fraud on the party dis-
nst *held* error.—Guild v. An-
) 369.

against a retiring partner of a
nstructions *held* favorable to de-
h he could not complain on ap-
George Wostenholm & Son (C.

o recover an interest in a min-
tiff *held* not prejudiced by the
to permit a witness to testify
sition to include the interest in
a settlement deed to complain-
or, had not been made.—Shields
xploration Co. (C. C. A.) 539.

against a master for negligence
error in the charge *held* to be
ould be disregarded.—Waters-
. Van Elderen (C. C. A.) 557;
me, Id.

PPEARANCE.

ght to remove cause, see "Re-
es," § 1.

PPLICATION.

see "Insurance," § 1.

PPOINTMENT.

"Receivers," § 1.

PORTIONMENT.

e improvements, see "Municipal
§ 2.

APPRAISAL.

subject to duty, see "Customs

IENT OF COUNSEL.

see "Trial," § 3.

ARREST.

SSESSMENT.

ssessment to old line plan of
"Insurance," § 6.
public improvements, see "Mu-
rations," § 2.
k stock, see "Banks and Bank-

ASSIGNMENTS.

Citizenship of assignee as affecting jurisdiction of federal courts, see "Courts," § 3.

Transfers of particular species of property, rights, or instruments.

See "Bills and Notes," § 1; "Patents," § 6; "Trade-Marks and Trade-Names," § 2.
Corporate shares, see "Corporations," § 1.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."

ASSISTANT DISTRICT ATTORNEY

See "District and Prosecuting Attorneys."

ASSOCIATIONS.

Bankruptcy proceedings against, see "Bankruptcy," § 1.
Mutual benefit insurance associations, see "Insurance," § 6.

ASSUMPSIT, ACTION OF.

See "Money Paid."

ASSUMPTION.

Of obligations by consolidated corporation, see "Corporations," § 4.
Of risk by employé, see "Master and Servant," § 1.
Of risk by person on vessel, see "Shipping," § 2.

ATTACHMENT.

See "Execution"; "Garnishment."

ATTORNEY AND CLIENT.

Allowance for fees in bankruptcy proceedings, see "Bankruptcy," § 10.
Allowance to trustee in bankruptcy for counsel fees, see "Bankruptcy," § 4.
Allowance to trustee in bankruptcy for personal services as attorney, see "Bankruptcy," § 7.
Argument and conduct of counsel at trial in civil actions, see "Trial," § 3.
Attorneys as public officers, see "District and Prosecuting Attorneys."
Attorneys in fact, see "Principal and Agent."

§ 1. Duties and liabilities of attorney to client.

It was not improper for attorneys for a bankrupt's trustee to make out and present the formal proof of claim of a creditor, where they did nothing to prejudice the interests of the bankrupt or the estate.—In re McKenna (D. C.) 611.

AUTHORITY.

Of agent, see "Principal and Agent," § 1.
To serve process, see "Process," § 1.

BAIL.

§ 1. In criminal prosecutions.

Where a bail bond was duly estreated after defendant's failure to appear, the United States thereby acquired a perfect cause of action against the surety, to be enforced in a proper forum after due notice.—Kirk v. United States (C. C. A.) 753.

The liability of a surety on a bail bond filed in another district than that where he resided and remained could not be enforced except in the district of his residence.—Kirk v. United States (C. C. A.) 753.

Where a surety on a bail bond filed in Georgia resided openly in New York, two returns nihil in Georgia to writs of certiorari after forfeiture of the bond *held* not equivalent to personal service on such surety.—Kirk v. United States (C. C. A.) 753.

BAILMENT.

See "Carriers," § 2.

BANKRUPTCY.

Attorney acting for trustee and creditor of bankrupt, see "Attorney and Client," § 1.
Following state decisions in federal courts of bankruptcy, see "Courts," § 6.
Surrender of premises on bankruptcy of lessee, see "Landlord and Tenant," § 1.

§ 1. Petition, adjudication, warrant, and custody of property.

Denial of an application to withhold adjudication dismissing an involuntary bankruptcy petition until certain creditors omitted from the involuntary bankrupt's answer could be notified by the clerk *held* not error.—In re Tribelhorn (C. C. A.) 3.

Denial of a nonparticipating creditor's right to intervene in an involuntary bankruptcy proceeding after the petition had been dismissed *held* a proper exercise of discretion.—In re Tribelhorn (C. C. A.) 3.

Under Bankr. Act 1898, providing for service of notice of hearing of an involuntary bankruptcy petition on creditors disclosed in the bankrupt's answer, the mode of service is immaterial, where it was not contended that any of the creditors were not served in time to intervene.—In re Tribelhorn (C. C. A.) 3.

A creditor signing an involuntary bankrupt's petition, having assigned his claim, or a part thereof, to the attorney for the petitioning creditors subsequent to the filing of the petition, the attorney was not entitled to join therein to make up the number of creditors required by Bankr. Act July 1, 1898, c. 541, § 59d, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445].—In re Tribelhorn (C. C. A.) 3.

Where an alleged involuntary bankrupt denied insolvency, and produced his books on the trial, under Bankr. Act July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419], and section 3, the burden of proving insolvency was on the petitioners.—McGowan v. Knittel (C. C. A.) 453, 1015.

Where a judgment against an alleged involuntary bankrupt had been opened generally, without conditions, it was inadmissible as an established indebtedness on the issue of the bankrupt's alleged insolvency.—McGowan v. Knittel (C. C. A.) 453, 1015.

An alleged bankrupt *held*, on the evidence, engaged chiefly in farming, and not subject to be adjudged an involuntary bankrupt.—In re Hoy (D. C.) 175.

The word "individual," as used in general bankruptcy order 6 (89 Fed. v, 32 C. C. A. ix), *held* to include a corporation.—In re United Button Co. (D. C.) 668.

On an application to transfer a bankruptcy proceeding to a court of another district, facts *held* insufficient to establish that such transfer would be for the greatest convenience of parties in interest.—In re United Button Co. (D. C.) 668.

Proximity of the place of a bankrupt's business or of a majority of creditors in number or in amount is not conclusive in determining which of several courts of bankruptcy having concurrent jurisdiction, in which proceedings were brought, should assume final jurisdiction.—In re United Button Co. (D. C.) 668.

The words "parties in interest," as used in Bankr. Act July 1, 1898, c. 541, § 32, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], and general order 6 (89 Fed. v, 32 C. C. A. ix), *held* not limited to unsecured creditors, but to apply to all persons whose pecuniary interests are directly affected by the bankruptcy proceedings.—In re United Button Co. (D. C.) 668.

Where an alleged involuntary bankrupt corporation had its domicile in one district and its principal place of business in another, the courts of bankruptcy of both districts had concurrent jurisdiction.—In re United Button Co. (D. C.) 668.

Under Bankr. Act July 1, 1898, c. 541, § 1, cl. 6, and sections 4, 5, 30 Stat. 544, 547 [U. S. Comp. St. 1901, pp. 3419, 3424], an association of individuals organized to do a banking business as authorized by Laning's Rev. Laws Ohio, § 4891 et seq. (Bates' Ann. St. § 3170–1 et seq.), was a partnership, and subject to be adjudged a bankrupt, though it exercised some of the attributes of a corporation.—Burkhart v. German-American Bank (D. C.) 958.

An objection to the jurisdiction of a court of bankruptcy because process was not properly served cannot be raised by demurrer.—In re Seaboard Fire Underwriters (D. C.) 987.

A voluntary unincorporated association of fire underwriters *held* subject to adjudication as an involuntary bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St.

23].—In re Seaboard Fire Under-
C.) 987.

gnment, administration, and tribution of bankrupt's estate ssignment, and title, rights, remedies of trustee in gen-l.

of the court of bankruptcy which ljudication to deal with or sell the the bankrupt on proper notice to in interest is not affected by the is situated in another district, or s outside the district claim liens re Granite City Bank (C. C. A.)

bankrupt acquired a legacy by the testator earlier on the same day adjudged a bankrupt, the title to vested in his trustee for administra-kruptcy.—In re McKenna (D. C.)

Preferences and transfers by krupt, and attachments and er liens.

it of defense in an action by a trus-uptcy to recover an unlawful pref-Bankr. Act July 1, 1898, c. 541, tat. 562 [U. S. Comp. St. 1901, p. nsufficient.—Plummer v. Myers (D.

efense to an action by a trustee in to recover an unlawful preference nt received the payment alleged to e preference through his agent, who goods to the debtor, and who by a reement with defendant had guar-t of the indebtedness, and that the pplied on such part.—Plummer v. C.) 660.

le Pub. Gen. Laws Md. art. 21, §§ ring mortgages to be recorded with-ths, a renewal mortgage, although voidable as to creditors and the trustee in bankruptcy, where a se-r mortgages, of which it was the l. had been withheld from record me exceeding six months.—In re 694.

valid mortgage was given as se-present loan, the fact that a new the same property, given within s prior to the mortgagor's bank-made to secure a renewal of the not render such mortgage voidable rful preference.—In re Noel (D. C.)

Administration of estate.

eld not entitled to a further allow-count of an extra service rendered master in connection with a compo-re Talton (D. C.) 178.

allowing attorneys for a bankrupt's for services *held* proper.—In re Mc-C.) 611.

bankrupt claimed a legacy adverse-ustee, the latter was entitled to em-to appear in a will contest, though the bankrupt was represented by counsel therein.—In re McKenna (D. C.) 611.

§ 5. —— Actions by or against trustee.

An affidavit of defense, in an action by a trustee in bankruptcy to recover the value of property alleged to have been preferentially transferred by the bankrupt, *held* insufficient.—American Lumber & Mfg. Co. v. Taylor (C. C. A.) 321.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, 32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1903, p. 416], a court of bankruptcy may determine the right of a trustee to recover an alleged preference on his petition, as well as in a plenary suit where the property affected is in the possession of the court.—In re Noel (D. C.) 694.

A mortgagee of property of a bankrupt *held* to have consented to the jurisdiction of a court of bankruptcy to determine the validity of his mortgage by availing itself of an order permitting it to foreclose on condition that the proceeds of the property be deposited subject to the court's order.—In re Noel (D. C.) 694.

§ 6. —— Claims against and distribution of estate.

Under Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], neither the court nor a referee has power to permit the filing of proofs of claim subsequent to one year after the adjudication nunc pro tunc as of a date prior to the expiration of said year, when they were delivered to the trustee.—In re Ingalls Bros. (C. C. A.) 517.

A bankrupt's principal *held* not entitled to a preference for trust funds wrongfully mingled by the bankrupt with its own funds, and not shown to have augmented the bankrupt's estate in the hands of its trustee.—John Deere Plow Co. v. McDavid (C. C. A.) 802; In re John Deere Plow Co., Id.

Where a state imposition on a corporation was a contract liability and not a tax, the assessment by a state board did not preclude a court of bankruptcy from examining the contract to determine the amount of the liability. —In re Cosmopolitan Power Co. (C. C. A.) 858; State of New Jersey v. Anderson, Id.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], the provability of a claim depends upon its status at the time of the filing of the petition in bankruptcy.—In re Pettingill & Co. (D. C.) 143; Ex parte Peters, Id.; Ex parte Chicago Newspaper Union, Id.; Ex parte Peirson, Id.; Ex parte Burlington Hawkeye, Id.; Ex parte Kellogg Newspaper Co., Id.

If a bankrupt, at the time of bankruptcy, by disenabling himself from performing a particular contract, and by repudiating its obligation, could give the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such party may prove as a creditor in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation.—In re Pettingill & Co. (D. C.) 143; Ex parte Peters, Id.; Ex parte

Chicago Newspaper Union, Id.; Ex parte Peirson, Id.; Ex parte Burlington Hawkeye, Id.; Ex parte Kellogg Newspaper Co., Id.

A valid guaranty executed by a bankrupt that a corporation would redeem certain of its stock at a stated time, which had not arrived at the time of the bankruptcy, may fairly be construed as a contract to buy the stock at par at such time, and the bankruptcy is such an anticipatory breach thereof that a claim for damages for such breach is a provable debt. —In re Pettingill & Co. (D. C.) 143; Ex parte Peters, Id.; Ex parte Chicago Newspaper Union, Id.; Ex parte Peirson, Id.; Ex parte Burlington Hawkeye, Id.; Ex parte Kellogg Newspaper Co., Id.

The liability of a bankrupt on a guaranty of payment of dividends by a corporation at a certain rate *held* not to create a debt provable in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 63b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], with respect to future dividends. —In re Pettingill & Co. (D. C.) 143; Ex parte Peters, Id.; Ex parte Chicago Newspaper Union, Id.; Ex parte Peirson, Id.; Ex parte Burlington Hawkeye, Id.; Ex parte Kellogg Newspaper Co., Id.

In the absence of any authoritative state decision or statutes governing the case, a vendee under a contract for the purchase of land, who has receipted his bond for a deed and paid the purchase money on the bankruptcy of the vendor without having conveyed, is entitled to prove his claim as one secured by an equitable lien on the land.—In re Peasley (D. C.) 190.

A receiver appointed by a state court for an insolvent corporation in proceedings instituted shortly prior to bankruptcy proceedings is not entitled to priority in the bankruptcy court on account of his services rendered prior to the bankruptcy proceedings, or of expenses or advances made to the estate which did not contribute to the fund in the hands of the trustee.—In re J. H. Alison Lumber Co. (D. C.) 643.

Secured creditors, who avail themselves of bankruptcy proceedings to realize on their securities, may be required to contribute their proportion of the costs and expenses of preserving and administering the estate, where there are not sufficient unincumbered assets.—In re J. H. Alison Lumber Co. (D. C.) 643.

Where mortgaged property of an insolvent corporation was disposed of during a receivership, prior to the institution of proceedings in bankruptcy, but neither the receiver nor the trustee in bankruptcy received any part of the proceeds, the mortgagee has no claim on the fund in the hands of the trustee on account of the mortgagee.—In re J. H. Alison Lumber Co. (D. C.) 643.

§ 7. —— Accounting and discharge of trustee.

The action of a district court in refusing to reopen a case after the bankrupt's estate had been closed *held* not erroneous as matter of law, where based on a finding that there were no substantial assets remaining unadministered. —In re O'Connell (C. C. A.) 838; In re Dow, Id.

A trustee of a bankrupt, though an attorney, is not bound to perform legal services; but, if he does so, he cannot have additional compensation therefor from the estate.—In re McKenna (D. C.) 611.

§ 8. Rights, remedies, and discharge of bankrupt.

Under Bankr. Act July 1, 1898, c. 541, §§ 4a, 14a, 59, 30 Stat. 547, 550, 561 [U. S. Comp. St. 1901, pp. 3423, 3427, 3445], and Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1903, p. 411], it was no objection to an insolvent's being adjudged a bankrupt that he had been previously discharged in bankruptcy within six years.—In re Little (C. C. A.) 521.

§ 9. Appeal and revision of proceedings.

On a petition to revise in matter of law bankruptcy proceedings in the District Court, the Circuit Court of Appeals will ordinarily consider only such matters of law as are shown by the record, by findings of fact, or their equivalent, to have been distinctly presented to the court below.—In re O'Connell (C. C. A.) 838; In re Dow, Id.

The record on a petition to revise proceedings of the District Court in bankruptcy in matter of law *held* not to present any question which was reviewable.—In re Pettingill & Co. (C. C. A.) 840; Ex parte Press Pub. Co., Id.

While a mere opinion filed by the judge in the District Court in a bankruptcy proceeding does not present findings of fact for the purposes of a reviewing court, unless made matter of record by order of the court, still it may be looked to for the purpose of determining in a general way the propositions on which the case has been disposed of, and especially the questions of law which were passed on.—In re Pettingill & Co. (C. C. A.) 840; Ex parte Press Pub. Co., Id.

A petition to revise in matter of law the proceedings of the District Court in bankruptcy does not bring the prior proceeding of a referee before the Circuit Court of Appeals for review. —In re Pettingill & Co. (C. C. A.) 840; Ex parte Press Pub. Co., Id.

Where more than $500 of a claim of a state for an alleged franchise tax against a bankrupt corporation was disallowed, the state was entitled to appeal to the Circuit Court of Appeals under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].—In re Cosmopolitan Power Co. (C. C. A.) 858; State of New Jersey v. Anderson, Id.

Where a claimant against a bankrupt's estate took an appeal respecting the amount of the claim under Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], it was entitled to present any question concerning the security or rank of the debt as an incident thereof.—In re Cosmopolitan Power Co. (C. C. A.) 858; State of New Jersey v. Anderson, Id.

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BEQUESTS.

BIDS.

iralty, see "Admiralty," § 2.

LS AND NOTES.

§ 1. **Negotiability and transfer.**

In the absence of a statute to the contrary, a negotiable note may be assigned by parol, so as to confer equitable title on the transferee.—First Nat. Bank v. Moore (C. C. A.) 505.

§ 2. **Actions.**

Where certain negotiable notes sued on were transferred by parol in Iowa, the transferee was entitled to maintain a suit thereon in his own name under the law of that state.—First Nat. Bank v. Moore (C. C. A.) 505.

Evidence that certain notes sued on by assignee had been transferred to plaintiff long before a written assignment was made thereon, admitted without objection, held to establish a prima facie case, regardless of the validity of the written assignment.—First Nat. Bank v. Moore (C. C. A.) 505.

BONA FIDE PURCHASERS.

Of goods, see "Sales," § 4.

BONDS.

See "Bail."

Corporate bonds, see "Corporations," § 3.

In aid of railroad, levy of tax to pay, see "Counties," § 1.

Indemnity for consolidated corporation, see "Corporations," § 4.

In proceedings for removal of cause to federal court, see "Removal of Causes," § 5.

Of government contractors, see "United States," § 1.

Supplies on bonds, see "Principal and Surety."

Under revenue laws, see "Internal Revenue."

BOUNDARIES.

Of counties, see "Counties," § 1.

BREACH.

Of condition, see "Insurance," §§ 2, 3.

Of contract, see "Vendor and Purchaser," § 1.

Of covenant, see "Insurance," § 2.

Of warranty, see "Insurance," §§ 2, 3; "Sales," § 5.

BREACH OF THE PEACE.

As defense against liability on accident policy, see "Insurance," § 4.

BROKERS.

See "Principal and Agent."

BY-LAWS.

See "Insurance," § 6.

CANCELLATION OF INSTRUMENTS.

See "Reformation of Instruments."

Rescission of contracts, see "Sales," § 3.

CARGO.

See "Shipping."

CARRIERS.

See "Commerce," § 2; "Receivers," §§ 3, 4.
Carriage of goods by vessels, see "Shipping."

§ 1. **Control and regulation of common carriers.**

§ 2. **Carriage of goods.**

§ 3. **Carriage of passengers.**

CASE.

See "Action."

CASE, TRIAL ON.

See "Trial."

CASE, WRIT OF.

See "Action."

CASE MADE.

See "Appeal and Error," § 3.

CASH.

See "Sales," § 1.

CASUALTY.

See "Accident."

CATTLE.

See "Animals."

CAUSE OF ACTION.

See "Action."
Joinder, see "Equity," § 1.
On bail bond, see "Bail," § 1.

CHANCERY.

See "Equity."

CHARGE.

To jury in civil actions, see "Trial," § 5.

CHARTER PARTIES.

See "Shipping," § 1.

CHATTEL MORTGAGES.

By bankrupt, see "Bankruptcy," § 3.
Mortgage or conditional sale, see "Sales," § 6.

§ 1. **Foreclosure.**

Where an order for machinery and mill equipment was an equitable mortgage to secure the price, and the seller failed to comply with its contract, it would only be enforced in equity to the extent of the unpaid price, less the buyers' damages.—D. A. Tompkins Co. v. Monticello Cotton Oil Co. (C. C.) 625.

Where buyers of machinery had a meritorious defense to a part of the seller's claim for the price, the latter was not entitled to recover attorney's and other fees connected with the collection.—D. A. Tompkins Co. v. Monticello Cotton Oil Co. (C. C.) 625.

CHATTELS.

See "Property."

CHEAT.

See "Fraud."

CHECKS.

Payment by, see "Accord and Satisfaction."

CHICAGO RIVER.

See "Navigable Waters," § 1.

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§ 1. **Control and regulation of common carriers.**

Whether a person injured in the alleged violation of the interstate commerce act could recover damages by a complaint to the commission, as provided by section 9 (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3156]), he was limited to the enforcement of the commission's lawful order, as provided by section 16, as amended by Act Cong. March 2, 1889, c. 382, § 5, 25 Stat. 855 [U. S. Comp. St. 1901, p. 3163].—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

A railroad company held not personally liable for a violation of the interstate commerce act by its lessee in participating in a discrimination through rate duties the control of the lessee.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

§ 2. **Carriage of goods.**

A carrier company held entitled by contract in receipt for carriage to limit its liability for loss thereof by its negligence.—Montariano Adams Express Co. (C. C.) 982.

§ 3. **Carriage of passengers.**

In an action for injuries to a passenger while attempting to alight from a street car, evidence held to require submission of plaintiff's contributory negligence to the jury.—Camden & S. Ry. Co. v. Rice (C. C. A.) 329.

In an action for injuries to a passenger on a street car, an allegation of duty to use proper care to carry plaintiff safely held to sufficiently raise the question of the carrier's negligence in properly operating the car at the time plaintiff alighted.—Camden & S. Ry. Co. v. Rice (C. C. A.) 329.

Where a street car approached a railroad crossing protected by a derailing switch, there was no negligence in the mere fact that the motorman of the street car left it and went ahead to operate the switch.—Camden & S. Ry. Co. v. Rice (C. C. A.) 329.

A passenger in a street car who was injured by protruding her head out at the upper part of a window above a screen and striking a trolley pole held chargeable with contributory negligence precluding a recovery for the injury.—Christensen v. Metropolitan St. Ry. Co. (C. C.) 708.

Poles with large meshes fastened across the lower half of the windows of a street car on the side next to the poles supporting the trolley wires are a sufficient protection against the accidental injury of passengers from such poles, as a sufficient warning of the danger of such poles to absolve the railway company from charge of negligence in that regard.—Christensen v. Metropolitan St. Ry. Co. (C. C. A.) 708.

The refusal of an instruction requested by defendant, in an action by a passenger against a street railroad company to recover for personal injuries, *held* erroneous.—St. Louis Transit Co. v. Thompson (C. C. A.) 713.

The evidence in an action by a passenger against a street railroad company to recover for a personal injury *held* to require the giving of a certain instruction, the failure to give which was error.—St. Louis Transit Co. v. Thompson (C. C. A.) 713.

CHILD.

"Infants."

CHINESE.

pulsion, see "Aliens," § 1.

COURTS OF APPEALS.

7.

ruptcy proceedings, see "Bank-

CITATION.

CITIES.

Corporations."

CITIZENS.

"Domicile."

nd of jurisdiction of United see "Courts," § 3; "Removal 3.

IVIL RIGHTS.

or removal of cause from state emoval of Causes," § 4.

CLAIMS.

of bankrupt, see "Bankruptcy,"

y in hands of receiver, see "Re-

States, see "United States,"

see "Mines and Minerals," § 1. "Patents," § 5.

ERAL AGREEMENT.

see "Evidence," § 1.

ATERAL ATTACK.

ee "Judgment," § 4.

COLLECTION.

"Customs Duties," § 4.

COLLISION.

, see "Master and Servant," § ," § 2.

nd precautions for prevent-llisions in general.

in a collision case is not what essels do when they get down close to each other, but what maneuver they should have adopted under the rules when far enough apart to maneuver deliberately and safely.—The Transfer No. 10 (D. C.) 666.

When a vessel deliberately places herself in a position where she is not free to maneuver, and remains therein until a collision happens, her inability to maneuver immediately before contact is no excuse; her embarrassment being brought about by her own negligence.—The Transfer No. 10 (D. C.) 666.

Violation of statutory rules of navigation cannot be justified on the ground that it is customary to violate them under certain tidal conditions.—The Transfer No. 10 (D. C.) 666.

§ 2. Sail vessels meeting or crossing.

When the privileged one of two schooners kept her course until collision, as she was bound to do, it is not material to inquire whether or not there was any incompetency on the part of her lookout, since, if so, it was not a fault which contributed to the collision.—The Fannie Hayden (D. C.) 280.

§ 3. Overtaking vessels.

Two steamers, which overtook and attempted to pass another with a tow while coming down Lake St. Clair, both *held* in fault under the evidence for a collision with the tow; one for crowding in when the other was attempting to pass between her and the tow, and the other for persisting in the attempt to pass after the danger should have been apparent.—Lake Shore Transit Co. v. Corrigan (C. C. A.) 484.

§ 4. Lights, signals, and lookouts.

While no specific location on a vessel is prescribed for the lookout, he is required by good navigation to be placed at the point best suited for the purpose alike of hearing and observing the approach of objects likely to be brought into collision with the vessel, having regard to the circumstances of the case and condition of the weather.—The Vedamore (C. C. A.) 844; The Lilie, Id.; Henry v. Michael, Id.

Where the only two men on the deck of a schooner navigating in the night were engaged in taking down sail, neither one nor both constituted a proper lookout, and she is in fault for a collision with another schooner having the right of way, and which should have been seen from a quarter to half a mile distant, but was not seen until immediately before the collision. —The Fannie Hayden (D. C.) 280.

§ 5. Fog or thick weather.

A large steamship navigating Chesapeake Bay in a fog in the night *held* in fault for a collision with a schooner whose fog signals were not heard, on the ground that the lookout stationed in the crow's nest 60 feet above the deck and 100 feet from the stern was not properly placed.—The Vedamore (C. C. A.) 844; The Lilie, Id.; Henry v. Michael, Id.

A steamship *held* solely in fault for a collision with a crossing schooner in the Atlantic on a foggy night on the ground of excessive speed and want of efficient lookouts.—The Furnessia (D. C.) 955.

§ 6. Narrow channels, harbors, rivers, and canals.

Vessel held in fault for collision occurring while such vessel was navigating the East river below Corlear's Hook on the left-hand side of the channel and near the Manhattan shore; such navigation being in violation of the narrow-channel rule requiring vessels to keep to the right, and of the East river statute, requiring vessels using the East river to navigate as nearly in the center thereof as possible.—The Transfer No. 10 (D. C.) 956.

§ 7. Special circumstances and errors in extremis.

A vessel lying moored at the end of a wharf in a dark night, in the navigable part of a narrow stream constantly used by vessels, without carrying any light or having a lookout, *held* in fault for a collision with a passing tow, under article 29 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]).—The Millville (D. C.) 974; The Pearl, Id.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

§ 1. Subjects of regulation.

Arrival of a shipment of renovated butter, duly marked and labeled as provided by Oleomargarine Act Cong. May 9, 1902, c. 784, § 1, 32 Stat. 193 [U. S. Comp. St. Supp. 1903, p. 370], within a state other than that from which it was shipped, *held* not to authorize the consignee to remove the marks and labels without liability for violation of such act.—United States v. Green (D. C.) 179.

§ 2. Interstate commerce commission.

The law allows no appeal from or writ of error to review a decision of the interstate commerce commission denying or awarding reparation for an alleged violation of the act.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

In an action to enforce an interstate commerce reparation order, whether the freight rate in question was unreasonable and excessive was a question for the jury.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

Interstate Commerce Act, § 16, as amended by Act Cong. March 2, 1889, c. 382, § 5, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3167], *held* to contemplate the arrangement of findings of the interstate commerce commission in the report, so that they could be offered in evidence in an action to enforce the commission's order, unaccompanied by extraneous legal arguments, opinions, or conclusions.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

The mere opinions of the interstate commerce commission are inadmissible in an action brought for the enforcement of an order of pecuniary reparation.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

A receiver of a railroad company should not be joined in an action to recover discriminating freight charges, where the judgment against such other railroad companies would constitute a personal liability enforceable by execution at law.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

The cause of action in a suit to recover pecuniary reparation under an interstate commerce commission's order must have been included in the order of reparation, whether the proceeding to enforce the same is in equity or at law.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

Under Interstate Commerce Act, § 16 (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), as amended by Act March 2, 1889, c. 382, § 5, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3167], no order or reparation of the interstate commerce commission is self-executing.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

The lawfulness of an interstate commerce commission's order depends on the existence of facts warranting the same, whether introduced before the commission or not.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

A reparation order of the interstate commerce commission, including discriminating freight charges by a lessee railroad company which was not a party to the proceeding, *held* erroneous.—Western New York & P. R. Co. v. Penn Refining Co. (C. C. A.) 343.

A Circuit Court will not suspend the operation of a decree entered in a suit brought by the interstate commerce commission, under Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165], enjoining railroad companies from violating an order of the commission affecting rates pending an appeal therefrom, where it does not appear that the damage to defendants from its enforcement will be greater than that which would result to shippers from its suspension.—Interstate Commerce Commission v. Southern Pac. Co. (C. C.) 606.

The provision of Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165], that in proceedings thereunder to enforce an order of the commission an appeal shall not operate to stay or supersede the order of the court appealed from, is merely declaratory of the general rule in equity, and does not affect the power of the court, under equity rule 93, to grant a stay pending appeal in its discretion.—Interstate Commerce Commission v. Southern Pac. Co. (C. C.) 606.

COMMISSION.

Interstate commerce commission, see "Commerce," § 2.

ONER OF PATENTS.

MON CARRIERS.

MPENSATION.

OMPETENCY.

OMPETITION.

OMPLAINT.

E AND SETTLEMENT.

MPUTATION.

ONCLUSION.

ENT JURISDICTION.

NDEMNATION.

TIONAL SALES.

ONDITIONS.

CONFLICT OF LAWS.

Construction of contract, see "Contracts," § 2.
Liability of partners, see "Partnership," § 1.

CONSIDERATION.

Of contract, see "Contracts," § 1.
Of deeds, conveyances, see "Deeds and Conveyances," § 1.
Of notes and of railroad, see "Trusts," § 1.

CONSOLIDATION.

Of corporations, see "Corporations," § 4.

CONSTITUTION.

Of insurance company, see "Insurance," § 6.

CONSTITUTIONAL LAW.

§ 1. Obligation of contracts.

[illegible] A statute incorporated a township to enable it to issue railroad aid bonds, and provided a remedy at the instance of taxpayers of the bonds. The state had no authority to abolish such remedy without providing adequate equally effective one.—Thomas v. Greenwood County (C. C. A.) 448.

A change from the assessment to the old line plan of insurance by an association held not an impairment of the obligation of the contracts of members holding certificates under the assessment plan.—Dingman v. Minnesota Mut. Life Ins. Co. (C. C.) 203.

Incorporation of an insurance association and a change of its plan of operations, as authorized by New York Insurance Law, Laws 1892, c. 690, § 70, as amended by Laws 1895, p. 1078, c. 722, held not an impairment of contract rights of policy holders.—Pratt v. Mutual Reserve Fund Life Ass'n (C. C.) 218.

§ 2. Due process of law.

Sec. Civil & C. Code 1903, § 2414, providing for the creation of aids to railroad companies if 10 years and payment of taxes, held not to deprive a person of his property without due process of law, and § 2415 and 2 months after the bill was filed and 7 months after the bill's adoption, to sue to recover the property.—Schmidt v. Smith (C. C. A.) 241.

A city ordinance imposing a license tax of $100 per year on any person selling trading stamps or merchandise to sell as an absolute part of the privilege of allowing to engage in business therein, in violation of the fourteenth constitutional amendment.—In re Hutchinson (C. C.) 440.

A so-called premium stamp ordinance imposing an annual license tax of $200 on persons selling goods by means of trading stamps held to operate to deprive of property without due process of law, and void.—Ex parte Hutchinson (C. C.) 440.

CONTEMPT.

Violation of injunction against infringement of patent, see "Patents," § 7.

§ 1. Acts or conduct constituting contempt of court.

Where a United States assistant district attorney had custody of certain state court records, which he had procured on a subpœna duces tecum and presented to a federal grand jury, he was not subject to punishment for contempt of the state court in refusing to return such records on demand.—In re Leaken (C. C.) 680.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."
Authority in federal courts of decisions of state courts impairing obligation, see "Courts," § 6.
Impairing obligation, see "Constitutional Law," § 1.
Novation, see "Novation."
Parol or extrinsic evidence, see "Evidence," § 1.
Reformation, see "Reformation of Instruments."
Specific performance, see "Specific Performance."
Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of parties.

See "Corporations," § 3; "Master and Servant"; "Municipal Corporations," § 2; "Towns," § 1; "United States," § 1.

Contracts relating to particular subjects.

See "Interest," § 1; "Patents," § 6; "Trade-Marks and Trade-Names," § 2.
Use of railroad right of way by telegraph company, see "Telegraphs and Telephones," § 1.

Particular classes of express contracts.

See "Bills and Notes"; "Insurance"; "Logs and Logging"; "Mechanics' Liens," § 1; "Mines and Minerals," § 3; "Partnership"; "Sales."

Affreightment, see "Shipping," § 3.
Agency, see "Principal and Agent."
Charter parties, see "Shipping," § 1.
Employment, see "Master and Servant."
Leases, see "Landlord and Tenant."
Mutual benefit insurance, see "Insurance," § 6.
Railroad aid subscription, see "Towns," § 1.
Sales of realty, see "Vendor and Purchaser."
Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Money Paid."

Particular modes of discharging contracts.

See "Accord and Satisfaction."

§ 1. Requisites and validity.

Delay, silence, or retention of the fruits of a contract induced by fraud after discovery of the fraud ratifies the agreement.—Burnes v. Burnes (C. C. A.) 781.

An agreement to procure the consent of property owners for the construction of a trolley line in front of their properties, and to obtain a municipal franchise to operate it for a contingent fee, *held* contrary to public policy.—Sussman v. Porter (C. C.) 161.

Where the decisive issue in a case was as to the existence of a contract for doing certain work, and the evidence as to what was said between the parties was in direct conflict, the issue was properly submitted to the jury.—Radel v. Lesher (C. C.) 719.

The business of dealing in trading stamps, when honestly conducted, is not contrary to public policy.—Sperry & Hutchinson Co. v. Temple (C. C.) 992.

§ 2. Construction and operation.

A contract for the purchase of goods in England through complainant, as purchasing agent of a firm doing business in California and Costa Rica, *held* governed by English law.—Easton v. George Wostenholm & Son (C. C. A.) 524.

Government consent to the introduction of a current in the Chicago river by sanitary district of Chicago *held* not to entitle third persons to recover damages against such district caused by the current, where they would otherwise have no cause of action.—Corrigan Transit Co. v. Sanitary Dist. of Chicago (C. C. A.) 851.

In construing a written contract, the court should put itself in the situation of the parties at the time it was made, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and the correct application of the language of the contract taken as a whole to the things described.—Vocalion Organ Co. v. Wright (C. C.) 313.

CONTRIBUTORY NEGLIGENCE.

Of passenger, see "Carriers," § 3.
Of person on railroad train, see "Railroads," § 2.

CONVEYANCES.

See "Chattel Mortgages"; "Deeds."

CONVICTS.

See "Criminal Law," § 1.

COPYRIGHTS.

§ 1. Nature and acquisition.

Rev. St. § 4965, as amended by Act March 2, 1895, c. 194, 28 Stat. 965 [U. S. Comp. St. 1901, p. 3414], relating to the recovery for infringement of copyright, was not changed by the proviso added by the amendment that in case of infringement of copyright of a photograph the recovery shall not be less than $100 nor more than $5,000, so far as relates to the necessity of finding copies or sheets of the infringing publication in defendant's possession for the purposes of forfeiture before there can be any recovery.—Boston Traveler Co. v. Purdy (C. C. A.) 717.

which is not only a light-writ-
ie object, but also an expres-
thought or conception of the
, is a "writing," within the
se, and a proper subject of
can Mutoscope & Biograph
. Co. (C. C.) 262.

ive pictures printed on a film
aken by a camera placed in
designed for use in a mov-
ine, is a photograph, within
ev. St. § 4952 [U. S. Comp.
], where, taken together, the
nected story.—American Mu-
h Co. v. Edison Mfg. Co. (C.

ient.

insufficient to warrant the
iminary injunction against in-
opyright of a photograph.—
ope & Biograph Co. v. Edison
262.

infringement of a copyright,
kes profert of the copyrighted
y be considered a part of the
ed, on demurrer.—American
graph Co. v. Edison Mfg. Co.

unction *held* not to be issued
n of arrangement of a music-
f which complainant has a
gement.—Littleton v. Fischer

RPORATIONS.

t in sale of stock, see "Prin-
," § 1.
eedings against, see "Bank-

bonds, see "Fraud," § 1.
n sale of stock, see "Principal

leral courts of suit to restrain
ee "Courts," § 3.
r for fraudulent concealment
bankrupt corporation, see
§ 11.
"Licenses," § 1.
ainst bankrupt on contract of
ividends, see "Bankruptcy,"

eading in suit by stockholder
tion, see "Pleading," § 5.

classes of corporations.
Corporations"; "Street Rail-

lephone companies, see "Tele-
ephones."
ks and Banking," § 1.
nies, see "Insurance."
s, see "Mines and Minerals,"

stock, and dividends.

o recover the value of 1,000
cent. preferred stock of a cor-
poration, evidence *held* to justify a verdict finding its value at $75,000.—Julia v. Critchfield (C. C.) 969.

§ 2. Officers and agents.

The transfer of stock from a corporation to a trustee for a majority of its directors and others by the controlling votes of that majority is voidable by the stockholders.—Burnes v. Burnes (C. C. A.) 781.

Unfair contracts between corporations and their controlling directors are voidable at the option of the corporation, its creditors, or stockholders.—Burnes v. Burnes (C. C. A.) 781.

Parties in fiduciary relations are prohibited by law from using their knowledge or power to the detriment of their correlates.—Burnes v. Burnes (C. C. A.) 781.

§ 3. Corporate powers and liabilities.

Where fiscal agents of a corporation misapplied income sufficient to pay interest installments and coupons on a prior mortgage debt to the payment of a subsequent debt, they could not hold such interest installments and coupons as outstanding debts under the mortgage lien to the prejudice of bondholders.—Farmers' Loan & Trust Co. v. New England Water Works Co. (C. C. A.) 729; United Water Works Co. v. Same, Id.

A count in a complaint for breach of warranty in the sale of certain bonds *held* demurrable.—Kimber v. Young (C. C. A.) 744.

Corporations in the absence of statutory prohibition have an inherent right to buy, to retire, and to sell their own stock.—Burnes v. Burnes (C. C. A.) 781.

A corporation, not organized to purchase or grant annuities, may contract to pay in annual installments during the lives of the vendors for property which it has corporate authority to buy, though corporations not organized to deal in annuities are expressly forbidden so to do.—Burnes v. Burnes (C. C. A.) 781.

Certain personal property, consisting of office furniture, etc., belonging to a manufacturing corporation, *held* not covered by a mortgage of its property given to secure bonds.—In re Adamant Plaster Co. (D. C.) 251.

A mortgage executed by a manufacturing corporation *held* not to cover office furniture, raw material, or manufactured products subsequently acquired, as against creditors, in favor of holders of bonds purchased from the corporation's trustee in bankruptcy.—In re Adamant Plaster Co. (D. C.) 251.

§ 4. Consolidation.

A covenant, in a bond given by a corporation on buying all the property and assets of another corporation, to assume all contracts of the latter and pay all of its obligations, creates a direct liability in equity on a contract transferred as a part of the assets, which is not affected by a further covenant to indemnify the selling company and its directors and stockholders against all liabilities.—Dancel v. Goodyear Shoe Machinery Co. (C. C.) 157.

A corporation which has sold all of its property, assets, and good will to another, which assumes its contracts and debts, and which then goes out of business, is not an indispensable party to a suit in equity against the purchasing company to enforce a contract assigned as a part of its assets.—Dayton v. Goodyear Shoe Machinery Co. (C. C.) 157.

Where a corporation, on a sale of its property and assets to another corporation, also caused to be transferred to the latter all of its stock and its books and records, which thereafter remained in its possession and under the control of the purchasing company, entries in such books relating to the transaction are admissible against such company in a suit, without further authentication.—Dayton v. Goodyear Shoe Machinery Co. (C. C.) 157.

COSTS.

In bankruptcy, see "Bankruptcy," § 10.

§ 1. Nature, grounds, and extent of right in general.

Where there was long delay in prosecuting a suit to recover for services in raising a sunken vessel, and the claim made was excessive, and, owing to the fact that complainant had a monopoly of such work it was difficult for defendant to obtain proof as to the value of the services, costs should not be allowed.—Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co. (C. C. A.) 780.

COUNTIES.

See "Municipal Corporations."

§ 1. Creation, alteration, existence, and political functions.

Where a statute provided for the levying and collection of taxes to pay township railroad aid bonds by the county auditor and treasurer, such duty devolved on the auditor and treasurer of another county into which the township was subsequently placed by a change of boundaries.—Folsom v. Greenwood County (C. C. A.) 449.

COURTS.

Contempt of court, see "Contempt."
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Right to sue in federal court pending action in state court, see "Abatement and Revival," § 1.

Jurisdiction of particular actions, proceedings, or subjects.

See "Bankruptcy," § 1; "Specific Performance," § 4.
On bail bond, see "Bail," § 1.

§ 1. United States courts—Jurisdiction and powers in general.

A federal court has jurisdiction to entertain a suit in equity for the allowance of claims after the time limited by the probate court in Minnesota, under Gen. St. 1894, § 4599, and within the 18 months provided for by such statutes after notice of the order.—Schurmeier v. Connecticut Mut. Life Ins. Co. (C. C. A.) 42.

Under Judiciary Act 1875, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], where a defendant suggests a want of jurisdiction after judgment for the first time, the court may set aside the judgment and determine the matter without a jury, and, unless want of jurisdiction appears, may re-enter judgment on the verdict.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

An averment of plaintiff's citizenship for jurisdictional purposes in a federal court is material, and under the Ohio Code is put in issue by a general denial in the answer; and a general finding for plaintiff by the jury is conclusive on the issue, as against a defendant who made no objection to the jurisdiction or the sufficiency of the evidence until after judgment.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

A federal court has power to issue a mandamus only in the exercise of a jurisdiction to which such proceeding is ancillary.—Large v. Consolidated Nat. Bank (C. C.) 168.

§ 2. —— Jurisdiction dependent on nature of subject-matter.

A federal court has jurisdiction of a suit by a telegraph company which has accepted the provision of Rev. St. § 5263 [U. S. Comp. St. 1901, p. 3579] to enjoin the threatened removal or destruction of its line by the local officers.—Ohio Postal Telegraph Cable Co. v. Board of Com'rs of Sandusky County (C. C.) 947.

§ 3. —— Jurisdiction dependent on citizenship, residence, or character of parties.

An allegation of plaintiff's citizenship *held* sufficient, especially after verdict and judgment without objection.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

Where the original petition contains the requisite averments to give a federal court jurisdiction, such jurisdiction is not lost because an amended petition alleges plaintiff's citizenship in the present tense only.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

Where the plaintiff is a minor, suing by his guardian, the question of the jurisdiction of a federal court is determined by his own citizenship, and not that of his guardian, which is immaterial.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

The citizenship of the nominal payee of a note, made to him as trustee, and in fact owned by another, is immaterial to the jurisdiction of a federal court of an action thereon by the real owner under the statute of Utah.—Franklin v. Conrad-Stanford Co. (C. C. A.) 737.

That a stockholder of a corporation, suing to restrain the use of corporate assets in an alleged ultra vires business, was assisted by other stockholders, citizens of the same state as the corporation, *held* not to show that the suit was collusive, within equity rule 94.—Consumers' Gas Trust Co v. Quinby (C. C. A.) 882.

U. S. Comp. St. 1901, p. 508], federal jurisdiction of suits on *held* not to apply to a bill by a holder of a corporation to recorporate assets for an alleged ss.—Consumers' Gas Trust Co. A.) 882.

a federal court, the fact that ing a part of the tract, who but who appeared after judgtenant and moved to set the of the same citizenship as oust the court of jurisdiction. (C. C.) 198.

ship railroad subscription acessor of the railroad's receiver the latter was not precluded ie federal courts by Rev. St. ause the corporation was not sue.—Paige v. Town of Roch-

gnee of a chose in action is thereon alone in the federal s assignees may sue there toassignment had been made.— Rochester (C. C.) 663.

of the receiver of a railroad to a township aid subscripassignee thereof within Rev. —Paige v. Town of Rochester

sdiction dependent on or value in controversy.

tion to a federal court by a national banking association ndamus to compel the associaı to inspect a list of its share- Rev. St. § 5210 [U. S. Comp. 8], the pleadings must show n dispute exceeds the value of e court jurisdiction.—Large v. Bank (C. C.) 168.

edure, and adoption of e of state courts.

for the allowance of claims ' estates in Minnesota cannot ecause barred, in the absence the probate court, and such e granted in the federal court —Schurmeier v. Connecticut o. (C. C. A.) 42.

courts, an action at law can- l in equity; nor is an equitaon, nor an equitable defense, .—Schurmeier v. Connecticut o. (C. C. A.) 42.

aw may be maintained in the secure the allowance of a estate and a certificate of it court for payment in its class, thin the time limited.—Schurcut Mut. Life Ins. Co. (C. C.

federal courts, the allowance t a decedent's estate for good of the time limited is indisaust be had to equity.—Schurmeier v. Connecticut Mut. Life Ins. Co. (C. C. A.) 42.

In allowing claims against the estates of decedents, the federal courts are governed by the same rules which direct the local tribunals. —Schurmeier v. Connecticut Mut. Life Ins. Co. (C. C. A.) 42.

Federal courts are not required, by Rev. St. § 861 [U. S. Comp. St. 1901, p. 661], providing that "the mode of proof in the trial of actions at common law shall be by oral testimony and examining of witnesses in open court, except as hereinafter provided," to exclude evidence which, although not within the terms of such section, or of the following provisions relating to depositions, is still admissible under the principles of evidence recognized by the common law.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

Rev. St. Ohio, § 5242a, which authorizes the admission in evidence of testimony given by a witness on a former trial of the case, where the witness is not within the jurisdiction, so that his oral testimony can be obtained, is not in conflict with Rev. St. § 861 [U. S. Comp. St. 1901, p. 661], and may properly be followed in an action at law in a federal court in that state.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

In an action by an infant, suing in a federal court by his guardian, an allegation that the guardian was duly appointed *held* not a material averment, which was put in issue by a general denial under the Ohio Code.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

Rev. St. §§ 863–867 [U. S. Comp. St. 1901, pp. 661–664] prescribe the modes of taking proof in actions at law in the courts of the United States to the exclusion of all others, and under such provisions the testimony of a witness given on a former trial of the same case cannot be read in evidence.—Diamond Coal & Coke Co. v. Allen (C. C. A.) 705.

A scire facias proceeding to revive a default judgment in ejectment in the Virginia federal courts is matured at rules, but the office judgment on default does not become final until judgment of the court at the following term, or until the term, or the fifteenth day thereof, has passed without an order setting it aside.—King v. Davis (C. C.) 198.

Under Act March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], where the laws of the state in which a federal court is held provide for the issuance of commissions by the clerk for the taking of depositions on interrogatories attached on notice to the adverse party, such practice may properly be followed in the federal court with respect to witnesses residing without the district.—Carrara Paint Agency Co. v. Carrara Paint Co. (C. C.) 319.

§ 6. —— State laws as rules of decision.

Decisions of state courts, which so construe their statutes as to impair rights previously acquired through contracts, *held* not obligatory on the courts of the United States.—Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co. (C. C. A.) 26.

Whether a claimant of a bankrupt is entitled to a preference must be determined by federal decisions.—John Deere Plow Co. v. McDavid (C. C. A.) 802; In re John Deere Plow Co. Id.

Decisions of the highest courts of a state affecting title to real property will be followed by the federal courts.—Hubbird v. Goin (C. C. A.) 822.

Federal courts of bankruptcy will not be bound by state decisions that an imposition constitutes a "tax," and is therefore entitled to priority of payment under Bankr. Act July 1, 1898, § 64a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], unless such decisions have expounded the subject-matter of such imposition.—In re Cosmopolitan Power Co. (C. C. A.) 858; State of New Jersey v. Anderson. Id.

The decisions of the highest courts of a state, interpreting state statutes under which a corporation was organized, are controlling on the federal courts.—Consumers' Gas Trust Co. v. Quinby (C. C. A.) 882.

Federal courts will follow federal decisions with reference to the validity of a contract limitation in an insurance policy, though such decisions conflict with those of the highest courts of the particular state.—Spinks v. Mutual Reserve Fund Life Ass'n (C. C.) 169.

Whether a return of substituted service of process in federal courts can be amended is a question of the power of the court, with reference to which it is not bound by state decisions.—King v. Davis (C. C.) 198.

Decisions of the highest state courts as to whether presumptions will be made in aid of a defective return of substituted service are not binding on the federal courts.—King v. Davis (C. C.) 198.

Va. Code 1887, § 3566 [Va. Code 1904, p. 1903], providing for the filing of lis pendens in actions affecting real estate, *held* not to apply in actions in the Virginia federal courts.—King v. Davis (C. C.) 222.

In a suit in the federal courts to determine the rights of policy holders and the insurer, the decisions of the highest courts of the state are of controlling authority.—Polk v. Mutual Reserve Fund Life Ass'n (C. C.) 273.

Under the holdings of the federal courts, a lessor of a railroad track is not liable for the negligence of its lessee in operating its trains on such tracks, and, the question being one of general law, a federal court is not controlled thereon by state decisions.—Yeates v. Illinois Cent. R. Co. (C. C.) 943.

§ 7. —— Circuit courts of appeals.

Findings of fact by the court on conflicting evidence cannot be reviewed, in the absence of obvious error in the consideration of the evidence or in the application of the law.—Shields v. Mongollon Exploration Co. (C. C. A.) 539.

Under Code Alaska (31 Stat. 393, c. 38), where an equitable defense was pleaded to ejectment to recover a mining claim, the trial court's findings of fact, on a jury being waived, did not have the conclusive effect of a verdict on appeal.—Shields v. Mongollon Exploration Co. (C. C. A.) 539.

Where the parties waived a jury orally in open court, under Civ. Code Alaska (31 Stat. 363, c. 19), the Circuit Court of Appeals was not precluded from reviewing errors affecting the admission or exclusion of evidence because such waiver was not in writing, as provided by Rev. St. U. S. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570].—Shields v. Mongollon Exploration Co. (C. C. A.) 539.

Appellate jurisdiction of the Ninth Circuit Court of Appeals over decisions of the District Courts of Alaska is not ruled by Act Cong. April 7, 1874 (18 Stat. pt. 3, p. 27, c. 80), but by Civ. Code Alaska (31 Stat. 414, c. 51).—Shields v. Mongollon Exploration Co. (C. C. A.) 539.

Under Civ. Code Alaska, §§ 504, 508 (31 Stat. 414, 415), the Ninth Circuit Court of Appeals *held* to have jurisdiction to review a decree in a suit to recover an interest in a mining claim by writ of error.—Shields v. Mongollon Exploration Co. (C. C. A.) 539.

§ 8. —— District courts.

Under Tucker Act March 3, 1887, c. 359, §§ 1-7, 24 Stat. 505, 506 [U. S. Comp. St. 1901, pp. 752-755], United States District Courts have jurisdiction to entertain petitions for a salvage award against the government.—United States v. Cornell Steamboat Co. (C. C. A.) 455.

§ 9. Concurrent and conflicting jurisdiction, and comity.

Federal courts *held* to have concurrent jurisdiction with state courts to allow claims against decedent's estate involving controversies over the requisite amounts between citizens of different states.—Schurmeier v. Connecticut Mut. Life Ins. Co. (C. C. A.) 42.

COVENANTS.

In bond of indemnity by consolidated corporation, see "Corporations," § 4.
In insurance policies, see "Insurance," § 3.

COVERTURE.

See "Husband and Wife."

CREDITORS.

See "Bankruptcy."
Remedies against surety, see "Principal and Surety," § 2.
Subrogation to rights of creditor, see "Subrogation."

CRIMINAL LAW.

See "Habeas Corpus," § 1.
Bail, see "Bail."
Prosecuting officers, see "District and Prosecuting Attorneys."

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"Extortion."
laws, see "Bankruptcy," §

see "Food."

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ings.—Ex parte Moebus (C.

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trains, see "Railroads," § 2.
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OMS DUTIES.

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for "blown glassware" in
1897, c. 11, § 1, Schedule
tat. 157 [U. S. Comp. St.
lassware" is not a term of
tion.—United States v. Du-
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Act July 24, 1897, c. 11,
. Comp. St. 1901, p. 1694],
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sed, does not apply where
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of two applicable rates is
e other specific.—Loggie v.
. A.) 813.

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nited States (C. C. A.) 813.

'additional duty equal to the
bounty" paid by the export-
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, 30 Stat. 205 [U. S. Comp.
], the collector of customs
basis of assessment as will
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ed as bounty. *Held*, that on
ay properly be based on its
of exportation, rather than
ranklin Sugar Refining Co.
C.) 655.

ject to duty, rate, and

riff Act July 24, 1897, c. 11,
ars. 258, 261, 30 Stat. 171
1901, pp. 1650, 1651], pro-
for "fish in packages con-
one-half barrel," and for
en," *held* that the former ap-
plies to frozen fish imported in packages containing less than one-half barrel.—Loggie v. United States (C. C. A.) 813.

Blown glass blanks are not dutiable as "blown glassware," under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], but under paragraph 112, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635].—United States v. Durand (C. C. A.) 382.

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 141, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640], providing for steel strips of a better grade than "cold-rolled, smoothed only," does not require that such condition must be the result of some process other than that of cold-rolling; but it does not include certain thin strips subjected to no other process than the cold-rolling necessary to produce that thinness, in the absence of any general, well-recognized meaning of the provision that would include such articles.—United States v. Crucible Steel Co. (C. C. A.) 384.

Saké, a fermented alcoholic beverage, *held* not sufficiently similar to still wines or to beer to be within Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], providing that unenumerated articles shall be subjected to duty at the rate applicable to the enumerated article they most resemble.—United States v. Nishimiya (C. C. A.) 396.

Saké, a Japanese alcoholic beverage, is dutiable as an unenumerated manufactured article, under Tariff Act July 24, 1897, c. 11, § 6, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693].—United States v. Nishimiya (C. C. A.) 396.

Provision in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], that articles not enumerated shall pay the same rate applicable to enumerated articles which they most resemble, requires only a substantial similitude.—United States v. Roesseler & Hasslacher Chemical Co. (C. C. A.) 770.

Ferro-chrome, ferro-molybdenum, ferro-tungsten and ferro-vanadium are by virtue of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], dutiable at the rate applicable to ferro-manganese, under paragraph 122 of said act, Schedule C, § 1, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636].—United States v. Roesseler & Hasslacher Chemical Co. (C. C. A.) 770.

Metals unwrought within Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 183, 30 Stat. 166 [U. S. Comp. St. 1901, p. 1645], imply a metal which is capable of being wrought, and ferro-chrome, ferro-molybdenum, ferro-tungsten, and ferro-vanadium are not within said provision.—United States v. Roesseler & Hasslacher Chemical Co. (C. C. A.) 770.

So-called spent ginger, a by-product from the manufacture of ginger extract, etc., from ginger root, is "ginger root, unground," under Tariff Act July 24, 1897, c. 11 § 2, par. 667, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688].—Lewis German & Co. v. United States (C. C. A.) 817.

There is not such a difference between imported fruit in bulk and that in packages as makes Customs Administrative Act June 10, 1890, c. 407, § 25, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1930], apply to the latter case, though not in the former. The rule that duty should not be imposed on fruit rendered valueless by decay accrues to fruit in packages, regardless of whether the whole package is worthless.—Stone v. Swalm (C. C.) 674.

Fish prepared for preservation, imported in packages containing less than a half-barrel, are dutiable as "fish prepared for preservation," under paragraph 201, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], and not as "fish in packages containing less than one-half barrel," under paragraph 278, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1667].—Harvey v. United States (C. C.) 816.

Embroidered hose are subject to the proviso relative to embroideries in Tariff Act July 24, 1897, c. 11, § 1, par. 330, Schedule J, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1692], whenever the rate provided for "hose and half hose" in paragraph 318, Schedule H, of said act (30 Stat. 179 [U. S. Comp. St. 1901, p. 1690]), is less than the embroidery rate.—Carter, Webster & Co. v. United States (C. C.) 978.

§ 3. Entry and appraisal of goods, bonds, and warehouses.

The consular certification of the invoice is conclusive evidence of the date of exportation, for the purpose of determining the quarter within which merchandise was exported to the United States, in estimating the value of the currency of the country of exportation under Tariff Act Aug. 28, 1894, c. 349, § 25, 28 Stat. 522.—United States v. Lawrence, Son & Gerrish (C. C. A.) 466.

A protest, naming the right rate, but an inapplicable paragraph, held not to satisfy the requirements of Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].—United States v. Fleitmann (C. C. A.) 476.

Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], established no new rule regarding terms of protests. If they do not satisfy the requirements of the section, the collector's decision should be affirmed.—United States v. Fleitmann (C. C. A.) 476.

Under Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1663], the component material of chief value in woven fabrics should be estimated as of the time the process of weaving commences, and the cost of warping, which is not a part of the weaving process, should be included wholly in the value of the material constituting the warp threads.—United States v. Hemminghaus & Curtiss (C. C. A.) 478.

The action of an importer in filing a protest against a tentative liquidation of an entry does not preclude him from filing another against the final liquidation, even though he had regarded the tentative liquidation as final at the time of his original protest.—United States v. Franklin Sugar Refining Co. (C. C.) 677.

Where the final liquidation of an entry of imported merchandise was preceded by a tentative liquidation, made under directions of the Secretary of the Treasury, protest may be made against the final liquidation, under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].—United States v. Franklin Sugar Refining Co. (C. C.) 677.

§ 4. Payment and collection, refunding, and drawback.

Under section 2984, Rev. St. [U. S. Comp. St. 1901, p. 1958], authorizing the Secretary of the Treasury to refund duties collected on merchandise accidentally damaged while in customs custody, the Secretary may not exercise this authority arbitrarily or capriciously.—United States v. Cornell Steamboat Co. (C. C. A.) 455.

Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], does not require that, on action by the government for unpaid duties, the importer should not be permitted to defend on the ground of illegal assessment rather than to pay the duties and bring proceedings for their recovery before the board of general appraisers.—United States v. Tiffany (C. C.) 971.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 1.
For defamation, see "Libel and Slander," § 2.
In addition to injunction, see "Injunction," § 2.
Recovery in ejectment, see "Ejectment," § 3.

§ 1. Measure of damages.

An award of $1,500 made to a seaman 43 years old for the permanent crippling of his right hand through the neglect of the ship to furnish him with proper treatment after an injury to the hand in the service.—The Sarnia (D. C.) 952.

DEATH.

By accident within meaning of insurance policy, see "Insurance," § 4.
Expert testimony in action for wrongful death, see "Evidence," § 2.
Of servant, see "Master and Servant," § 1.

DEBTOR AND CREDITOR.

See "Bankruptcy."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."
Estates, following state practice as to allowance of claims against, see "Courts," § 5.

DECEIT.

See "Fraud."

ECISION.

al courts of decisions of state
rts," § 6.

CLARATION.

DECREE.

"Admiralty," § 2.
uity," § 3.

DEEDS.

Reformation of Instruments."

ion and operation.

father to his daughter and
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n by the mother, *held* void in
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nd.—Hubbird v. Goin (C. C.

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does not come within the rule
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g such rule, under any con-
f the Supreme Court of that
o the deed in question.—Hub-
. A.) 822.

conveys land to grantor's
r children, the estate in re-
n to let in after-born children
dermen.—Hubbird v. Goin (C.

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for the mother for life and
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ubbird v. Goin (C. C. A.) 822.

EFAMATION.

lander."

DEFAULT.

"Judgment," § 1.

DELAY.

ingement of patent, see "Pat-

DEMURRAGE.

See "Shipping," § 4.

DEMURRER.

In pleading, see "Pleading," § 3.
Raising objection to jurisdiction in bankruptcy, see "Bankruptcy," § 1.
To patent, see "Patents," § 7.

DEPORTATION.

Of Chinese, see "Aliens," § 1.

DEPOSITIONS.

Following state practice, see "Courts," § 5.
In equity, see "Equity," § 2.

A party will not be limited in advance as to the number of witnesses whose testimony he may take by deposition, unless it appears from the nature of the issues that the number is unreasonable and unnecessary.—Carrara Paint Agency Co. v. Carrara Paint Co. (C. C.) 319.

DESCENT AND DISTRIBUTION.

See "Executors and Administrators"; "Wills."

§ 1. Rights and liabilities of heirs and distributees.

Claim of adopted father and the sons who participated in the suit to set aside family settlement considered, and *held*, that there was no equity in the claim, and a decree for defendant was properly rendered.—Burnes v. Burnes (C. C. A.) 781.

Family settlements will not be avoided for inadequacy of consideration, nor without clear proof of fraud or mistake.—Burnes v. Burnes (C. C. A.) 781.

DEVISES.

See "Wills."

DISABILITIES.

Effect on limitation, see "Limitation of Actions," § 2.

DISCHARGE.

From indebtedness, see "Accord and Satisfaction"; "Bankruptcy," § 8.
From liability as assignee, see "Bankruptcy," § 7.
From liability as surety, see "Principal and Surety," § 1.

DISCRETION OF COURT.

See "Specific Performance," § 2.
Amendment of return of service of process, see "Process," § 2.
Intervention in bankruptcy proceedings, see "Bankruptcy," § 1.

Stay of proceedings pending appeal from order of interstate commerce commission, see "Commerce," § 2.

DISMISSAL AND NONSUIT.

See "Bankruptcy," § 1.

DISSOLUTION.

Of insurance company, see "Insurance," § 6.
Of mining company, see "Mines and Minerals," § 3.

DISTILLERS.

See "Internal Revenue."

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 6.
Of estate of decedent, see "Descent and Distribution"; "Executors and Administrators," § 2.

DISTRICT AND PROSECUTING ATTORNEYS.

Contempt of court, see "Contempt," § 1.

Assistant district attorneys appointed under Act Cong. May 28, 1896, c. 252, 29 S. 29 Stat. 181 [U. S. Comp. St. 1901, p. 613], *held* officers of the United States courts for their respective districts.—In re Leaken (C. C.) 680.

DISTRICT COURTS.

See "Courts," § 8.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 3; "Removal of Causes," § 3.

DIVIDENDS.

Proof of claim for guaranty of, against bankrupt, see "Bankruptcy," § 6.

DOCUMENTS.

Production in equity, see "Equity," § 2.

DOMICILE.

Of bankrupt, see "Bankruptcy," § 1.
Residence as ground of jurisdiction, see "Courts," § 3.

Where the father and mother of an infant plaintiff were divorced, and he had been awarded to the custody of his mother, who had removed with him to another state, he became a citizen of such state for the purposes of jurisdiction of a federal court.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

DUE PROCESS OF LAW.

See "Constitutional Law," § 2.

DUTIES.

Customs duties, see "Customs Duties."
Excise duties, see "Internal Revenue."

EJECTMENT.

See "Lis Pendens."
Amendment of return of service of process, see "Process," § 2.
Collateral attack on judgment, see "Judgment," § 4.
Jurisdiction of federal courts, see "Courts," § 3.
Persons concluded by judgment, see "Judgment," § 5.
Process to sustain judgment, see "Judgment," § 1.
Recovery of mining claim, see "Mines and Minerals," § 1.
Review by circuit court of appeals, see "Courts," § 7.
Revival of judgment, see "Judgment," § 6.
Vacation of judgment, see "Judgment," § 3.

§ 1. Pleading and evidence.

Under Va. Code 1887, § 3253 [Va. Code 1904, p. 1712], plaintiff in ejectment *held* entitled to amend the description in his declaration before defendants' appearance, whether defendants were originally personally or only constructively served with the original declaration.—King v. Davis (C. C.) 198.

§ 2. Trial, judgment, enforcement of judgment, and review.

A judgment for plaintiff in ejectment, not having been executed within a year and a day, *held* insufficient, without revival, to support a subsequent writ of possession, both under Va. Code 1887 § 3577 [Va. Code 1904, p. 1910], and at common law.—King v. Davis (C. C.) 198.

An officer executing a writ of possession on a judgment in ejectment *held* entitled to oust persons wrongfully using a right of way over the land, under a purchase from defendants in suit pendente lite.—King v. Davis (C. C.) 222.

Where petitioner was not a party to ejectment, and her possession illegally disturbed by the execution of the judgment in favor of plaintiff, she was entitled to an order restraining execution against her.—King v. Davis (C. C.) 222.

§ 3. Damages, mesne profits, improvements, and taxes.

Under Va. Code 1887, § 2751 [Va. Code 1904, p. 1412], it was proper for the clerk, on entering confirmation of the common order in ejectment, to award a writ of inquiry, though no statement of damages had been filed.—King v. Davis (C. C.) 198.

TION OF REMEDIES.

ELECTRICITY.

MINENT DOMAIN.

ERS' LIABILITY INSUR ANCE.

EMPLOYES.

ENGINEERS.

TIRE CONTRACT.

ENTRY.

NTRY, WRIT OF.

TABLE DEFENSES.

EQUITABLE ESTOPPEL.

EQUITABLE MORTGAGES.

EQUITY.

Particular subjects of equitable jurisdiction and equitable remedies

§ 1. Pleading.

§ 2. Taking and filing proofs.

A federal court of equity has no power to order the removal to another district, for the purpose of examining witnesses, of documentary evidence produced by witnesses before an examiner within the district in obedience to a subpœna duces tecum.—Pepper v. Rogers (C. C.) 173.

§ 3. Decree and enforcement thereof.

ERROR, WRIT OF.

See "Appeal and Error."
From circuit court of appeals, see "Courts," § 7.

ESCAPE.

Effect on term of imprisonment, see "Criminal Law," § 1.

ESTABLISHMENT.

Of counties, see "Counties," § 1.
Of railroads, see "Steam Railroads," § 1.
Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.

ESTATES.

Created by deed, see "Deeds," § 1.
Descent of estates, see "Descent and Distribution"; "Executors and Administrators."
Estates for years, see "Landlord and Tenant."

ESTOPPEL.

By judgment, see "Judgment," § 5.
Of retiring partner to avoid liability for debt, see "Partnership," § 2.
To claim forfeiture of rights in streets, see "Municipal Corporations," § 5.
To object to writ of error, see "Appeal and Error," § 2.
To sue for infringement of patent, see "Patents," § 7.

§ 1. Equitable estoppel.

Mere reasons presented by a railroad company in defense of an alleged abuse of misuse of a franchise *held* not to estop it from subsequently making an inconsistent claim to establish a claim of res judicata.—Cleveland Electric Ry. Co. v. City of Cleveland (C. C.) 111.

EVIDENCE.

See "Depositions."
Harmless error, see "Appeal and Error," § 4.
Questions of fact for jury, see "Trial," § 4.
Reception at trial, see "Trial," § 2.
Review, see "Courts," § 7.

As to particular facts or issues.

See "Bankruptcy," § 1; "Novation."
Insolvency of insurance company, see "Insurance," § 6.

In actions by or against particular classes of parties.

See "Corporations," § 4; "Master and Servant," § 1.

In particular civil actions or proceedings.

See "Libel and Slander," § 2; "Money Paid."
For enforcement of orders of interstate commerce commission, see "Commerce," § 2.
For personal injuries, see "Master and Servant," § 1.
For recovery of corporate shares, see "Corporations," § 1.
For recovery of interest in mining claim, see "Mines and Minerals," § 2.
In federal courts, see "Courts," § 5.
On note, see "Bills and Notes," § 2.

§ 1. Parol or extrinsic evidence affecting writings.

When the written agreement of parties is complete in itself parol evidence as to the same subject-matter is inadmissible to explain or contradict it.—Davis Calyx Drill Co. v. Mallory (C. C. A.) 332.

In an action to recover an interest in a mining claim, evidence as to what plaintiff's prior grantor did pursuant to an agreement of settlement in which he assumed title to the interest in question *held* admissible.—Shields v. Mongolian Exploration Co. (C. C. A.) 339.

§ 2. Opinion evidence.

In an action for the death of plaintiff's intestate at a railroad crossing, a witness *held* entitled to testify as an expert as to the rate of speed the train would have to go at the point in question in order to haul the train across the street where the accident occurred and into the defendant's yards.—Baltimore & O. R. Co. v. Connell (C. C. A.) 8.

In an action for injuries to a brakeman by striking an overhead trestle, a railroad expert *held* entitled to testify what, in his opinion, good railroading required with reference to the construction of tellisses.—Pittsburgh, S. & N. R. Co. v. Lamphere (C. C. A.) 20.

EXCISE.

Duties, see "Internal Revenue."

EXECUTION.

See "Garnishment."
Against property of wife, see "Husband and Wife," § 2.
In action of ejectment, see "Ejectment," § 2.
In admiralty, see "Admiralty," § 2.

§ 1. Nature and essentials in general.

Though a court of law has no power after the term to vacate its judgment, except for errors of fact available under a writ of error *coram vobis* or an audita querela, it has power to control its execution to prevent injustice.—King v. Davis (C. C.) 222.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."
Conclusion in pleading in suit to set aside conveyance by executor, see "Pleading," § 1.
Concurrent jurisdiction to allow claims, see "Courts," § 9.
Effect of infancy on suit to set aside executor's conveyances, see "Limitation of Actions," § 2.
Following state practice in proceedings for allowing claims, see "Courts," § 5.
Jurisdiction of federal court of suit for allowance of claims, see "Courts," § 1.

and payment of claims.
linn. 1894, § 4509, *held*, that which are contingent, and roof within the time limited, absolute a sufficient length expiration of the 18 months, rs an opportunity to present 18 months, are barred, unpresented within that time. Connecticut Mut. Life Ins.

on of estate.
dministrators to distributees the personalty of an estate, t subsequently approved by vests all title therein in the es v. Burnes (C. C. A.) 781.

conveyances under order
or fully and truthfully statthe estate and his previous irs on an application to sell t that the sales were irregut establish that he was guilty son v. Beardsley (C. C. A.) oppe, Id.
ds on which certain execuwere attacked were matters plainants had notice of the eedings, they would be deemctual knowledge of the conrds.—Williamson v. Beard; Same v. Schoppe, Id.
ough nonresidents, *held* barintain a suit to set aside exs, under Rev. St. Utah 1898, lliamson v. Beardsley (C. C. Schoppe, Id.

T TESTIMONY.

e "Evidence," § 2.

PLOSIVES.

ng gasoline into a tank *held* ajury resulting from an overunknown to him.—Waters-Van Elderen (C. C. A.) 557; Id.

SS COMPANIES.

TENSION.

franchise, see "Street Rail-

ee "Pleading," § 2.

TORTION.

2, § 2, a special agent of the of the United States, appropriation Act June 4, 1897, *eld* not an officer of the Unit-Rev. St. § 5481 [U. S. Comp. St. 1901, p. 3701], imposing a penalty for extortion.—United States v. Schlierholz (D. C.) 616.

EXTRADITION.

See "Habeas Corpus," § 1.

FACTORS.

See "Principal and Agent."

FAMILY SETTLEMENTS.

See "Descent and Distribution," § 1.

FARMERS.

Bankruptcy proceedings against, see "Bankruptcy," § 1.

FEDERAL COURTS.

See "Courts."
Jurisdiction of habeas corpus, see "Habeas Corpus," § 1.

FEDERAL QUESTIONS.

Ground for jurisdiction, see "Courts," § 2.
Ground for removal of cause, see "Removal of Causes," § 2.

FEES.

Extortion, see "Extortion."
In bankruptcy, see "Bankruptcy," § 10.
In foreclosure proceedings, see "Chattel Mortgages," § 1.

FELLOW SERVANTS.

See "Master and Servant," § 1.

FIDUCIARY RELATIONS.

See "Corporations," § 2.

FILING.

Bond for removal of cause, see "Removal of Causes," § 5.
Claim for mechanic's lien, see "Mechanics' Liens," § 2.

FINDINGS.

Of commissioner of patents, see "Patents," § 4.
Of interstate commerce commission, see "Commerce," § 2.
Review, see "Courts," § 7.

FIRES.

Caused by operation of railroad, see "Railroads," § 2.
Liability of city for failure to maintain water supply, see "Municipal Corporations," § 4.

FOG.

Collision of vessels, see "Collision," § 5.

FOOD.

The removal of stamps and caution notices from original packages of renovated butter, which was the subject of interstate commerce, held to constitute an offense under Oleomargarine Act Cong. May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1905, p. 205], construed in connection with Act March 3, 1891, c. 555, 26 Stat. 1084, as amended by Act March 1, 1895, c. 189, 28 Stat. 732 [U. S. Comp. St. 1901, p. 3189]—United States v. Green (D. C.) 179.

FORECLOSURE.

Of mortgage, see "Chattel Mortgages," § 1; "Corporations," § 3.

FORFEITURES.

Of insurance, see "Insurance," § 3.
Of rights in streets, see "Municipal Corporations," § 3.

FORMER ADJUDICATION.

See "Judgment," § 5.

FORMS OF ACTION.

See "Ejectment."
In federal courts, see "Courts," § 5.

FRANCHISES.

See "Street Railroads," § 1.
Validity of contract to procure, see "Contracts," § 1.

FRAUD.

Vitiation of contract procured by, see "Contracts," § 1.

By particular classes of persons.

Agent, see "Principal and Agent," § 1.

In particular classes of conveyances, contracts, or transactions.

See "Contracts," § 1; "Insurance," § 2; "Judgment," §§ 1, 3, 4.
Family settlements, see "Descent and Distribution," § 1.

Particular remedies.

Collateral attack on judgment, see "Judgment," § 4.
Setting aside judgment, see "Judgment," §§ 1, 3.

§ 1. Deception constituting fraud, and liability therefor.

A complaint, alleging that defendant falsely represented to plaintiff that others had agreed to accept bonds in part payment of mining property, to induce plaintiff to accept the same in part payment for her property, *held* to state a cause of action for deceit.—Kimber v. Young (C. C. A.) 744.

A representation, made to induce the purchase of certain bonds, that their provisions must be met by the corporation, whether or no, *held* a mere statement that the bonds constituted a legal obligation of the corporation, and was insufficient to sustain an action for deceit.—Kimber v. Young (C. C. A.) 744.

In an action for deceit, either knowledge on the part of defendant of the falsity of the alleged representations, or what in law is equivalent thereto, must be averred and proved.—Kimber v. Young (C. C. A.) 744.

False statements made by defendant to induce a sale of corporate bonds *held* mere statements of opinion, and insufficient to render defendant liable for deceit.—Kimber v. Young (C. C. A.) 744.

Evidence that defendant made false representations to a note broker with reference to certain notes, which the broker sold to plaintiff, *held* insufficient to sustain an action by plaintiff against defendant for deceit, without proving that the representations were repeated to plaintiff, and that it relied thereon.—Chemical Bank v. Lyons (C. C.) 976.

FRAUDS, STATUTE OF.

§ 1. Requisites and sufficiency of writing.

A written and signed offer, which is accepted, either in writing or orally, constitutes a sufficient memorandum of contract under the statute of frauds.—In re Pettingill & Co. (D. C.) 143; Ex parte Peters, Id.; Ex parte Chicago Newspaper Union, Id.; Ex parte Peirson, Id.; Ex parte Burlington Hawkeye, Id.; Ex parte Kellogg Newspaper Co., Id.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 3.

FREIGHT.

Order of interstate commerce commission for restitution of charges, see "Commerce," § 2.

GARNISHMENT.

See "Execution."

§ 1. Persons and property subject to garnishment.

An employer's liability insurance policy *held* a contract of indemnity from loss, and not from liability, so that the insurer was not liable to insured's attaching creditor for loss until after payment thereof by insured.—Allen v. Gilman, McNeil & Co. (C. C.) 136.

Where a judgment creditor of the holder of an employer's liability policy garnished the insurer, such creditor was only entitled to enforce the rights of the debtor, if any, against

llen v. Gilman, McNeil & Co.

GAS.

Minerals," § 3.

GASOLINE.

OOD FAITH.

equitable relief, see "Specific § 3.
"Sales," § 4.

GRANTS.

ee "Public Lands."

GUARANTY.

d Surety."
gainst bankrupt on guaranty e "Bankruptcy," § 6.

IAN AND WARD.

rd as affecting jurisdiction of ee "Courts," § 3.

EAS CORPUS.

ion, proceedings, and re-

a writ of habeas corpus *held* se for federal interference on regularity in extradition pro- of the rule of the Supreme rge measure of credence and ust be accorded to proceedings nor in such cases.—Ex parte 54.

a writ of habeas corpus by a *ld* to state grounds for inter- eral court.—Ex parte Moebus

§§ 753, 761 [U. S. Comp. St. 94], the federal courts *held* to to release on habeas corpus United States held in custody r omitted under authority vest- e laws of the United States, s no act of Congress covering se.—In re Leaken (C. C.) 680.

MLESS ERROR.

ee "Appeal and Error," § 4.

HEALTH.

HEARING.

kruptcy proceedings, see "Bank-

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Municipal Corporations," § 3; "Navigable Waters," § 1.
Accidents at railroad crossings, see "Railroads," § 2.
Rights of telegraph company, see "Telegraphs and Telephones," § 1.

HUSBAND AND WIFE.

Estoppel by judgment, see "Judgment," § 5.

§ 1. Mutual rights, duties, and liabilities.

Under Va. Code 1887, § 2284 et seq. [Va. Code 1904, p. 1139], a husband's presumptive right of curtesy in his wife's land *held* not to entitle him to possession or use of the land, or its rents and profits, during coverture.—King v. Davis (C. C.) 222.

§ 2. Actions.

A wife owning certain property recovered in an ejectment suit, who was not a party thereto, *held* entitled to have the judgment set aside and be permitted to defend, but was not entitled to an order restraining the execution of the judgment as against her.—King v. Davis (C. C.) 222.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 1.

IMPLIED CONTRACTS.

See "Money Paid."

IMPLIED WARRANTY.

See "Sales," § 5.

IMPORTS.

See "Commerce," § 1.
Duties, see "Customs Duties."

IMPRISONMENT.

See "Bail."
Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."
Of navigable waters, see "Navigable Waters," § 1.
Patents for, see "Patents," § 1.
Public improvements, see "Municipal Corporations," § 2.

INCORPORATION.

Of insurance company, see "Insurance," § 6.

INDEMNITY.

See "Principal and Surety."
By corporation purchasing property and assets of other corporation, see "Corporations," § 4.

INFANTS.

See "Adoption"; "Domicile."
Effect of infancy on limitations, see "Limitation of Actions," § 2.

§ 1. Property and conveyances.

Rev. Codes N. D. 1899, § 5108, suspending limitations for the time within which suits on real property may be made during minority of parties, *held* inapplicable to section 5491a, providing a 10-years period of adverse possession, when accompanied by payment of taxes and assessments.—Schauble v. Schulz (C. C. A.) 389.

INFRINGEMENT.

Of patent, see "Patents," § 7.
Of trade-mark, see "Trade-Marks and Trade-Names," § 3.

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

In particular actions or proceedings.

For infringement of copyright, see "Copyrights," § 2.

Restraining particular acts or proceedings.

Collection of sewer assessment, see "Municipal Corporations," § 2.
Execution in ejectment, see "Ejectment," § 2.
Execution of judgment against property of wife, see "Husband and Wife," § 2.
Infringement of patent, see "Patents," § 7.
Infringement of trade-mark and unfair competition in trade, see "Trade-Marks and Trade-Names," § 3.

§ 1. Subjects of protection and relief.

Complainant *held* entitled to an injunction restraining defendant from advertising that he would purchase complainant's nontransferable trading stamps, and from selling the same as articles of merchandise, but not to restrain him from purchasing them.—Sperry & Hutchinson Co. v. Temple (C. C.) 902.

§ 2. Permanent injunction and other relief.

Equity has no inherent power to ascertain the damages sustained by reason of a tort, unattended with profits to the wrongdoer.—Corbin v. Taussig (C. C.) 151.

Where a party has the exclusive agency for sale of manufactured articles within a certain territory, a recovery in equity against a third party invading such territory is limited to the damages or benefits derived by the offending party.—Corbin v. Taussig (C. C.) 151.

Where plaintiff has exclusive agency for sale of articles manufactured by another within certain territory, to determine profits derived from sales made by third party invading such territory, offending party can offset expenses in making them.—Corbin v. Taussig (C. C.) 151.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSOLVENCY.

See "Bankruptcy."
Of insurance company, see "Insurance," § 6.

INSTRUCTIONS.

In civil actions, see "Trial," § 5.

INSURANCE.

Admissions by demurrer in suit to dissolve association, see "Pleading," § 3.
Bankruptcy proceedings against association of underwriters, see "Bankruptcy," § 1.
Change from assessment to old line plan as impairment of obligation of contract, see "Constitutional Law," § 1.
Election of remedy on change of assessment to old line company, see "Election of Remedies."
Garnishment of liability on employer's liability policy, see "Garnishment," § 1.
State laws as rules of decision in federal courts, see "Courts," § 6.

§ 1. The contract in general.

Where questions asked by an insurance company in an application were of doubtful import, insurer was bound by an answer to which the questions were properly susceptible.—Mutual Reserve Life Ins. Co. v. Dobler (C. C. A.) 550.

§ 2. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Facts *held* insufficient to establish the untruthfulness of certain statements in an application for insurance, to the effect that insured had not recently consulted a physician for any ailment.—Mutual Reserve Life Ins. Co. v. Dobler (C. C. A.) 550.

Failure of insured to disclose certain accident policies held by him, in answer to questions with reference to other insurance, *held* not a breach of warranty.—Mutual Reserve Life Ins. Co. v. Dobler (C. C. A.) 550.

§ 3. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

An extension provision for the payment of dues and premiums on a policy *held* to relate to both, so that, if either was not paid within the extended period, the policy would be for-

v. Mutual Reserve Fund Life
).

d causes of loss.
ood poisoning resulting from an
l by deceased in an altercation
ld a death by accident within
accident policy.—Carroll v. Fi-
y Co. of New York (C. C.) 1012.
from which deceased died was
tercation constituting a breach
ld no defense to an accident
v. Fidelity & Casualty Co. of
) 1012.

on policies.
an insurance policy that no
brought after the lapse of one
ate of insured's death is valid.
ual Reserve Fund Life Ass'n

benefit insurance.
insurance association *held* au-
ge from the assessment to the
r the protest of a minority of
-Iversen v. Minnesota Mut.
. C.) 268.

ssolve an assessment insurance
ence *held* insufficient to estab-
ion's insolvency.—Polk v. Mu-
nd Life Ass'n (C. C.) 273.

n insurance association having
st in its assets, on becoming
a change of plan, *held* only
redress at law, in the absence
nt by the association's officers.
l Reserve Fund Life Ass'n (C.

n of an insurance association
ith New York Insurance Law,
955, c. 690, § 52, as amended by
779, c. 722, *held* not to operate
a new corporation.—Polk v.
Fund Life Ass'n (C. C.) 273.

y holders and the insurer must
n connection with the constitu-
d certificates of insurance con-
ntract between the parties.—
Reserve Fund Life Ass'n (C.

as to the place of the contract
l the laws by which it should
construed *held* binding on both
t impaired the express provi-
act or conflicted with the laws
ere it was made.—Polk v. Mu-
nd Life Ass'n (C. C.) 273.

INTENT.

"Deeds," § 1.
"Wills," § 1.

INTEREST.

see "Licenses."

nd liabilities in general.
vas long delay in prosecuting a
or services in raising a sunken vessel, and the claim made was excessive, and, owing to the fact that complainant had a monopoly of such work, it was difficult for defendant to obtain proof as to the value of the services, interest should not be allowed.—Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cumings Dredging Co. (C. C. A.) 780.

INTERNAL REVENUE.

Declaration on indemnity bond given by distiller *held* insufficient, as the act prescribing the penalty should be set forth with reasonable certainty, and the act authorizing the commissioner of internal revenue to make regulations and the fact that they were made by him as well as the regulations thus authorized and made which were violated.—United States v. Zemel (C. C.) 989.

INTERNATIONAL LAW.

See "Aliens."

INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

INTERSTATE COMMERCE COMMISSION.

See "Carriers," § 1; "Commerce," § 2.

INTERVENTION.

Citizenship of interveners, see "Courts," § 3.
In bankruptcy proceedings, see "Bankruptcy," § 1.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

See "Customs Duties," § 2.

INVENTION.

See "Patents."

ISSUES.

See "Admiralty," § 1.

JOINDER.

Of causes of action, see "Action," § 1; "Equity," § 1.

JUDGES.

See "Courts."
Presentation to, of petition for removal of cause, see "Removal of Causes," § 5.

JUDGMENT.

Amendment of service of process on scire facias to revive judgment, see "Process," § 2.
Effect in federal courts of decisions of state courts, see "Courts," § 6.
Following state practice in proceedings to revive, see "Courts," § 5.
Review, see "Appeal and Error"; "Courts," § 7.
Review in deportation proceedings, see "Aliens," § 1.

In particular civil actions or proceedings.
See "Ejectment," § 2.
By interstate commerce commission, see "Commerce," § 2.
Decree in admiralty, see "Admiralty," § 2.
Decree in equity, see "Equity," § 3.

§ 1. By default.

Federal courts of equity having jurisdiction under Rev. St. U. S. § 723 [U. S. Comp. St. 1901, p. 583], to set aside judgments recovered at law for fraud, a judgment in a federal court of law could not be vacated therein for fraud.—King v. Davis (C. C.) 198.

Where, in ejectment, there was no necessity of an inquiry, the entry of an order reciting that defendants' time to answer had expired, and setting the case for inquiry, was equivalent to an order making the office judgment final.—King v. Davis (C. C.) 198.

The entry of an order reciting the expiration of defendants' time to plead in ejectment, and directing service of notice of the setting of the case for inquiry, *held* a mere irregularity, not affecting the validity of a final judgment subsequently entered.—King v. Davis (C. C.) 198.

Where no statement of damages was filed in ejectment requiring an inquiry, under Va. Code 1887, § 2751 [Va. Code 1904, p. 1412], the court, at the term following an office judgment by default, or at any subsequent term, was entitled to render judgment for possession, and make the office judgment final, without setting the cause for inquiry at the next term.—King v. Davis (C. C.) 198.

The office judgment on default in ejectment, cannot in any case become final without the intervention of the court or jury.—King v. Davis (C. C.) 198.

Where, on scire facias to revive a default judgment in ejectment, it appeared that the service was void as to two of the defendants, the judgment would be set aside as to them, either under their motions to vacate the same or their pleas of nul tiel record.—King v. Davis (C. C.) 198.

Under Va. Code 1887, §§ 2733, 3287 [Va. Code 1904, pp. 1406, 1728], failure of plaintiff in ejectment to serve a rule to plead, required by an order of the court, where there had been no appearance, *held* not to authorize a vacation of a default judgment long after the term of its rendition, on the ground of surprise.—King v. Davis (C. C.) 198.

A defendant in ejectment *held* bound by a judgment, notwithstanding the misspelling of his name in the process served on him.—King v. Davis (C. C.) 198.

Where petitioners' grantor purchased land from defendants in ejectment, in a federal court, after judgment a petition to set aside such judgment and permit petitioner to defend *held* insufficient to show that petitioners were bona fide purchasers for value and were not bound by the judgment, within Act Aug. 1, 1888, c. 729, 25 Stat. 357 [U. S. Comp. St. 1901, p. 701], or Va. Acts 1889–90, p. 22, c. 23.—King v. Davis (C. C.) 222.

Where a husband had no interest in property sued for until after the death of his wife pendente lite, who held the title, he was entitled on the death of his wife to have a judgment against him by default vacated and be permitted to defend.—King v. Davis (C. C.) 222.

Where process, notices, etc., were properly served on a defendant in ejectment instituted in 1896, but the case was retired from the docket without judgment against her in 1900, she was entitled to notice before subsequent rendition of judgment against her.—King v. Davis (C. C.) 222.

Where, on motion to vacate a judgment based on invalid returns of constructive service, a motion to amend the return was made, which amendment disclosed a valid service, the motion to dismiss would not be granted if the facts stated in the amendment were true.—King v. Davis (C. C.) 222.

§ 2. On trial of issues.

Where several defendants are sued jointly for negligence, causing personal injury to the plaintiff, to warrant a joint judgment against the defendants, the evidence must satisfactorily show that the acts of negligence co-operated concurrently or in continuous successive order, producing the common result.—Waters-Pierce Oil Co. v. Van Elderen (C. C. A.) 557; Chambers v. Same. Id.

§ 3. Opening or vacating.

An erroneous judgment that the return of service of a notice of an application for leave to amend a declaration in ejectment was sufficient *held* not an error of law sufficient to justify vacation of the final judgment.—King v. Davis (C. C.) 198.

Erroneous findings of fact in ejectment with reference to the giving of notice of an application to amend the declaration, and of a rule to plead, *held* immaterial, and therefore insufficient to justify vacation of a final judgment in favor of plaintiff.—King v. Davis (C. C.) 198.

Where a landlord had no notice of ejectment brought against his tenant in time to have made himself a party, he was entitled, before execution of a writ of possession, to have a default judgment against the tenant opened and to be allowed to defend.—King v. Davis (C. C.) 198.

A federal court of law *held* without power after the term to set aside a judgment based on the fraudulent service by a private person, whether plaintiff participated in the fraud or not.—King v. Davis (C. C.) 222.

ral attack.
ment in ejectment was recovered
defense in a collateral proceeding
to revive the judgment.—King
) 198.

siveness of adjudication.
ant only was sued in ejectment,
d entered, before execution of a
ver of the plaintiff, either by
ough another tenant, such judg-
operate as an estoppel or res
t the landlord, under Va. Code
a. Code 1904, p. 1414].—King v.
98.

e time a husband was sued in
property belonged to his wife,
sued, and died pendente lite, a
st the husband did not operate
to the life estate acquired by
's death.—King v. Davis (C. C.)

sion, enforcement, and re-

as to revive a judgment by de-
ent, a plea by a tenant of a part
leging his tenancy and a surren-
ion, *held* insufficient to prevent
st him.—King v. Davis (C. C.)

as to revive a judgment in eject-
ying service, and alleging service
rized person, *held* not objection-
. Code 1887, § 3264 [Va. Code
—King v. Davis (C. C.) 198.

ire facias to revive a judgment,
of process, *held* a collateral at-
gment, on which defendants were
controvert the record by evidence
v. Davis (C. C.) 198.

JUDICIAL SALES.

f decedent, see "Executors and
rs," § 3.

JURISDICTION.

troversy, see "Courts," § 4.

particular actions or proceedings.
Corpus," § 1; "Specific Perform-

see "Bail," § 1.

pecial jurisdictions.
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diction, see "Courts," § 7.
rts, see "Courts,"

JURY.

onduct, see "Trial," § 6.
civil actions, see "Trial," § 5.
jury in civil actions, see "Trial,"

question from jury at trial, see

KNOWLEDGE.

Of falsity of statements, see "Fraud," § 1.

LACHES.

In suing to set aside sale of property of decedent, see "Executors and Administrators," § 3.
In suit for infringement of patent, see "Patents," § 7.

LAND DEPARTMENT.

Extortion by special agent, see "Extortion."

LANDLORD AND TENANT.

Estoppel by judgment against tenant, see "Judgment," § 5.
Liability of lessor of railroad for injuries to employé of lessee, see "Railroads," § 2.
Liability of lessor of railroad for violation of interstate commerce act, by lessee, see "Carriers," § 1.

§ 1. Rent and advances.
On the bankruptcy of a tenant, the landlord, having accepted a surrender of the premises, *held* not entitled to enforce a covenant that in case of bankruptcy the rent for the remainder of the term shall immediately mature and be collectible.—In re Winfield Mfg. Co. (D. C.) 984.

LANDS.

See "Public Lands."

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."
Vesting in trustee in bankruptcy, see "Bankruptcy," § 2.

LEGISLATIVE POWER.

See "Municipal Corporations," § 1.

LETTERS PATENT.

For inventions, see "Patents."

LIBEL AND SLANDER.

§ 1. Justification and mitigation.
In an action for libel, a requested instruction as to the publication of a "correction" *held* properly refused.—Post Pub. Co. v. Butler (C. C. A.) 723.

Under Const. Ohio, art. 1, § 16, Rev. St. Ohio § 5094, providing that a retraction of a libel etc., published on demand, shall operate to re but the presumption of malice, should be con

statute to apply only to cases in which the person libeled has demanded the publication of a retraction.—Post Pub. Co. v. Butler (C. C. A.) 723.

§ 2. Actions.

In an action for the publication of a libelous telegram, received by defendant from a press association, evidence as to the origin of the telegram, not known to defendant prior to the publication, was inadmissible.—Post Pub. Co. v. Butler (C. C. A.) 723.

In an action for libel, evidence *held* to justify an award of punitive damages.—Post Pub. Co. v. Butler (C. C. A.) 723.

LICENSES.

Imposition of tax as denial of due process of law, see "Constitutional Law," § 2.

§ 1. For occupations and privileges.

Where a corporation was liable to pay the state one-tenth of 1 per cent. annually on the amount of stock outstanding on January 1st, the fact that, after that date in a certain year, and before such liability matured, it reduced its outstanding capital, was immaterial.—In re Cosmopolitan Power Co. (C. C. A.) 858; State of New Jersey v. Anderson, Id.

A state statute imposing an annual license fee on corporations held not a franchise or property tax, but an imposition which corporations subsequently organized contracted by their charters to pay.—In re Cosmopolitan Power Co. (C. C. A.) 858; State of New Jersey v. Anderson, Id.

A statutory liability of a corporation to the state creating it held not to constitute a contractual obligation until the date specified for payment, and therefore bore no interest prior to such date.—In re Cosmopolitan Power Co. (C. C. A.) 858; State of New Jersey v. Anderson, Id.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.
Secured claims in bankruptcy, see "Bankruptcy," § 6.
Subrogation to rights under, see "Subrogation."

Particular classes of liens.

See "Maritime Liens"; "Mechanics' Liens"; "Salvage," § 3.
On mining property, see "Mines and Minerals," § 3.
On railroad, see "Railroads," § 1.

LIFE INSURANCE.

See "Insurance."

LIMITATION.

Of claim of patent, see "Patents," § 5.
Of time of street railway franchises, see "Street Railroads," § 1.

LIMITATION OF ACTIONS.

See "Adverse Possession."
Creation of title by adverse possession as denial of due process of law, see "Constitutional Law," § 2.
On insurance policy, see "Insurance," § 5.

§ 1. Statutes of limitation.

Code Civ. Proc. Or. § 4, with reference to suspension of limitations, having become fully operative in Alaska by Act Cong. May 17, 1884 (chapter 53, 23 Stat. 24), it did not become again operative on its being introduced in the Alaska Civil Code by Act Cong. June 6, 1900 (chapter 786, 31 Stat. 321).—Tyee Consol. Min. Co. v. Jennings (C. C. A.) 863.

§ 2. Computation of period of limitation.

A statute of limitations, containing no saving clause exempting infants, puts them on the same footing as adults.—Schauble v. Schulz (C. C. A.) 389.

Rev. St. Utah 1898, § 2870, limiting suits to set aside executor's conveyances, *held* to run during the minority of the complainant.—Williamson v. Beardsley (C. C. A.) 467; Same v. Schoppe, Id.

Where a deed conveyed land to the grantor's daughter for life and her minor children, as under Code Iowa 1897, § 4223, an action to quiet title to real property may be brought by anyone claiming an interest therein, the two children living at the time of the grant, under section 3453 of the Code, *held* barred from bringing an action to quiet title one year after their coming of age, when ten years had at that time expired from the time of the execution of the deed.—Hubbird v. Goin (C. C. A.) 822.

LIMITATION OF LIABILITY.

Of carrier, see "Carriers," § 2.
Of owner of vessel, see "Shipping," § 5.

LIMITED PARTNERSHIP.

See "Partnership," § 3.

LIS PENDENS.

Following state laws, in federal courts, see "Courts," § 6.
Pendency of other action ground for abatement, see "Abatement and Revival," § 1.

A landlord, who was not a party to and had no notice of an ejectment suit against her tenant until after judgment by default, *held* entitled to convey the land, and her right to have the judgment opened and be permitted to defend, to a purchaser, innocent or otherwise.—King v. Davis (C. C.) 222.

The holder of an independent title to land sued for in ejectment, who was not a party, having acquired possession by purchase from defendants in such suit, was subject to the execution of a writ of possession on the judgment in favor of plaintiff, though his independent title

ıdicated.—King v. Davis (C.

was brought by a third per-
ıt alone, a purchaser from the
lite *held* not entitled to have
ion in favor of plaintiff re-
sence of an allegation that the
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ARY PROPERTY.

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see "Mines and Minerals,"

AND LOGGING.

es, see "Property."

ontract, which is partial, and
full scope and consideration
does not excuse further per-
other party, nor give him a
until such performance has
v him so far as possible.—
Lumber Co. v. Edward Hines
.) 300.

sawing logs, as extended by
greement, construed.—Barker
r Co. v. Edward Hines Lum-
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LOOKOUT.

Collision," § 4.

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leral court, see "Courts," § 1.

ITIME LIENS.

"Salvage," § 3.

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of British North America v.
The Hutton (C. C. A.) 534;
etc., of The Ansgar, Id.

n for repairs or supplies fur-
el in her home port on the
ers, unless given by the local
n case the provisions of such
owed, or no lien is acquired.
) 133.

§ 2. Creation, operation, and effect.

Where a check was drawn by an agent against a trust deposit for his own purposes, and before the check was shown to have been delivered the agent deposited other money to the credit of the account, such money should be applied to pay the check in exoneration of the trust deposit.—Bank of British North America v. Freights, etc., of The Hutton (C. C. A.) 534; Same v. Freights, etc., of The Ansgar, Id.

A bank's maritime lien on freight for advances made to a charterer *held* not to terminate on the charterer's collection and mingling the freight with his own funds.—Bank of British North America v. Freights, etc., of The Hutton (C. C. A.) 534; Same v. Freights, etc., of The Ansgar, Id.

§ 3. Enforcement.

A bank having a maritime lien for advances on freight *held* entitled to enforce the same in admiralty, though it also had a lien enforceable in equity.—Bank of British North America v. Freights, etc., of The Hutton (C. C. A.) 534; Same v. Freights, etc., of The Ansgar, Id.

MARRIAGE.

See "Husband and Wife."

MARRIED WOMEN.

See "Husband and Wife."

MASTER.

Negligence as to seamen, see "Seamen."

MASTER AND SERVANT.

See "Seamen."
Contributory negligence of servant injured by collision of trains, see "Railroads," § 2.
Discharge of surety on contractor's bond, see "Principal and Surety," § 1.
Expert testimony in action for death of or injuries to servant, see "Evidence," § 2.
Garnishment of liability on employers' liability insurance, see "Garnishment," § 1.
Harmless error in action for personal injuries, see "Appeal and Error," § 4.
Liability of lessor of railroad for injuries to employé of lessee, see "Railroads," § 2.
Right of employer to patent for invention by employé, see "Patents," § 3.

§ 1. Master's liability for injuries to servant.

In an action for injuries to a brakeman by striking a low trestle, evidence of his knowledge or means of knowledge thereof *held* not such as to require a finding that he assumed the risk as a matter of law.—Pittsburgh, S. & N. R. Co. v. Lamphere (C. C. A.) 20.

In an action for injuries to a brakeman by striking a low trestle, instructions given *held* not mere abstract propositions not applicable to the facts.—Pittsburgh, S. & N. R. Co. v. Lamphere (C. C. A.) 20.

Where the place in which an employé was required to work and where he was injured was only dangerous because of the negligence of his fellow workmen in carrying on the work, the risk from such danger was one which was assumed, and the master cannot be held liable for the injury.—Ibey v. Lodge & Shipley Mach. Tool Co. (C. C. A.) 481.

The injury of an employé held to have resulted from the negligent manner in which the work about which he was engaged was done by his fellow servants, for which the master was not liable.—Ibey v. Lodge & Shipley Mach. Tool Co. (C. C. A.) 481.

The killing of a railroad engineer by a landslide while on his regular run held due to accident, for which the company was not liable and which was a risk assumed by the employé.—Kinnaird v. Atlanta, K. & N. Ry. Co. (C. C. A.) 480.

In an action for death of a railroad section hand, the declaration, failing to charge that defendant or its vice principal knew or should have known that deceased was inexperienced or ignorant of the dangers attendant on the service he was ordered to perform, held demurrable.—O'Connor v. Atchison, T. & S. F. Ry. Co. (C. C. A.) 505.

A railroad section hand engaged in dumping a gravel car held a fellow servant with the operatives of an engine attached to such car.—O'Connor v. Atchison, T. & S. F. Ry. Co. (C. C. A.) 505.

Evidence of negligence of a mining company in connection with the injury of an employé held insufficient to warrant the submission of the question to the jury in an action by the employé for damages.—Diamond Coal & Coke Co. v. Albo (C. C. A.) 705.

A fireman on a passenger engine *held* a fellow servant with the conductor of a passenger train approaching in an opposite direction, for whose negligence, resulting in the fireman's death, the railroad company was not liable.—Crosby v. Lehigh Valley R. Co. (C. C. A.) 765.

A railroad conductor in violating a train order resulting in a collision in which the fireman of another train was killed held not in the exercise of superintendence within N. Y. Employers' Liability Act, Laws 1902, p. 1742, c. 600.—Crosby v. Lehigh Valley R. Co. (C. C. A.) 765.

In an action for death of a car repairer, evidence held insufficient to establish that a rule requiring repairers to protect cars they were working on had become fixed to obtain by frequent violation.—Canadian Pac. Ry. Co. v. Elliott (C. C. A.) 804.

Evidence that car repairers had only protected cars when they were working "under" the same held inadmissible to show a customary violation of a subsequent rule, requiring the protection of cars when repairers were working "under or about them."—Canadian Pac. Ry. Co. v. Elliott (C. C. A.) 804.

Where a car repairer was killed while working on a car which he failed to protect by signals, as required by a rule of his employer, he assumed the risk precluding a recovery for his death.—Canadian Pac. Ry. Co. v. Elliott (C. C. A.) 804.

§ 2. Liabilities for injuries to third persons.

A person visiting a public building in course of construction by invitation of the contractor or his superintendent in charge is not a trespasser, because of a notice posted warning the general public to keep out, and he does not assume the risk of injury from the negligence of the contractor or his servants.—De Haven v. Hennessey Bros. & Evans Co. (C. C. A.) 472.

The question of the liability of a contractor engaged in building a courthouse for an injury to plaintiff, who visited the building by invitation of the superintendent in charge, which resulted from the falling of an elevator through the gross carelessness of the man in charge, *held* a question for the jury under all the facts shown.—De Haven v. Hennessey Bros. & Evans Co. (C. C. A.) 472.

MATERIALS.

Mechanic's lien for, see "Railroads," § 1.

MEASURE OF DAMAGES.

See "Damages," § 1.

MECHANICS' LIENS.

Joinder of causes of action, see "Equity," § 1. On mining property, see "Mines and Minerals," § 3.

On railroad, see "Railroads," § 1.

§ 1. Right to lien.

A contractor for the construction of a mill, machinery, etc., failing to complete his contract within the time specified, *held* not entitled to a special lien on the real estate for the contract price under Code Ga. 1895, §§ 2801, 2804.—D. A. Tompkins Co. v. Monticello Cotton Oil Co. (C. C.) 625.

§ 2. Proceedings to perfect.

Extra machinery and materials furnished by a contractor for the equipment of a mill, and made necessary by changes in the specifications by the owner, are to be regarded as having been furnished under the original, and not under an independent, contract.—Salt Lake Hardware Co. v. Chainman Mining & Electric Co. (C. C.) 632.

Mechanic's lien statutes are to be construed so as to effect substantial justice, and a lien will not be held void because the statement filed claimed more than was actually due, where it was the result of mistakes, and without fraud or wrongful intent.—Salt Lake Hardware Co. v. Chainman Mining & Electric Co. (C. C.) 632.

A claim for a mechanic's lien for machinery and equipment for a mill furnished and installed under a contract *held* to have been filed within the time allowed by statute after the comple-

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g & Electric Co. (C. C.) 632.

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t.—Westinghouse Air Brake
Southern Ry. Co. (C. C. A.)

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Brake Co. v. Kansas City
C. C. A.) 26.

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act will not revive a lien for
has once been destroyed.—
Brake Co. v. Kansas City
(C. C. A.) 26.

L TREATMENT.

MORANDA.

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AND MINERALS.

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U. S. §§ 2322, 2324 [U. S.
. 1425, 1426], and Act Cong.
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essment work until after De-
Malone v. Jackson (C. C. A.)

recover a mining claim de-
n *held* to give him exclusive
year from the date thereof.—
(C. C. A.) 878.

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e ground that defendant was
—Malone v. Jackson (C. C.

veyances, and contracts.

recover an interest in a min-
held insufficient to show that
nocent purchaser without no-
equity.—Shields v. Mongollon
C. C. A.) 539.

Adverse possession of a mining claim in the territory of Alaska as against the locator or his successors in interest cannot be instituted before the issuance of a patent therefor by the United States.—Tyee Consol. Min. Co. v. Jennings (C. C. A.) 863.

§ 3. Operation of mines, quarries, and wells.

In a suit for specific performance of a contract to convey a certain interest in a mining claim in consideration of complainants sinking three holes to bedrock, evidence *held* to sustain a finding of performance by complainants.—Meehan v. Nelson (C. C. A.) 731.

A contract to convey an interest in a mining claim in consideration of the sinking of holes to bedrock *held* performed if any part of each hole extended to bedrock.—Meehan v. Nelson (C. C. A.) 731.

Where the business of manufacturing was only incidental to that of mining natural gas, as shown by the incorporation certificate of a corporation organized under Rev. St. Ind. 1881, c. 35, it was not entitled to manufacture artificial gas for fuel and light, as against dissenting stockholders, by Acts 1903, p. 147, c. 73.—Consumers' Gas Trust Co. v. Quinby (C. C. A.) 882.

That a stock subscription contract provided that, after payment of the subscription, with interest, no further dividends should be paid, *held* not to deprive the stockholders of the right to have the corporation dissolved and its assets administered for their benefit on termination of its business.—Consumers' Gas Trust Co. v. Quinby (C. C. A.) 882.

A corporation organized under Rev. St. Ind. 1881, c. 35 (Burns' Ann. St. 1901, § 5051), and Burns' Ann. St. 1894, § 5099, to drill and mine for natural gas and furnish the same to consumers, *held* without power, after the supply was exhausted, to manufacture and distribute artificial gas.—Consumers' Gas Trust Co. v. Quinby (C. C. A.) 882.

A mechanic's lien under the Nevada statute (Cutt. Comp. Laws, § 3881 et seq.) for machinery and equipment for a mill and reduction works built on mining property *held* to extend to the group of mines composing such property, and to reduce the ores from which the mill was built.—Salt Lake Hardware Co. v. Chainman Mining & Electric Co. (C. C.) 632.

MINORS.

See "Adoption"; "Infants."

MISJOINDER.

Of causes of action, see "Action," § 1.

MISREPRESENTATION.

See "Fraud."
By insured, see "Insurance," § 2.

MISTAKE.

Ground for avoiding family settlement, see "Descent and Distribution," § 1.
Ground for reformation of deed, see "Reformation of Instruments," § 1.

MITIGATION.

Of damages, see "Libel and Slander," § 1.

MONEY.

Valuation on importation, see "Customs Duties," § 3.

MONEY PAID.

Evidence to establish the amount of plaintiff's creditor held properly admitted under the allegations of their pleading.—Rudel v. Lesher (C. C.) 719.

MORTGAGES.

By bankrupt, see "Bankruptcy," § 3.
By or to corporations, see "Corporations," § 3.
Claim for against estate of bankrupt, see "Bankruptcy," § 6.
Of personal property, see "Chattel Mortgages."
Of railroads, see "Railroads," § 1.
Pendency of foreclosure suit as bar to action on note, see "Abatement and Revival," § 1.

MOTIONS.

Opening or setting aside default judgment, see "Judgment," § 1.

MULTIFARIOUSNESS.

See "Equity," § 1.
In pleading in suit for infringement of patent, see "Patents," § 7.

MUNICIPAL CORPORATIONS.

See "Counties," "Towns."
Bringing in third party in action for damages from public improvements, see "Parties," § 2.
Deprivation of remedy on railroad aid bonds as impairing obligation of contracts, see "Constitutional Law," § 1.
Exercise of power of eminent domain, see "Eminent Domain."
Imposition of license tax, for dealing in trading stamps as denial of due process of law, see "Constitutional Law," § 2.
Street railroads, see "Street Railroads."

§ 1. Legislative control of municipal acts, rights, and liabilities.

Terr. Act Neb. Jan. 25, 1866, vacating streets and alleys in the town of Columbus to the Union Pacific Railroad Company, *held* a valid exercise of the legislative power under Organic Act, § 6.—City of Columbus v. Union Pac. R. Co. (C. C. A.) 869.

§ 2. Public improvements.

A stipulation in a contract for construction of a sewer, making the engineer judge of the amount and character of the work, *held* valid.—Guild v. Andrews (C. C. A.) 369.

To destroy conclusive character of engineer's estimate of the amount and character of the work, gross mistakes must imply bad faith.—Guild v. Andrews (C. C. A.) 369.

In an action to recover damages for failure to construct sewer in accordance with contract with sewer district, instructions assuming that the district would be concluded by mistake of inspectors appointed by the engineer *held* erroneous.—Guild v. Andrews (C. C. A.) 369.

Under a contract for the paving of a street, a resurfacing *held* a repair.—American Bonding Co. v. City of Ottumwa (C. C. A.) 572.

Where a bill to restrain collection of a special sewer assessment alleged the establishment of the sewer subdistrict, the passage of the ordinance authorizing the improvement, and thereafter the assessing ordinance, it would be presumed that Rev. St. Ohio 1892, §§ 2304, 2374–2376, 2378, were complied with.—Cleneay v. Norwood (C. C.) 962.

An allegation in a bill to restrain the collection of a special sewer assessment *held* not an allegation that the steps required by Rev. St. Ohio 1892, §§ 2304, 2374–2376, 2378, have not been taken.—Cleneay v. Norwood (C. C.) 962.

An allegation, in a bill to restrain collection of a sewer assessment, that the outlet was insufficient to carry off the sewage, *held* not an allegation that the outlet was insufficient to carry off "any" of the sewage.—Cleneay v. Norwood (C. C.) 962.

An assessment for sewer construction *held* not invalid for nonuniformity because of the exemption of certain of the lots fronting on the improvement under Rev. St. Ohio 1892, § 2383.—Cleneay v. Norwood (C. C.) 962.

Under Rev. St. Ohio 1892, § 2370, the exercise of discretion by a city council in determining the outlet for sewers is binding on property owners.—Cleneay v. Norwood (C. C.) 962.

That a village or its officers and agents violated certain statutes and incurred a liability for penalties by turning sewage into a stream *held* no ground for setting aside an assessment for constructing the sewers.—Cleneay v. Norwood (C. C.) 962.

The publication of a resolution declaring the necessity of a sewer, and the filing of plans and plats thereof, as required by Rev. St. Ohio 1892, §§ 2304, 2374–2376, 2378, *held* sufficient notice of the improvements, etc., to property owners.—Cleneay v. Norwood (C. C.) 962.

§ 3. Use and regulation of public places, property, and works.

An ordinance vacating certain streets for railroad purposes *held* not void as a grant or sale because it contained a provision granting to the railroad company the portion of the street vacated.—City of Columbus v. Union Pac. R. Co. (C. C. A.) 869.

73, c. 9, and chapter 11, § a city to pass an ordinance reets to a railroad company ons.—City of Columbus v. C. C. A.) 869.

ed to claim that a railroad ted its rights under certain certain streets, because of ation of the railroad's pas- depots.—City of Columbus o. (C. C. A.) 869.

of waterworks by a munic- Acts Mich. 1875, p. 57, No. ended by Pub. Acts 1879, p. governmental function, car- ability for negligence in its tates v. City of Sault Ste.

ng waterworks under Pub. 57, No. 62, c. 11, § 1, as Acts 1879, p. 247, No. 245, contract to indemnify a user by the city's failure to main- pressure.—United States v. Iarie (C. C.) 258.

NEFIT INSURANCE.

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NAMES.

and Trade-Names."

e in process as affecting de- ee "Judgment," § 1.

NAL BANKS.

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BLE WATERS.

public.

d by the Secretary of War provements in the Chicago he introduction of a current onditional on the district's within a stated minimum.— o. v. Sanitary Dist. of Chi-

grant of permission to the Chicago to connect its chan- go river being unambiguous, of could not be resorted to tional condition.—Corrigan ary Dist. of Chicago (C. C.

preamble of the grant by ar to the Chicago sanitary guaranty on the part of the e rate of current to be in- Chicago river.—Corrigan ary Dist. of Chicago (C. C.

Congress not having attempted to regulate the current in the Chicago River under interstate commerce law, such regulation was within the jurisdiction of the state as to all persons except future Congresses.—Corrigan Transit Co. v. Sanitary Dist. of Chicago (C. C. A.) 851.

Expenditure of money by the United States for the improvement of the Chicago river lying wholly within Illinois *held* not to evidence an intent to exclude the state from the control of the river.—Corrigan Transit Co. v. Sanitary Dist. of Chicago (C. C. A.) 851.

NAVIGATION.

See "Navigable Waters," § 1.

Rules for preventing collisions, see "Collision," § 1.

NEGLIGENCE.

Injuries to seamen, see "Seamen."

Measure of damages, see "Damages," § 1.

By particular classes of parties.

See "Carriers," §§ 2, 3; "Municipal Corporations," § 4; "Street Railroads," § 2.

Employers, see "Master and Servant," § 1.

Railroad companies, see "Railroads," § 2.

Servant, see "Master and Servant," § 2.

Tugs, see "Towage."

Condition or use of particular species of property, works, or machinery.

See "Explosives"; "Railroads," § 2; "Street Railroads," § 2.

Vessels, see "Collision"; "Shipping," § 2.

Contributory negligence.

Of passenger, see "Carriers," § 3.

Of person injured by collision of trains, see "Railroads," § 2.

§ 1. Proximate cause of injury.

In an action to recover damages for the destruction of plaintiff's ocean bulkhead by storm, facts *held* to show that the proximate cause of such destruction was the negligence of defendant in failing to timely and properly send a tug to haul stone to protect the same as agreed.—Mott v. Chew (C. C.) 197.

§ 2. Actions.

Where, in an action for personal injuries, the physical facts contradict mere deductions drawn from isolated facts, and the existence of the facts necessary to show liability rests upon surmises or theory, it is the duty of the court to direct a verdict for defendant.—Waters-Pierce Oil Co. v. Van Elderen (C. C. A.) 557; Chambers v. Same, Id.

Conditions stated which authorize a court to withdraw a question of negligence or contributory negligence from the jury.—Christensen v. Metropolitan St. Ry. Co. (C. C. A.) 708.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEW TRIAL.

Opening or vacating judgment, see "Judgment," § 3.

NEXT OF KIN.

See "Descent and Distribution."

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

See "Bankruptcy," § 1; "Lis Pendens."
Amendment of return of service of process, see "Process," § 2.

To particular classes of parties.

Creditors of bankrupt, see "Bankruptcy," § 1.

NOVATION.

An offer to prove by oral testimony that a contract for a novation was "drawn" by which defendant was to be released from liability on a note was properly rejected where the contract was not produced nor its execution proved.—Franklin v. Conrad-Stanford Co. (C. C. A.) 737.

NUNC PRO TUNC.

Order as to proof of claims in bankruptcy, see "Bankruptcy," § 6.

OBJECTIONS.

To jurisdiction, see "Courts," § 1.
To writ of error, see "Appeal and Error," § 2.

OBLIGATION OF CONTRACT.

Authority in federal courts of decisions of state courts impairing, see "Courts," § 6.
Laws impairing, see "Constitutional Law," § 1.

OFFER.

See "Sales," § 1.
Proposals for contract, see "Contracts," § 1.

OFFICE JUDGMENT.

See "Judgment," § 1.

OFFICERS.

Extortion, see "Extortion."
Jurisdiction to release by habeas corpus, see "Habeas Corpus," § 1.

Particular classes of officers.

See "District and Prosecuting Attorneys"; "Receivers."
Corporate officers, see "Corporations," § 2.

OLEOMARGARINE.

See "Commerce," § 1; "Food."

OPENING.

Judgment, see "Judgment," §§ 1, 3.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 2.

OPINIONS.

False statements, see "Fraud," § 1.

ORDERS.

Disobedience of, as contempt, see "Contempt," § 1.
Of interstate commerce commission, see "Commerce," § 2.
Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Imposing license tax for dealing in trading stamps as denial of due process of law, see "Constitutional Law," § 2.
Municipal ordinances, see "Municipal Corporations," §§ 2, 3.
Street railroad franchises, see "Street Railroads," § 1.

PARENT AND CHILD.

See "Adoption"; "Infants."
Domicile of child, see "Domicile."

PAROL EVIDENCE.

In civil actions, see "Evidence," § 1.

PARTIES.

Character ground of jurisdiction, see "Courts," § 3.
Joinder, see "Equity," § 1.
Persons concluded by judgment, see "Judgment," § 5.

In actions by or against particular classes of parties.

See "Corporations," § 4.

In particular actions or proceedings.

See "Bankruptcy," § 1; "Judgment," § 2; "Specific Performance," § 4.
On appeal or writ of error, see "Appeal and Error," § 1.

To particular classes of conveyances, contracts, or transactions.

See "Contracts," § 2; "Deeds," § 1.

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C. C.) 663.

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ently done.—Johnson v.
C.) 439.

NERSHIP.

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law.—Easton v. George
C. C. A.) 524.

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aston v. George Wosten-
A.) 524.

of a firm *held* estopped
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general partner, where it
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ster v. Lanum (C. C. A.)

PAYMENT.

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SENGERS.

PATENTS.

§ 1. Subjects of patents.

When the advance in an art is gradual, and many inventors form different combinations, materially aiding the desired result, each is entitled to his own improvement.—Mallon v. William C. Gregg & Co. (C. C. A.) 68.

§ 2. Patentability.

The term "mechanical equivalent" has a narrow and restricted meaning in the construction of a patent for a slight improvement.—Mallon v. William C. Gregg & Co. (C. C. A.) 68.

The conception of the application of an endless-chain rake to the new use of raking sugar cane from a loaded car before it is crushed is not an exercise of inventive genius.—Mallon v. William C. Gregg & Co. (C. C. A.) 68.

Application of an old combination to a new use is not the subject of a patent, unless such new application would not occur to the trained mind of an ordinary mechanic.—Mallon v. William C. Gregg & Co. (C. C. A.) 68.

An abandonment of an application for a patent is not an abandonment of the invention.—Hayes-Young Tie Plate Co. v. St. Louis Transit Co. (C. C. A.) 80.

Where an application for a patent has been abandoned, absence of a prior use or sale of the invention for more than two years prior to a second application is indispensable to the validity of the patent.—Hayes-Young Tie Plate Co. v. St. Louis Transit Co. (C. C. A.) 80.

Where the original application has not been abandoned, the two years' public use or sale which may avoid the patent must be reckoned from the presentation of the first application, and not from the filing of subsequent applications or amendments.—Hayes-Young Tie Plate Co. v. St. Louis Transit Co. (C. C. A.) 80.

The abandonment of an application destroys the continuity of the solicitation of the patent, and a subsequent application institutes a new proceeding, and the two years' public use or sale which may invalidate the patent must be counted from the latter application.—Hayes-Young Tie Plate Co. v. St. Louis Transit Co. (C. C. A.) 80.

A device in one mechanism, to be the equivalent of the device in another, must perform the same function and perform it in substantially the same manner.—American Can Co. v. Hickmott Asparagus Canning Co. (C. C.) 86.

It is sufficient to sustain a patent for a valve against the objection of inoperativeness, if the combination of parts shown forms a workable device, when attached to a structure for which it was evidently intended.—Kenney Mfg. Co. v. J. L. Mott Iron Works (C. C.) 431.

Evidence considered, and *held* insufficient to invalidate a patent on the ground of prior use.—Mica Insulator Co. v. Union Mica Co. (C. C.) 928.

§ 3. Persons entitled to patents.

In the absence of an express contract or agreement therefor, the relation of employer

and employé under whatever circumstances, at least short of a specific employment to make an invention, does not vest the employer with the entire property right in an invention of the employé and to the patent exclusively thereof, or with anything more than the shop right or an irrevocable license to use the invention.—Pressed Steel Car Co. v. Hansen (C. C. A.) 403.

§ 4. Applications, and proceedings thereon.

Findings of the Commissioner of Patents, under Act July 8, 1870, to Stat. 202, c. 230, § 32 (U. S. Comp. St. 1901, § 4884, p. 3384), that the delay which caused the abandonment of an application was not unavoidable, held sustained by the presumption that his decision is correct.—Hayes-Young Tie Plate Co. v. St. Louis Transit Co. (C. C. A.) 80.

§ 5. Construction and operation of letters patent.

Where the field of invention has been narrowed by many prior devices in the same art, a patent for a new combination must be narrowly construed and limited to the precise structure shown.—Iesner Mfg. Co. v. J. L. Mott Iron Works (C. C.) 431.

§ 6. Title, conveyances, and contracts.

Findings that an express contract by defendant to assign to complainant, his employer, the patent rights in inventions made by him during his employment, was not proved, and that the facts shown were not such as to warrant the presumption that such a contract existed, *held* sustained by the evidence.—Pressed Steel Car Co. v. Hansen (C. C. A.) 403.

A contract between a manufacturing company and its superintendent, by which the latter agreed, in consideration of an increased salary, to assign to the company a half interest in inventions which should be made by him during the term relating to articles manufactured by the company, construed and applied.—Vocalion Organ Co. v. Wright (C. C.) 313.

§ 7. Infringement.

The absence, from a device that is alleged to infringe a patented combination, of a single mechanical element of that combination, is fatal to the claim of infringement.—Mallon v. William C. Gregg & Co. (C. C. A.) 68.

Averments of specific facts, from which it appears that the fact was probably otherwise than the finding that delay causing the abandonment of an application for a patent was unavoidable, are essential in a pleading to overcome such presumption.—Hayes-Young Tie Plate Co. v. St. Louis Transit Co. (C. C. A.) 80.

Evidence *held* to sustain a decree adjudging a person guilty of contempt for aiding others, who had been enjoined from infringement of a patent, in evading the injunction by taking over and conducting the business in his name with actual knowledge of the injunction.—Hamilton v. Diamond Drill & Machine Co. (C. C. A.) 417.

In a combination claim of a patent, every element specified by the patentee, either directly or by a reference to the specification, which carries such element into the claim, must be deemed material; and to constitute an infringement of such claim the infringing device must contain every one of its elements, or its equivalent.—American Can Co. v. Hickmott Asparagus Canning Co. (C. C.) 86.

To sustain a claim of infringement of a patented machine, three things must be found: First, identity of result; second, identity of means; third, identity of operation. The fact that an invention is of a primary character does not entitle the patentee to all means for accomplishing the same result.—American Can Co. v. Hickmott Asparagus Canning Co. (C. C.) 86.

The owner of a patent is not subject to a plea of estoppel, laches, or implied license because of delay in bringing suit against an infringer during the pendency of a test suit in which the validity of the patent was involved.—Hutter v. Koscherak (C. C.) 92.

Where a patentee, with knowledge of a device made by defendant, made no claim of infringement for five years, he will be held estopped to thereafter place a different construction on his patent, just before its expiration, for the purpose of making out a case of infringement.—McGill v. Whitehead & Hoag Co. (C. C.) 97.

Where the defendant, pending a suit for infringement, begins the use of another alleged infringing device, separate and distinct from that complained of, the court may permit the filing of a supplemental bill covering such alleged infringement, in the interest of saving delay and expense incident to the commencement of an independent suit.—Chicago Grain Door Co. v. Chicago, B. & Q. R. Co. (C. C.) 101.

A demurrer to a patent can be sustained only when the question of invention is free from doubt.—General Electric Co. v. Campbell (C. C.) 600.

A petition in the nature of a supplemental bill, filed after decree in a suit for infringement against a purchaser of defendant's business pendente lite, considered on demurrer and *held* multifarious.—Western Telephone Mfg. Co. v. American Electric Telephone Co. (C. C.) 603.

§ 8. Decisions on the validity, construction, and infringement of particular patents.

Letters patent No. 583,408, to James Mallon, for an automatic machine for unloading and feeding sugar cane, are not invalid for want of invention in the combination which they portray.—Mallon v. William C. Gregg & Co. (C. C. A.) 68.

Letters patent No. 670,176, to William C. Gregg, for a cane unloading machine, *held* not to infringe letters patent No. 583,408, to James Mallon, because a mechanical element of Mallon's combination is absent.—Mallon v. William C. Gregg & Co. (C. C. A.) 68.

The Kemp patent, No. 607,620, for a pipe elbow, *held* void for lack of novelty.—Shepard v. Excelsior Steel Furnace Co. (C. C. A.) 399.

nt, No. 429,874, for a stone-
s not anticipated, and dis-
laims 1, 2, and 3 also *held*
Stone Sawing Mach. Co.
910.

nt, No. 559,446, for a shade-
ns 3 and 4, *held* valid, but
tain Supply Co. v. Keeler

nt, No. 520,429, for an elec-
t anticipated, valid, and in-
Electric Novelty & Mfg.
tric Novelty Co. (C. C. A.)
Langlos Electric Mfg. Co.,

No. 617,592, for an electric
r lack of invention.—Amer-
ty & Mfg. Co. v. Howard
. (C. C. A.) 913; Same v.
ectric Mfg. Co., Id.

t, No. 285,641, for a scarf
id for lack of novelty, and
if conceded validity.—Mc-
Hoag Co. (C. C.) 97.

nt, No. 363,186, for an elec-
d as against the defense of
iption, and also infringed.—
Electric Co. v. Dayton Fan
) 917.

t, No. 371,431, for a water-
valid and infringed as to
Kenney Mfg. Co. v. J. L.
. C.) 431.

tent, No. 397,860, for a
g tubes, *held* void on the
atentee was not the true
& Mattison Co. v. Ameri-
overing Co. (C. C.) 602.

Wightman patent No. 399,-
on patent No. 428,650, both
on the electromotor of the
ent No. 363,186, construed,
fringed.—Thomson-Houston
yton Fan & Motor Co. (C.

nt, No. 407,260, for a steam
nd *held* infringed.—Stirling
uff Co. (C. C.) 94.

Remington patent, No. 417,-
eening machine, *held* valid
Epps v. United Box Board
) 418.

n patent, No. 436,792, for a
nachine, the Norton patent,
can-cap soldering machine,
Brown patent, No. 598,567,
achine, is infringed by the
dridge patent, No. 712,998,
rming machine. — American
ott Asparagus Canning Co.

tent, No. 447,757, for an in-
ld not anticipated, valid, and
vania Globe Gas Light Co.

No. 483,646, for a process
l mica sheets for electrical insulation, called "micanite," construed, and *held* not anticipated, valid, and infringed as to claims 1 and 2.—Mica Insulator Co. v. Union Mica Co. (C. C.) 928.

The Jefferson patent, No. 483,653, claim 2, for a process of molding an artificial mica sheet, *held* void for anticipation or lack of invention. —Mica Insulator Co. v. Union Mica Co. (C. C.) 928.

The Hutter patent, No. 491,113, for a bottle stopper, *held* valid and infringed, on motion for a preliminary injunction.—Hutter v. Koscherak (C. C.) 92.

The Kenney patent, No. 566,770, claim 1, for a water-closet valve, construed, and *held* not infringed.—Kenney Mfg. Co. v. J. L. Mott Iron Works (C. C.) 431.

The Denayrouze patent, No. 673,705, for a gas burner, construed, and *held* not infringed. —Central Lighting Co. v. Northern Light Co. (C. C.) 423.

The Kotten patent, No. 701,580, for a pneumatic surfacer for stone, *held* valid and infringed.—Kotten v. Knight (C. C.) 597.

Patent No. 718,499, for tenting cloth to be used to cover tobacco and other plants, *held* void for want of novelty both in the elements used to constitute the product and in the combination thereof.—West Boylston Mfg. Co. v. Wallace (C. C.) 922.

The Howell patent, No. 726,293, for improvements in exhausting lamps, *held*, on demurrer, not shown to be invalid.—General Electric Co. v. Campbell (C. C.) 600.

§ 9. **Patents enumerated.**

AUSTRIA.

46–4466. Gas burner, cited..... 427

BELGIUM.

123,759. Gas burner, cited..... 427

ENGLISH.

1880.

3,620. Pulp-screening machine, cited... 419, 422

4,669. Pulp-screening machine, cited... 419, 422

1887.

4,073. Pulp-screening machine, cited... 419, 422

FRENCH.

259,985. Gas burner, cited..... 427

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42,772. Gas burner, cited..... 427

UNITED STATES.

ORIGINAL.

54,822. Grain-conveyor, cited..... 73
123,391. Ice elevator, cited..... 74
152,760. Hay and grain elevator, cited... 74
251,912. Scarf pin, cited.....97, 98
256,511. Lumber conveyor, cited..... 76

258,287. Grain conveyor, cited..... 76
259,134. Machine for dressing or polishing stone, cited..... 598
285,641. Scarf pin, held void and not infringed..... 97
295,185. Threading machine, feeler, cited 74
301,083. Scarf pin, cited..... 99
305,784. Coal conveyor, cited..... 74
315,420. Pulp-screening machine, cited... 419, 422
359,043. Pulp-screening machine, cited... 419, 422
363,186. Electric motor, held valid and infringed..... 917, 919
365,316. Can cap sealing machine, held not infringed..... 86, 91
371,431. Water-closet valve, held valid and infringed..... 431
382,279. Electrometer, cited..... 921
397,800. Machine for molding tubes, held void..... 602, 603
399,801. Electromotor, held infringed... 917, 920
407,290. Steam boiler, held infringed.... 94
412,921. Endless chain rake, cited..... 75
417,451. Pulp-screening machine, held valid and infringed..... 418
428,650. Electrometer, held infringed 917, 920
429,874. Stone sawing machine, held infringed..... 910
436,792. Can body making machine, held not infringed..... 86
447,757. Incandescent lamp, held valid and infringed..... 940
481,837. Crushed cane conveyor, cited.... 75
482,646. Meanite, held valid and infringed 928, 929
483,653. Process for molding mica sheets, held void..... 929
485,124. Pipe elbow, cited..... 402
491,113. Bottle stopper, held valid and infringed..... 92
509,119. Pipe elbow, cited..... 402
511,559. Electric motor, cited..... 920
511,560. Electric motor, cited..... 920
520,420. Electric battery, held valid and infringed..... 913
521,461. Combined annunciator and spring jack for telephone switchboards, cited..... 604
527,702. Carabiner bracket, cited..... 101
541,978. Stone polishing machine, cited... 598
549,273. Stone-polishing machine, cited... 598
555,190. Electrometer, cited..... 921
559,446. Shade-holding device held valid.. 911
560,770. Water-closet cisterns, held not infringed..... 431
583,408. Automatic mechanism for unloading and feeding sugar-cane, held valid and not infringed... 69
594,193. Steam boiler, cited..... 94
598,567. Can body machine, held not infringed..... 86, 91
607,620. Pipe elbow, held void..... 399
617,592. Electric hand lamp, held void... 913
670,176. Cane-unloading machine, held not infringed..... 69
673,705. Gas burner, held not infringed.. 423
701,580. Pneumatic surfacer, held valid and infringed..... 597
712,998. Can body forming machine, held not infringed..... 86
718,499. Tenting cloth, held void..... 922
726,293. Lamps, held not invalid, on demurrer..... 600

PAVING.

See "Municipal Corporations," § 2.
Sureties on contract to keep in repair, see "Principal and Surety."

PAYMENT.

See "Accord and Satisfaction."
Of duties, see "Customs Duties," § 4.
Recovery for money paid, see "Money Paid."
Subrogation on payment, see "Subrogation."

PENDENCY OF ACTION.

Effect as to property involved, see "Lis Pendens."

PERSONAL INJURIES.

See "Negligence."
Caused by explosion of gasoline, see "Explosives."
Caused by negligence of servant, see "Master and Servant," § 2.
Caused by operation of street railroad, see "Street Railroads," § 2.
Custody and conduct of jury, see "Trial," § 6.
Expert testimony, see "Evidence," § 2.
Harmless error, see "Appeal and Error," § 4.
Joint judgment, see "Judgment," § 2.
Liability of lessor of railroad, see "Railroads," § 2.
Measure of damages, see "Damages," § 1.
Removal of action to federal court, see "Removal of Causes," §§ 2, 3.
To employé, see "Master and Servant," §§ 1, 2.
To passenger, see "Carriers," § 3.
To persons on or about vessels, see "Shipping," § 2.
To persons on railroad trains, see "Railroads," § 2.
To seamen, see "Seamen."
To traveler on highway crossing railroad, see "Railroads," § 2.
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PERSONAL PROPERTY.

See "Property."

PETITION.

In bankruptcy, see "Bankruptcy," § 1.
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e "Pleading," § 2.
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ral court, see "Courts," § 3.
jainst particular classes of
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1; "Ejectment," § 1; "Eq-
mation of Instruments," § 2;
ance," § 4.
ranty in sale of corporate
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s, see "Carriers," § 3; "Mas-
§ 1.
see "Courts," § 5.
nent contractor, see "United

on of sewer assessment, see
rations," § 2.

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tion in a pleading is con-
averments on the same sub-
; Tie Plate Co. v. St. Louis
A.) 80.

ide conveyances by an ex-
eging that the proceedings
held insufficient.—William-
(C. C. A.) 467; Same v.

ether a declaration states a
rable cause of action against
to be determined from the
s not affected by an allega-
omplained of was the joint and concurrent act of both defendants.—Yeates v. Illinois Cent. R. Co. (C. C.) 943.

§ 2. Plea or answer, cross complaint, and affidavit of defense.

Gen. Prac. Rule N. Y. 24, relating to extension of time to plead, *held* only to apply to applications to the court, and not to prevent such extension by stipulation, without an order of the court.—Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 284.

§ 3. Demurrer or exception.

The words "fraudulent mismanagement," alleged in a bill to dissolve an insurance association, cannot be considered as an admission thereof by a demurrer to the bill.—Polk v. Mutual Reserve Fund Life Ass'n (C. C.) 273.

§ 4. Amended and supplemental pleadings and repleader.

The fact that an amendment of a complaint was allowed by consent on application by the plaintiff after he had sold the cause of action, and before the substitution of the purchaser, does not invalidate such amendment.—Franklin v. Conrad-Stanford Co. (C. C. A.) 737.

An action against a railroad company, under Code Ga. 1895, §§ 2317, 2318, known as the "Tracing Act," as construed by the Supreme Court of the state, is one for a penalty, and it cannot be converted into one on contract by an amendment of the declaration.—Venable Bros. v. Louisville & N. R. Co. (C. C.) 981.

§ 5. Signature and verification.

Where a bill by a stockholder against a corporation was amended so as to contain a verification by complainant personally, it was immaterial that it was originally improperly verified by another.—Consumers' Gas Trust Co. v. Quinby (C. C. A.) 882.

PLEDGES.

Of bank stock, see "Banks and Banking," § 1.

POLICY.

Of insurance, see "Insurance."

POSSESSION.

See "Adverse Possession."
Of property, see "Property."
Of wife's realty, see "Husband and Wife," § 1.
Writ of, see "Ejectment," § 2.

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Of mining company, see "Mines and Minerals," § 3.

PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 5.
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In particular civil actions or proceedings.
See "Ejectment"; "Habeas Corpus," § 1.

Particular proceedings in actions.
See "Abatement and Revival"; "Costs"; "Depositions"; "Evidence"; "Execution"; "Judgment"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Removal of Causes"; "Trial."
Revival of judgment, see "Judgment," § 6.

Particular remedies in or incident to actions.
See "Garnishment"; "Injunction"; "Receivers."

Procedure in criminal prosecutions.
See "Bail"; "Criminal Law."

Procedure in courts of special jurisdictions.
In admiralty, see "Admiralty"; "Maritime Liens," § 3; "Shipping," § 5.
In bankruptcy, see "Bankruptcy," § 1.
In equity, see "Equity."
Particular courts, see "Courts."

Procedure on review.
See "Appeal and Error."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 3.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 4.

PRELIMINARY INJUNCTION.

In suit for infringement of copyright, see "Copyrights," § 2.
In suit for unfair competition in trade, see "Trade Marks and Trade Names," § 3.

PREMIUMS.

For insurance, see "Insurance," § 3.

PRESCRIPTION.

Acquisition of rights, see "Adverse Possession."

PRESENTMENT.

Of claims against estate of decedent, see "Executors and Administrators," § 1.

PRINCIPAL AND AGENT.

See "Attorney and Client."
Sale or agency, see "Sales," §§ 1, 6.

§ 1. Rights and liabilities as to third persons.

A contract for the sale of certain corporate stock *held* a mere contract of agency on the part of the sellers acting for defendants, who were, therefore, liable for the sellers' fraudulent representations made to induce purchases.—Briggs v. Foster (C. C. A.) 773.

PRINCIPAL AND SURETY.

See "Bail."

§ 1. Discharge of surety.

The variation from a paving contract, made by a city in making a repair, *held* not to discharge the surety on the contractor's bond from its liability; it appearing that the change entailed no additional cost to the surety.—American Bonding Co. v. City of Ottumwa (C. C. A.) 572.

Under a contract to keep the pavement of a street in repair, the indemnitee *held* justified in relying upon the sufficiency of a certain irregular notice to the contractor's surety.—American Bonding Co. v. City of Ottumwa (C. C. A.) 572.

Failure of the government to keep its lease of certain land on which rock was stored in force during a contract for the removal of the rock *held* a breach of the government's contract, discharging the contractor's surety from liability on the contractor's bond.—Fidelity & Deposit Co. of Maryland v. United States (C. C. A.) 866.

Where a government contractor's surety was discharged by a breach of contract by the government, a subsequent waiver of the breach by the contractor was ineffectual against the surety.—Fidelity & Deposit Co. of Maryland v. United States (C. C. A.) 866.

§ 2. Remedies of creditors.

The defense of ultra vires, based upon the contention that a supplemental contract for paving a street varied from the original contract, *held* not available to the surety on the contractor's bond.—American Bonding Co. v. City of Ottumwa (C. C. A.) 572.

Where a paving contract provided that the contractor should repair, in default of which the work should be done by the city, it is no defense by the surety, in an action by the city for the cost of repairs, that the city council, in raising the money to repair, proceeded under the statute authorizing it to issue bonds as in case of the original construction work.—American Bonding Co. v. City of Ottumwa (C. C. A.) 572.

PRIORITIES.

Of claims against bankrupt, see "Bankruptcy," § 6.
Of liens, see "Railroads," § 1; "Salvage," § 3.

PROCESS.

Authority in federal courts of decisions of state courts as to service, see "Courts," § 6.

In particular actions or proceedings.

See "Bankruptcy," § 1.
On bail bond, see "Bail," § 1.

ns of writs or other process.
"; "Garnishment"; "Injune-

ission of service of summons
Montana court, conforming to
Mont. § 642, which makes such
nt proof of service, estops the
ubsequently denying the juris-
irt to render judgment against
. Conrad-Stanford Co. (C. C.

e 1887, § 3207 [Va. Code 1904,
rn of substituted service by
vith defendant's wife *held* in-
ilure to allege that the wife
f defendant's family.—King v.
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e 1887, § 3207 [Va. Code 1904,
tituted service by posting on
efendant's usual house, as dis-
the "front door" thereof, *held*
ufficient service.—King v. Da-

. § 3207 [Va. Code 1904, p.
s service of process by any
turn is verified by affidavit.—
. C.) 198.

e 1887, § 3207 [Va. Code 1904,
ttacking service of process by
, on the ground that he was
ntiff's agent, *held* insufficient.
(C. C.) 198.

objections, and amend-

rns of substituted service in
mendable, as to the defendants
scire facias to revive a judg-
m by default.—King v. Davis

ervice of process on a defend-
was not shown, personal serv-
notice of application for leave
declaration was insufficient to
n of such defendant.—King v.
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to amend a return of sub-
which was fatally defective
anted, in the discretion of the
notice.—King v. Davis (C. C.)

turn of service on a defendant
suit in a federal court in Vir-
dable as against an innocent
nte lite of the person served.—
C. C.) 222.

for leave to amend a return
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l a declaration in ejectment
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Taking and filing proof in equity, see "Equity," § 2.

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Adverse possession, see "Adverse Possession."
Constitutional guaranties of rights of property, see "Constitutional Law," § 2.
Protection of rights of property by injunction, see "Injunction," § 1.
Taking for public use, see "Eminent Domain."
Title of trustee in bankruptcy, see "Bankruptcy," § 2.

On a conveyance of standing trees with the right of entry, neither the grantor nor the grantee has actual or constructive possession of the trees until he is actually engaged in felling them.—King v. Davis (C. C.) 222.

Use of a right of way over land in controversy in ejectment *held* not to constitute possession of trees on the tract over which the right of way ran, conveyed to petitioner's remote grantor by persons not parties to the ejectment suit.—King v. Davis (C. C.) 222.

PROSECUTING ATTORNEYS.

See "District and Prosecuting Attorneys."

PROTEST.

By importers, see "Customs Duties," § 3.

PROXIMATE CAUSE.

Of injury, see "Negligence," § 1.
Of injury to longshoreman, see "Shipping," § 2.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 2.

PUBLIC LANDS.

Extortion by special agent of land department, see "Extortion."
Mineral lands, see "Mines and Minerals," § 1.

§ 1. Government ownership.

Partial survey by the United States by running lines on two sides of a section *held* insufficient to identify it as an odd-numbered section within a railroad grant, so as to relieve one cutting timber thereon of liability to the United States.—United States v. Birdseye (C. C. A.) 516.

PUBLIC POLICY.

See "Contracts," § 1.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUNISHMENT.

See "Criminal Law," § 1.

PUNITIVE DAMAGES.

See "Libel and Slander," § 2.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 4.

RAILROADS.

See "Carriers," § 2; "Street Railroads."
Action against receiver of railroad, see "Receivers," § 4.
Amendment of pleading in action against, see "Pleading," § 4.
As employers, see "Master and Servant."
Authority in federal courts of decisions of state courts as to liability of lessee for negligence of lessee, see "Courts," § 5.
Carriage of goods and passengers, see "Carriers."
Claims against road in hands of receiver, see "Receivers," § 3.
Deprivation of remedy on railroad aid bonds as impairing obligation of contract, see "Constitutional Law," § 1.
Jurisdiction of action on railroad aid subscription, see "Courts," § 3.
Legislative vacating of streets to railroad company, see "Municipal Corporations," § 1.
Levy of tax to pay railroad aid bonds, see "Counties," § 1.
Parties to action to recover subsidy, see "Parties," § 1.
Rights of telegraph company as to right of way, see "Telegraphs and Telephones," § 1.
Town aid subscription, see "Towns," § 1.

§ 1. Indebtedness, securities, liens, and mortgages.

The furnishing to a railroad company of materials for its road is sufficient to sustain a mechanic's lien, under Rev. St. Mo. 1889, § 4239 et seq., without proof of their application for that purpose.—Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co. (C. C. A.) 20.

Preferential claims for labor or materials for the operation of a railroad must accrue within six months preceding the impounding of the income and property by the mortgage bondholders.—Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co. (C. C. A.) 26.

One whose claim for labor and materials furnished a railroad company accrued more than 17 months before the impounding of the property by the mortgage bondholders, and who extended the time of its payment for 18 months, *held* not entitled to a preference over the mortgage bondholders.—Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co. (C. C. A.) 26.

§ 2. Operation.

In an action for the death of plaintiff's husband by being struck by defendant's railroad train at a crossing, evidence *held* to require submission of deceased's contributory negligence to the jury.—Baltimore & O. R. Co. v. Connell (C. C. A.) 8.

A switchman, in charge of a transfer train belonging to another company, *held* guilty of contributory negligence, precluding a recovery for injuries sustained in a rear end collision with a first-class passenger train belonging to defendant.—Northern Pac. Ry. Co. v. Cummiskey (C. C. A.) 508.

A rule of a railroad company, requiring a flagman to be sent out immediately, when a train is delayed so that it may be overtaken by another train, *held* to apply to a transfer train of another company using defendant's main track on the time of a passenger train.—Northern Pac. Ry. Co. v. Cummiskey (C. C. A.) 508.

A custom in railroad yards for engines and inferior trains to occupy a main track without waiting for the lapse of five minutes after the due time of a belated train, as required by a rule of the company, did not justify action on information as to the delay of a first-class train, acquired nearly an hour before.—Northern Pac. Ry. Co. v. Cummiskey (C. C. A.) 508.

In an action for fire set out by one of defendant's locomotives, the question of defendant's negligence in equipping one of the engines with spark arresting devices *held* for the jury.—Richmond v. Oregon R. & Nav. Co. (C. C. A.) 848.

In an action for fire set out by certain of defendant's locomotives, defendant *held* not entitled to claim on appeal that the question of negligence with reference to one of the engines was not in issue.—Richmond v. Oregon R. & Nav. Co. (C. C. A.) 848.

Rev. St. Ohio 1892, § 3305, *held* not to make a lessor of a railroad liable for injury to an employé of the lessee through the lessee's negligence.—Beltz v. Baltimore & O. R. Co. (C. C.) 1016.

RATIFICATION.

Of contract, see "Contracts," § 1.

REAL ACTIONS.

See "Ejectment."

REAL PROPERTY.

See "Property."

ECEIVERS.

to recover freight charges
nterstate commerce commis-
erce," § 2.
eral courts of actions by, see

gainst bankrupt for services,
," § 6.

ent, qualification, and

er oath may be used as an
ion for the appointment of a
ch answer is not waived by
s all the material allegations
ly be overcome by the evi-
sses or its equivalent.—Ford
49.

rte application is made for
f a receiver, the proper prac-
order requiring the defend-
why the application should
nd, if a proper showing of
e, to appoint a temporary re-
y for hearing on the rule to
v. Taylor (C. C.) 149.

d possession of property.

y a corporation of an under-
for an issue of its bonds to
bonds *held* to entitle the
ion of certain certificates of
to be given to the under-
s, as against receivers of the
its insolvency.—Kirkpatrick
& Export Co. (C. C. A.) 387;
Id.

n for an order requiring re-
olvent corporation to deliver
of its stock to a pledgee of
e pledgee to make a tender of
ubscribers to an underwriting
port of a suit thereon, de-
erwriters to their liability on
be considered.—Kirkpatrick
& Export Co. (C. C. A.) 387;
Id.

e and payment of claims.

t receivers of a railroad for
illegal discriminating freight
and allowed in the receiver-
held unenforceable, either
ers individually or the cor-
g to the railroad assets under
-Western New York & P. R.
ing Co. (C. C. A.) 343.

railroad company *held* not li-
n action to recover reparation
ation in an illegal through
ction not having been brought
our years after they had been
.—Western New York & P.
efining Co. (C. C. A.) 343.

RECORDS.

On petition to review bankruptcy proceedings, see "Bankruptcy," § 9.
Transcript on appeal or writ of error, see "Appeal and Error," § 3.

REFERENCE.

In bankruptcy, see "Bankruptcy," § 4.

REFORMATION OF INSTRUMENTS.

§ 1. Right of action and defenses.

Failure of a grantor to read a deed before executing it *held* not such negligence as to preclude a reformation, so as to exclude a certain mining claim erroneously included therein by mutual mistake.—Shields v. Mongollon Exploration Co. (C. C. A.) 539.

A contract made without fraud or mistake may not be modified in equity to give either party a better bargain while he retains all the benefits of the original trade.—Burnes v. Burnes (C. C. A.) 781.

§ 2. Proceedings and relief.

In an action to recover an interest in a mining claim, an answer by one of the defendants, praying reformation of a deed to plaintiff's prior grantor, *held* not objectionable as failing to state a defense or furnish ground for reformation of the deed.—Shields v. Mongollon Exploration Co. (C. C. A.) 539.

RELEASE.

See "Accord and Satisfaction."
Of mechanic's lien, see "Mechanics' Liens," § 3.

REMAINDERS.

Construction of deed, see "Deeds," § 1.

REMEDIES.

Deprivation of, as impairing obligation of contract, see "Constitutional Law," § 1.
Limitation of as denial of due process of law, see "Constitutional Law," § 2.

REMOVAL.

Of stamps from packages of renovated butter, see "Food."

REMOVAL OF CAUSES.

§ 1. Power to remove and right of removal in general.

The law is well settled that an amendment to a complaint in the state court, which transforms a nonremovable case into a removable one, gives the defendant the right to remove, if he acts promptly.—Myrtle v. Nevada, C. & O. Ry. Co. (C. C.) 193.

A general appearance of a defendant in a state court *held* not a waiver of its right to remove the cause to the federal court.—Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 284.

A cause *held* to be remanded to the state court on the ground that the complaint stated but one cause of action for an amount insufficient to give the federal Circuit Court jurisdiction.—Pinner v. Western Union Telegraph Co. (C. C.) 100.

§ 2. Origin, nature, and subject of controversy.

An action in a state court to recover for personal injuries alleged to have been received by reason of the failure of defendant railroad company to properly equip its cars with safety appliances is not removable merely because of an allegation in the complaint that defendant is engaged in interstate commerce, where it does not appear that there is any controversy as to the construction or effect of the federal law relating to railroads engaged in such commerce.—Myrtle v. Nevada C. & O. Ry. Co. (C. C.) 102.

A federal question which will confer jurisdiction on a United States court, either by original process or by removal, must be a question of law as stated by the plaintiff in his complaint, and when a legal question arising under the Constitution or a law or treaty of the United States has been decided by the Supreme Court, it ceases to be a federal question for removal purposes.—Myrtle v. Nevada, C. & O. Ry. Co. (C. C.) 102.

§ 3. Citizenship or alienage of parties.

A declaration in an action against two railroad companies for a personal injury construed, and *held* to state a separate and distinct cause of action against each defendant, which rendered the cause removable in one which was a citizen of a different state.—Yeates v. Illinois Cent. R. Co. (C. C.) 843.

§ 4. Prejudice, local influence, or denial of civil rights.

Inability of defendant in an action in a state court to obtain a trial because of her inability to secure an attorney or because of postponements secured by plaintiff *held* not to authorize a removal of the cause to the federal courts under Rev. St. U. S. § 641 (U. S. Comp. St. 1901, p. 520).—Scott v. R. D. Kinney & Co. (C. C.) 1869.

§ 5. Proceedings to procure and effect of removal.

While a removal bond should be presented to the state court for allowance, the court's arbitrary refusal so to do will not prevent the removal.—Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 284.

A removal bond, filed under Removal Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], *held* not defective because it was not signed by the party and was limited to $500.—Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 284.

Where a petitioner for the removal of a cause signed the petition, it was not necessary that he should have also signed the verification attached thereto.—Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 284.

A removal petition is not fatally defective for want of verification, where the ground of removal is not prejudice or local influence, or the denial of civil rights, and the cause is not a suit or prosecution against revenue officers.—Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 284.

Under Removal Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], it is not necessary that a petition for removal should be presented to a judge or to a court in session; it being sufficient if it is presented to a judge in chambers, and the bond filed with the clerk of the county where the venue is laid.—Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 284.

The filing of a removal petition and bond within the time granted defendant by a stipulation to plead *held* in time.—Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 284.

Where a removal petition was filed while the defendant still had time to plead or demur to the complaint, it was in time, under Removal Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 [U. S. Comp. St. 1901, p. 510], or Code Civ. Proc. N. Y. § 487, though under N. Y. Sup. Ct. Gen. Prac. Rule 22, defendant's time to attack plaintiff's pleading by motion had expired.—Groton Bridge & Mfg. Co. v. American Bridge Co. (C. C.) 284.

RENOVATED BUTTER.

See "Commerce," § 1; "Food."

RENT.

See "Landlord and Tenant," § 1.
Of wife's realty, see "Husband and Wife," § 1.

REOPENING.

Estate of bankrupt, see "Bankruptcy," § 7.

REPAIRS.

Of streets, see "Municipal Corporations," § 2.
Lien for, see "Maritime Liens."
Sureties on contract for repair of paving, see "Principal and Surety."

RESCISSION.

Of contract for sale of goods, see "Sales," § 3.

RESIDENCE.

See "Domicile."

RES JUDICATA.

See "Judgment," § 5.

ESOLUTION.

see "Municipal Corporations,"

ING PARTNERS.

." § 2.

ETRACTION.

Slander," § 1.

RETURN.

eturn of service of process, see

REVENUE.

ıties"; "Internal Revenue."

REVIEW.

Error."
ee "Bankruptcy," § 9.
circuit court of appeals, see

interstate commerce commis-
merce," § 2.

REVIVAL.

e "Judgment," § 6.
chanics' Liens," § 3

GHT OF WAY.

and Telephones," § 1.

RISKS.

ployé, see "Master and Serv-

son on vessel, see "Shipping,"

e policy, see "Insurance," § 4.

RIVERS.

Waters," § 1.

ROADS.

see "Municipal Corporations,"

SHELLEY'S CASE.

RULES.

ts of trains, see "Railroads,"

RULES OF NAVIGATION.

See "Collision," § 1.

RULES OF PROPERTY.

Authority of decisions of state courts, see "Courts," § 6.

SALES.

See "Vendor and Purchaser."
Of corporate bonds, see "Corporations," § 3.
Of corporate shares, see "Corporations," § 1.
Of property of decedent under order of court, see "Executors and Administrators," § 3.

§ 1. Requisites and validity of contract.

An acceptance of an offer to sell machine bolts *held* not rendered conditional by a mere request that the smaller sizes should be put up in packages.—Kelley, Maus & Co. v. Sibley (C. C. A.) 586.

An absolute acceptance of a seller's offer to sell bolts *held* not modified by his subsequent statement that he assumed no responsibility in the sale, and simply procured the bolts from manufacturers for the buyer.—Kelley, Maus & Co. v. Sibley (C. C. A.) 586.

An acceptance of an offer for the sale of carriage bolts *held* not absolute, nor sufficient to constitute a contract.—Kelley, Maus & Co. v. Sibley (C. C. A.) 586.

Defendant, having agreed to furnish bolts to plaintiffs, *held* a seller of the bolts, and not plaintiff's agent to procure them from manufacturers.—Kelley, Maus & Co. v. Sibley (C. C. A.) 586.

§ 2. Construction of contract.

A contract for the sale of bolts, if any, *held* several with reference to each character of bolts ordered.—Kelley, Maus & Co. v. Sibley (C. C. A.) 586.

§ 3. Modification or rescission of contract.

A seller of lumber, which was used by the purchasers, together with other lumber, in the construction of barges, cannot acquire any right or title to such barges by an attempted rescission of the sale for fraud.—American Lumber & Mfg. Co. v. Taylor (C. C. A.) 321.

§ 4. Operation and effect.

Where complainant was employed to purchase goods in England for a firm operating in California and Costa Rica, title to goods so purchased passed to the firm, as against a retiring partner, on delivery of the goods to a carrier for transportation.—Easton v. George Wostenholm & Son (C. C. A.) 524.

Defendant *held* not an innocent purchaser of trading stamps for resale.—Sperry & Hutchinson Co. v. Temple (C. C.) 992.

§ 5. Warranties.

An implied warranty of fitness of a machine to do a particular work does not include a warranty that it will do the work as rapidly and

§ 2. Amount of recovery, and effect of contributory negligence, as affecting liability of vessel, see "Collision," § 2.

Davis Calyx Drill Co. v. Mallory (C. C. A.) 332.

A contract for sale of machinery construed, and *held*, that there was no implied warranty that the drill and machinery would be suitable to bore holes through the American strata.—Davis Calyx Drill Co. v. Mallory (C. C. A.) 332.

No implied warranty that an article will be fit for a particular purpose arises out of a contract to make a definite article, though the vendor knows the vendee is purchasing it to accomplish the specific purpose.—Davis Calyx Drill Co. v. Mallory (C. C. A.) 332.

An implied warranty that an article will be fit for a particular purpose may be inferred from a contract to furnish it to accomplish that purpose.—Davis Calyx Drill Co. v. Mallory (C. C. A.) 332.

§ 6. Conditional sales.

A contract between a claimant and a bankrupt for the sale of goods held a contract of agency, and not of a conditional sale.—John Deere Plow Co. v. McDavid (C. C. A.) 802; In re John Deere Plow Co., Id.

A contract for the sale of machinery and mill equipment *held* at most an equitable mortgage, and not a conditional sale.—D. A. Tompkins Co. v. Monticello Cotton Oil Co. (C. C.) 625.

SALVAGE.

Claim for, against government, see "United States," § 2.

Jurisdiction of district court of action against United States, see "Courts," § 8.

§ 1. Right to compensation.

The raising of a dredge sunk in shallow water, where there is no danger involved, nor any extraordinary means required or employed, is not a salvage service.—Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co. (C. C. A.) 780.

§ 2. Amount and apportionment.

An award for services in raising a sunken dredge, based on the finding of a commissioner, affirmed.—Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co. (C. C. A.) 780.

§ 3. Lien and recovery.

On distribution of the proceeds of a vessel sold in admiralty, one who advanced money to pay off a lien for salvage on said vessel under an agreement that he should be subrogated to such lien *held* entitled to priority of payment over claims based on prior personal judgments against the owners.—The Dredge No. 1 (D. C.) 110.

SANITARY DISTRICT.

See "Navigable Waters," § 1.

SATISFACTION.

See "Accord and Satisfaction."

SCIRE FACIAS.

Following state practice, see "Courts," § 5.

Revival of judgment, see "Judgment," § 6.

SEAMEN.

Measure of damages for injuries, see "Damages," § 1.

A ship *held* liable in damages for a permanent injury to a seaman's hand resulting from the failure to send him to a hospital or to afford him proper treatment after the hand was injured in the course of duty.—The Sarnia (D. C.) 952.

A seaman who laid off from work on account of illness, although the surgeon refused to give him a certificate, and was flogged and fined, cannot recover wages for the time without proof that he was in fact too ill to work.—The St. Louis (D. C.) 972.

A seaman injured while in the service of the ship *held* entitled to recover expense of maintenance and cure, at least during the continuance of the voyage.—The Kenilworth (D. C.) 1003.

Evidence *held* insufficient to show that the master of a vessel was guilty of negligence in diagnosing or treating libelant's injury, or failing to put into port to afford him surgical assistance.—The Kenilworth (D. C.) 1003.

SECRETARY OF THE TREASURY.

Refunding customs duties, see "Customs Duties," § 4.

SEPARABLE CONTROVERSY.

Removal from state court, see "Removal of Causes," § 3.

SERVICE.

Of process, see "Process," § 1.

SERVICES.

See "Seamen."

SETTLEMENT.

See "Accord and Satisfaction."

Family settlements, see "Descent and Distribution," § 1.

SEVERABLE CONTRACTS.

See "Sales," § 2.

SEWERS.

Construction, see "Municipal Corporations," § 2.

SHELLEY'S CASE.

Application of rule in, see "Deeds," § 1.

SHIPPING.

"; "Collision"; "Maritime
e"; "Seamen"; "Towage."

sabled by stranding while
rter *held* entitled to charter
g port during the time re-
ging.—Lake Steam Shipping
.) 961.

of vessels and owners
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ssel *held* not guilty of negli-
promptly provide lights for a
the hold.—The Santiago (C.

juries to a longshoreman, his
ing about on an uneven pile
hted part of the hold of the
ximate cause of his injury.—
'. A.) 323.

in going upon a vessel while
dock, used a cargo skidway
res, instead of a safe passen-
which he had knowledge, he
ind the vessel cannot be held
y by falling from it into the
e (D. C.) 448.

of goods.
on a voyage with a port neg-
causing damage to cargo, her
for failing to provide a ship
beginning of the voyage, and
by Harter Act Feb. 13, 1893,
t. 445 [U. S. Comp. St. 1901,
round that the fault was one
he management of the vessel,
ppliances for closing the ports
nd this rule is especially ap-
ports were so located as to
n the vessel was fully loaded.
. C.) 443.

go from sea water entering
ed port, from which the bulls-
n sometime during the load-
held to have been due to her
when she commenced the voy-
e was liable, on the ground
iled to exercise due diligence
on made before the compart-
closed.—The Tenedos (D. C.)

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g a steamer at a public pier,
of the captain of the port,
n of "constituted authorities"
on in the charter party, re-
ers from liability for demur-
& Mail v. 4,300 Tons Pyrites

n of owner's liability.
84, c. 121, § 18, 23 Stat. 57
1901, p. 2945], relating to the
of shipowners, is to be con-
on with the limited liability
83 [U. S. Comp. St. 1901, p.
2943]), and does not exempt a part owner from full liability for supplies purchased by his authority or with his knowledge and consent.—Rudolf v. Brown (D. C.) 106.

SIGNALS.

On vessels, see "Collision," §§ 4, 5.

SIGNATURES.

To bond for removal of cause, see "Removal of Causes," § 5.
To verification of petition for removal of cause, see "Removal of Causes," § 5.

SLANDER.

See "Libel and Slander."

SPECIFIC PERFORMANCE.

Of contract as to use of right of way by telegraph company, see "Telegraphs and Telephones," § 1.
Of contract to convey mine, see "Mines and Minerals," § 3.

§ 1. Nature and grounds of remedy in general.

A decree for specific performance of a contract to convey a portion of a mining claim *held* a proper exercise of discretion.—Meehan v. Nelson (C. C. A.) 731.

§ 2. Contracts enforceable.

To warrant a decree for the specific performance of a contract, such contract must be clearly and unequivocally proved, and its terms, as to subject-matter, consideration, and all other essentials, must be specific and unambiguous.—Pressed Steel Car Co. v. Hansen (C. C. A.) 403.

§ 3. Good faith and diligence.

A contract for the sale of land, made in good faith, may be specifically enforced by the vendor, notwithstanding the fact that he did not have title at the time it was made, where such fact was stated and known to both parties, and he acquired the title before the time for performance arrived.—Day v. Mountin (C. C. A.) 756.

§ 4. Proceedings and relief.

In a suit to enforce specific performance of certain telegraph right of way contracts, the necessary parties being before the court, it was immaterial that a portion of the property was beyond the court's territorial jurisdiction.—Western Union Telegraph Co. v. Pittsburg, C., C. & St. L. Ry. Co. (C. C.) 435.

In a suit in a federal court to obtain specific performance of a telegraph right of way contract with certain consolidated railroad corporations, the fact that the court could not enforce its orders outside the district, except by personal proceedings, was not conclusive in determining what parties were before the court.—Western Union Telegraph Co. v. Pittsburg, C., C. & St. L. Ry. Co. (C. C.) 435.

A bill for specific performance of certain right of way contracts between railroads and [illegible] Telegraph Company held not demurrable because complainant had an adequate remedy at law.—Western Union Telegraph Co. v. Pittsburg, C., C. & St. L. Ry. Co. (C. C.) 455.

STAMPS.

Removal from packages of renovated butter, see "Food."

STATEMENT.

Of claim for lien, see "Mechanics' Liens," § 2.

STATES.

See "United States."

Appeal from disallowance of claim against bankrupt for franchise tax, see "Bankruptcy," § 5.

Control of navigable waters, see "Navigable Waters," § 1.

Courts, see "Courts," § 9.

Courts, authority of decisions in federal courts, see "Courts," § 6.

Legislative power over municipal corporation, see "Municipal Corporations," § 1.

STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 6.

Laws impairing obligation of contracts, see "Constitutional Law," § 1.

Provisions relating to particular subjects.

See "Adverse Possession"; "Aliens," § 1; "Bankruptcy"; "Commerce"; "Copyrights," § 1; "Courts"; "Customs Duties"; "Descent and Distribution"; "Food"; "Licenses," § 1; "Limitation of Actions"; "Master and Servant," § 1; "Mechanics' Liens"; "Mines and Minerals"; "Partnership," § 3.

Exemption of shipowner from liability, see "Shipping," § 3.

Limitation of shipowner's liability, see "Shipping," § 5.

Revenue laws see "Internal Revenue."

Statute of frauds, see "Frauds, Statute of."

§ 1. Construction and operation.

Where a penal statute creates a new offense, and is unambiguous, the courts may not lawfully extend it by interpretation to a class of persons who were excluded from its effect by its terms.—Field v. United States (C. C. A.) 6.

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...poration *held* authorized to ... street railway franchise, ... of Act Ohio May 14, 1878 ...90).—Cleveland Electric Ry. ...eland (C. C.) 111.

...ubsequent ordinance author- ...ay to extend its track on a ...equip and operate all of the ... *held* a surrender of its al- ...chise to operate the original ...Electric Ry. Co. v. City of ...11.

...lidation of railway lines nor ...imposed by an ordinance au- ...nal line prolonged any pri- ...d Electric Ry. Co. v. City ... 111.

...ng street railway extensions, ...eir titles to an extension of ...se, *held* not to extend such ...ation. — Cleveland Electric ...Cleveland (C. C.) 111.

...g a street railway company ...d tracks and operate them, ... the main line," for a period ...n line franchise, did not ex- ...n franchise.—Cleveland Elec- ... of Cleveland (C. C.) 111.

...ordinance, providing for the ...ity for horse power, *held* ... contract by which the rail- ...authorized to operate an ex- ...line for a period longer than ...se.—Cleveland Electric Ry. ...eland (C. C.) 111.

An extension of a street railway line under Rev. St. Ohio, § 2505, subject to the provisions of sections 3437-3443, *held* not a new route, provided for by sections 2501, 2502, and hence the extension franchise expired on the expiration of the franchise for the original line.—Cleveland Electric Ry. Co. v. City of Cleveland (C. C.) 111.

A city, having established a street railway route and granted a franchise as provided by Rev. St. Ohio, ss 2501, 2502, had no power to extend the life of the franchise by merely giving the corporation the right to double track its line.—Cleveland Electric Ry. Co. v. City of Cleveland (C. C.) 111.

§ 2. Regulation and operation.

Instructions as to the immateriality of the failure of a motorman to sound the gong on a street car and of the speed of the car *held* properly refused, in an action for the injury of a child.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

STREETS.

See "Municipal Corporations," §§ 1, 3.

SUBPŒNA.

Production of documents in equity, see "Equity," § 2.

SUBROGATION.

One who at the request of a debtor furnishes the money to discharge a lien under an agreement that he shall have the same lien is entitled in equity to be subrogated to the lien of the creditor whose debt is paid.—**In re McGuire** (D. C.) 997.

SUBSCRIPTIONS.

Town aid to railroad, see "Towns," § 1.

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See "Customs Duties"; "Internal Revenue"; "Revenue," § 1.

Assessments for municipal improvements, see "Municipal Corporations," § 2.

Payment by adverse holder, see "Adverse Possession."

TELEGRAPHS AND TELEPHONES.

§ 1. Establishment, construction, and maintenance.

Terminations of an operating agreement with reference to the operation of telegraph right of way contracts *held* not to deprive complainant of rights acquired under such contract and condemnation proceedings.—Western Union Telegraph Co. v. Pittsburg, C., C. & St. L. Ry. Co. (C. C.) 435.

In a suit to obtain specific performance of telegraph right of way contracts with certain railroad companies, defendants *held* not entitled to object that the contracts contained certain illegal provisions in violation of Act Cong. August 7, 1888, c. 772, 25 Stat. 382 [U. S. Comp. St. 1901, p. 3582].—Western Union Telegraph Co. v. Pittsburg, C., C. & St. L. Ry. Co. (C. C.) 435.

A telegraph company which has built its line on a public highway with the consent of the local authorities, and has accepted the provisions of Rev. St. § 5263 [U. S. Comp. St. 1901, p. 3579], cannot be required to remove such line without compensation because it has become an inconvenience to the public by reason of the construction of a street railway on the highway.—Ohio Postal Telegraph Cable Co. v. Board of Com'rs of Sandusky County (C. C.) 947.

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See "Wills."

TESTAMENTARY POWERS.

Creation, see "Wills," § 1.

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See "Logs and Logging."

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For filing claim for mechanic's lien, see "Mechanics' Liens," § 2.

For filing proof of claims in bankruptcy, see "Bankruptcy," § 6.

For pleading, see "Pleading," § 2.

For presentation of claims against estate of decedent, see "Executors and Administrators," § 1.

For proceeding to remove cause to federal court, see "Removal of Causes," § 5.

For setting aside judgment, see "Judgment," § 3.

TITLE.

Authority in federal courts of decisions of state courts affecting title to real property, see "Courts," § 6.

Color of title, see "Adverse Possession."

Of trustee in bankruptcy, see "Bankruptcy," § 2.

Of vendor, see "Specific Performance," § 3; "Vendor and Purchaser," § 1.

Transfer on sale, see "Sales," § 4.

Particular species of property or rights.

See "Mines and Minerals," § 2; "Patents," § 6; "Trade-Marks and Trade-Names," § 2.

Title necessary to maintain particular actions.

On note, see "Bills and Notes," § 2.

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Measure of damages, see "Damages," § 1.

By particular classes of parties.

See "Municipal Corporations," § 4.

Employés, see "Master and Servant," § 2.

Particular torts.

See "Fraud"; "Libel and Slander"; "Negligence."

Maritime torts, see "Collision."

TOWAGE.

A tug *held* liable for the injury of a tow by pounding in rough water, because of her failure to exercise due care in the arrangement of the tow.—The Winnie (D. C.) 166.

In determining the condition of the sea during a towage service in controversy, the allegations of the pleadings and the observations of the witnesses taken on the water are to be regarded, rather than a record condition of the wind noted at a weather station several miles distant and at a considerable altitude above the water.—The Winnie (D. C.) 166.

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Municipal Corporations."
ıedy on railroad aid bonds
ɪation of contract, see "Con-
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on on railroad aid subscrip-
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'ounties," § 1.

ontracts, and liabilities.
railroad aid vote, the mak-
ith the railroad corporation
to entitle the railroad's re-
cription on complying with
Town of Rochester (C. C.)

aid subscription, in consid-
enefit and contributions by
oad, *held* based on a suffi-
—Paige v. Town of Roches-

AND TRADE-NAMES.

n suit for infringement, see
," § 1.
g in suit for infringement,
Error," § 3.

names subjects of own-

of neck scarfs *held* not en-
mark in the name "Muf-
Fleeced Underwear Co. v.
92.

yances, and contracts.
restrain infringement of a
vidence *held* to show that
ot the originators thereof,
ed the arrangement of the
previously used.—Bulte v.
C. A.) 492.
of a flour trade-mark, dis-
e business in which it had
nd acquired, *held* void.—
Bros. (C. C. A.) 492.

nt and unfair competi-

ain infringement of a flour
endment of the bill *held* an
mplainants had pirated the
prior use belonged to an-
essors.—Bulte v. Igleheart
2.
being entitled to the ex-
symbol or name in a flour
ants *held* not guilty of un-
—Bulte v. Igleheart Bros.

of a patented neck scarf
ense *held* not entitled to use
nted" thereon.—Hygienic
Co. v. Way (C. C. A.) 592.
defendant *held* both entitled
"Way" or "Way's" in con-
manufacture and sale of a muffler, provided such words were used in connection with others clearly indicating the manufacturer of the particular article.—Hygienic Fleeced Underwear Co. v. Way (C. C. A.) 592.

Where complainant and defendant were entitled to use the name "Way" or "Way's" in connection with the manufacture and sale of a muffler, but defendant owned the patent for the same, the use of words indicating that complainant owned such patent *held* objectionable.—Hygienic Fleeced Underwear Co. v. Way (C. C. A.) 592.

Differences in the cover of complainant's package *held* insufficient to avoid confusion with defendant's package, and that the similarity constituted unlawful competition.—Hygienic Fleeced Underwear Co. v. Way (C. C. A.) 592.

Although unfair competition by simulating the dress of complainant's goods is apparently shown, a preliminary injunction will not be granted, where it appears that defendant has publicly used the same dress for many years.—Von Mumm v. Steinmetz (C. C.) 168.

The exclusive right to a distinctive dressing of goods which has been in use for many years, although it does not contain any technical trade-mark, is one which passed with a sale of the business and good will, and in which the purchaser is entitled to protection against fraudulent imitation.—Kronthal Waters v. Becker (C. C.) 649.

Complainant *held* entitled to protection by injunction against unfair competition by defendant by the imitation of the bottles and labels in use by complainant and its predecessors for many years for the sale of a German mineral water.—Kronthal Waters v. Becker (C. C.) 649.

TRADING STAMPS.

Bona fide purchasers, see "Sales," § 4.
Imposition of license tax as denial of due process of law, see "Constitutional Law," § 2.
Public policy as affecting dealings in, see "Contracts," § 1.
Restraining advertisement to purchase, etc., see "Injunction," § 1.

TREES.

See "Logs and Logging"; "Property"; "Public Lands."

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See "Ejectment."

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Existence of contract as question for jury, see "Contracts," § 1.
Review of proceedings, see "Appeal and Error."
Use of testimony at former trial in federal courts, see "Courts," § 5.

Proceedings incident to trials.

Entry of judgment after trial of issues, see "Judgment," § 2.

Trial of particular civil actions or proceedings.

See "Libel and Slander," § 2; "Negligence," § 2.

For death at railroad crossing, see "Railroads," § 2.

For enforcement of orders of interstate commerce commission, see "Commerce," § 2.

For damages from fires caused by locomotives, see "Railroads," § 2.

For personal injuries, see "Carriers," § 3; "Master and Servant," §§ 1, 2; "Street Railroads," § 2.

§ 1. Course and conduct of trial in general.

The court and counsel must prevent the jury from consideration of incompetent evidence and erroneous views of the law.—Union Pac. R. Co. v. Field (C. C. A.) 14.

§ 2. Reception of evidence.

Evidence derogatory to plaintiff's moral character having been introduced to show a different physical condition from that described by her, it was not error for the court to charge that such evidence should not be considered to impeach her testimony.—Camden & S. Ry. Co. v. Rice (C. C. A.) 329.

It is not error to admit evidence which is material and competent on one theory of the case, although it is neither material nor competent on the theory of the adverse party, where the correct theory depends upon questions of fact.—Rudel v. Lasher (C. C.) 719.

§ 3. Arguments and conduct of counsel.

The suggestion of erroneous views of the law by counsel in argument, unless extracted by the charge of the court, is fatal.—Union Pac. R. Co. v. Field (C. C. A.) 14.

Admission of unsworn statements of irrelevant facts by counsel in his address is as fatal as the introduction of testimony to prove them.—Union Pac. R. Co. v. Field (C. C. A.) 14.

The trial judge, without objection from opposing counsel, should prevent counsel in his address to the jury from discussing extraneous issues, from introducing irrelevant facts, and from insinuating erroneous views of the law.—Union Pac. R. Co. v. Field (C. C. A.) 14.

§ 4. Taking case or question from jury.

While the credibility of witnesses on disputable facts should be submitted to the jury, yet, where the evidence in respect of a given situation or fact is overwhelmingly persuasive, it is not to be maintained that any evidence to the contrary, however inconsequential and improbable, should carry the case to the jury.—Waters-Pierce Oil Co. v. Van Elderen (C. C. A.) 557; Chambers v. Same, Id.

§ 5. Instructions to jury.

Where the charge is impartial and correct as a whole, error cannot be successfully assigned on portions subject to criticism when separated from the entire charge.—Guild v. Andrews (C. C. A.) 369.

In an action against a guaranty company, an instruction that, while such company was organized to transact business within the state, not as an accommodation guarantor, but for a consideration, *held* not reversible error, in view of a subsequent instruction.—American Bonding Co. v. City of Ottumwa (C. C. A.) 572.

§ 6. Custody, conduct, and deliberations of jury.

Permitting the jury in a personal injury case to take with them to the jury room a photograph of plaintiff after the injury was not reversible error, where the accuracy of the picture was not disputed.—Toledo Traction Co. v. Cameron (C. C. A.) 48.

TROVER AND CONVERSION.

Parties on appeal, see "Appeal and Error," § 1.

TRUSTS.

Creation by will, see "Wills," § 1.
Trust deeds, see "Chattel Mortgages."

TUGS.

See "Towage."

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Availability of defense to surety, see "Principal and Surety," § 2.

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 3.

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See "Customs Duties"; "Public Lands."
Courts, see "Courts," §§ 1–9; "Removal of Causes."
Discharge of surety on bond of government contractor, see "Principal and Surety," § 1.
Jurisdiction of district court of action against, for salvage award, see "Courts," § 8.
Jurisdiction to release officers by habeas corpus, see "Habeas Corpus," § 1.

§ 1. Property, contracts, and liabilities.

Where, in an action on a bond for the construction of two steamers according to certain plans, the declaration alleged the steamers were not completed, that the contractor abandoned the contract, that a new contract was thereupon made, and they were completed thereunder, *held*, that a demurrer to the declaration, for the reason that the new contract was for the "construction and completion" of said steamers, whereas, under the original contract, it should have been for their completion only, would not lie.—United States v. Perth Amboy Shipbuilding & Engineering Co. (C. C.) 685.

Where a bond was conditioned for the performance of a contract, and, on default, a new contract was entered into, a declaration on the bond, setting up the new contract "for

...d completion" of certain ... imply either or different ...e originally contracted for. ... Perth Amboy Shipbuilding ... (C. C.) 685.

... bond for the construction ...s, where the original con... the same, it was unnecess... declaration the exact date ...t. United States v. Perth ... & Engineering Co. (C. C.)

...d given under Act Cong. ...80, § 1, 28 Stat. 278 [U. S. ...2523], for the performance ... the United States, it was ...r that there were no other ...ms or demands against the ...said bond than the usee, ...ch creditors, that they had ... States v. Perth Amboy ...ineering Co. (C. C.) 689.

... a bond given under Act ...4, c. 280, § 1, 28 Stat. 278 ...901, p. 2523] for the com... ...ors for the United States. ...creditor of the principal, a ...eclaration, because it was ... the claim of the United ...f any, had been paid, over... ...es v. Perth Amboy Ship... ...ring Co. (C. C.) 689.

...inst United States.

... merchandise while in cus... ...board a vessel was saved ..., under Rev. St. § 2984 [U. ..., p. 1958], the government ...iable to refund the duties. ... award against the United ...de on the basis of this in... ...ates v. Cornell Steamboat

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...ainst bankrupt vendor, see ...6.
... suit, see "Lis Pendens."
...e of contract, see "Specific

...ce of contract.

... sale of lands which requires ...sh an abstract showing clear ...in fee simple, and cannot be ...d by the vendor, where the ...o a substantial part of the lands is a government entry without final proofs, the legal title remaining in the United States.—Day v. Mountin (C. C. A.) 756.

VENUE.

Of action on bail bond, see "Bail," § 1.
Transfer of bankruptcy proceedings, see "Bankruptcy," § 1.

VERIFICATION.

Of petition for removal of cause, see "Removal of Causes," § 5.
Of pleading, see "Pleading," § 5.

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See "Collision."
Judicial sale, see "Admiralty," § 2.

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See "Master and Servant," § 1.

VILLAGES.

See "Municipal Corporations."

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See "Seamen."

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See "Estoppel."

Of rights or remedies.

See "Mechanics' Liens," § 3; "Removal of Causes," § 1.

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WATERS AND WATER COURSES.

See "Navigable Waters."
Liability of city for injuries from failure to maintain water supply, see "Municipal Corporations," § 4.

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Public ways, see "Municipal Corporations," § 3.

WILLS.

See "Descent and Distribution"; "Executors and Administrators."
Authority of trustee in bankruptcy to employ counsel in will contest, see "Bankruptcy," § 4.
Legacies vesting in trustee in bankruptcy, see "Bankruptcy," § 2.

§ 1. Construction.

The test of a precatory trust is the clear intent of the testator to imperatively control the conduct of the party to whom the language of

the will is addressed.—Burnes v. Burnes (C. C. A.) 781.

Will construed, and *held* not to create a trust in favor of testator's children, either in the estate of testator or the property of his brothers.—Burnes v. Burnes (C. C. A.) 781.

Words of request or confidence in a will addressed to a legatee whom the testator has the power to command held to create no trust in favor of the parties recommended, unless the intention of the testator to make the request imperative is shown.—Burnes v. Burnes (C. C. A.) 781.

The true end of the construction of wills is to ascertain the intent of the testator.—Burnes v. Burnes (C. C. A.) 781.

WITNESSES.

See "Depositions"; "Evidence."
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Liens for work and materials, see "Mechanics' Liens."

WRITS.

See "Process."

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See "Execution"; "Habeas Corpus"; "Injunction."
Scire facias on judgment, see "Judgment," § 6.
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